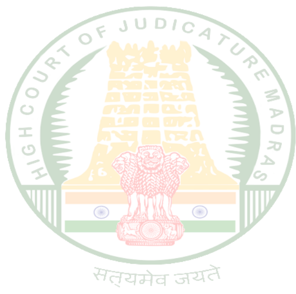
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IN THE HIGH COURT OF JUDICATURE AT MADRAS

| RESERVED ON | 26.03.2024 |
|---|---|
| DELIVERED ON | 14.06.2024 |

CORAM:

THE HON'BLE MR. JUSTICE M.S.RAMESH
and
THE HON'BLE MR. JUSTICE SUNDER MOHAN

**R.T. No.2 of 2021**
**and**
**Crl.A.Nos.262, 454, 455, 456, 457, 458, 459, 460 and 462 of 2022**

**R.T. No.2 of 2021:**

State Rep. By
The Inspector of Police (Law and Order),
E4 Abiramapuram Police Station,
Chennai – 600 018.
(Cr.No.1352 of 2013) ... Petitioner/complainant

vs.

P.Ponnusamy .. Respondent

**Crl.A. Nos.262, 454 to 460 and 462 of 2022:**

1. Dr.James Satish Kumar ... Appellant in Crl.A.No.262 of 2022 /A7
2. Selva Prakash ... Appellant in Crl.A.No.454 of 2022 /A9
3. Basil .P.M. ... Appellant in Crl.A.No.455 of 2022 /A3



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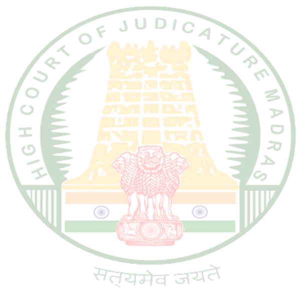

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4. Boris .P.M. ... Appellant in Crl.A.No.456 of 2022 /A4
5. B.William ... Appellant in Crl.A.No.457 of 2022 /A5
6. Yesurajan ... Appellant in Crl.A.No.458 of 2022 /A6
7. P.Ponnusamy ... Appellant in Crl.A.No.459 of 2022 /A1
8. Mary Pushpam ... Appellant in Crl.A.No.460 of 2022 /A2
9. Murugan ... Appellant in Crl.A.No.462 of 2022 /A8

vs.

State Rep. By
The Inspector of Police (Law and Order),
E4 Abiramapuram Police Station,
Chennai – 600 018.
(Cr.No.1352 of 2013) ... Respondent / Complainant

**R.T. No.2 of 2021:**

Referred Trial under Section 366 Cr.P.C.,/under Clause 15 of the Letters Patent Act on the judgment and order dated 04.08.2021 passed in S.C.No.348 of 2015 on the file of the learned I Additional Sessions Judge, Chennai.

**Crl. A. Nos.262 and 454 to 460 and 462 of 2022:**

Criminal Appeals filed under Section 374(2) Cr.P.C. seeking to set aside the judgment of conviction and sentence dated 04.08.2021 passed in S.C.No.348 of 2015 on the file of the learned I Additional Sessions Judge, Chennai.



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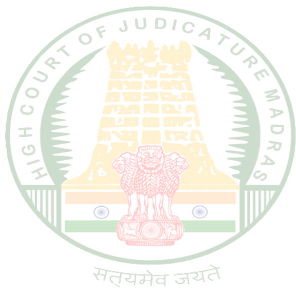
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| | | |
|---|---|---|
| For Appellant in R.T.No.2/2021 and Respondent/State in all Crl.Appeals | : | Mr.G.Prabhakaran, Spl. Public Prosecutor, assisted by Mr.R.Vivekananthan |
| For R1, R2 and R3 in RT No.2/2021 and Appellants in Crl.A.Nos.459, 460 and 455 of 2022 / Accused Nos.1, 2 and 3 | : | Mr.Yug Mohit Chaudhry, Advocate for Mr.G.Sriram |
| For R4 in RT No.2/2021 and Appellant in Crl.A.No.456 of 2022 / Accused No.4 | : | Mr.Abudu Kumar Rajarathinam, Sr. Counsel for Mr.Kumana Raja |
| For R5 in RT No.2/2021 and Appellant in Crl.A.No.457 of 2022 / Accused No.5 | : | Mr.Yug Mohit Chaudhry, Advocate for Mr.G.Karuppasamy Pandian |
| For R6 in RT No.2/2021 and Appellant in Crl.A.Nos.458 of 2022 / Accused No.6 | : | Mr.Jayanth Muth Raj, Advocate for Mr.Prabhu Ramasubramanian |
| For R7 in RT No.2/2021 and Appellant in Crl.A.Nos.262 of 2022 / Accused No.7 | : | Mr.R.John Sathyan, Sr.Advocate for Mr.P.Divakar |
| For R8 in RT No.2/2021 and Appellant in Crl.A.Nos.462 of 2022 / Accused No.8 | : | Mr.Gopalakrishna Lakshmana Raju, Sr.Advocate for Mr.R.Radha Pandian |
| For R9 in RT No.2/2021 and Appellant in Crl.A.Nos.454 of 2022 / Accused No.9 | : | Mr.R.Shunmuga Sundaram, Sr.Advocate for Mr.P. Raja |



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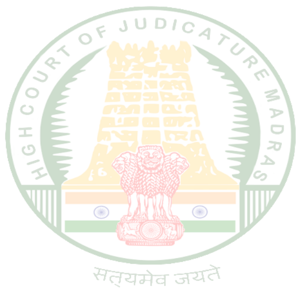
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Victim/PW1 rep. by Mr.R.Vivekananthan
to assist the prosecution.

## COMMON JUDGMENT

The Referred Trial and the Criminal Appeals are taken up together, heard and disposed of by this common judgment. For the sake of convenience, the parties are referred to as per their ranking before the trial Court.

2. The brief facts leading to the institution of the Referred Trial and the Criminal Appeals, are as follows:

### Case of the Prosecution:

(i) It is the case of the prosecution that on 14.09.2013 at about 5.00 p.m., at 1st Main Road, near Billroth Hospital, Raja Annamalaipuram, Chennai-28, the deceased one, Dr.Subbiah, was attacked by A8, A9 and PW12 with a sickle and the deceased sustained multiple cut injuries on his head, neck, shoulder, right forearm, etc., and he was shifted to Billroth



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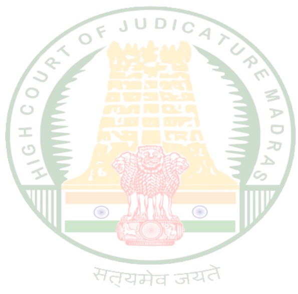
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Hospital, Raja Annamalaipuram, for treatment; that since his condition became serious, he was referred to Billroth Hospital, Aminjikarai, where he succumbed to the injuries at 1.00 a.m., on 23.09.2013. Initially, the case was registered for the offence under Section 307 of the IPC and thereafter, on 23.09.2013, it was altered to Section 302 of the IPC.

(ii) It is the further case of the prosecution that there was a bitter dispute between A1's family and the deceased, with regard to the claim for title over the property measuring an extent of 2 acres in S.No.758/8 and 759/7A at Anjugramam Village, Kanyakumari District; that the said property originally belonged to one Perumal Nadar, who was married to one Seethalakshmi; that the said Seethalakshmi died in the early 1960s; that the said Perumal Nadar had a sister by name Annakili, who was the mother of the deceased Dr.Subbiah; that Perumal Nadar had married one Annapazham; that A1-Ponnusamy, is the son of Perumal Nadar through Annapazham; that Annapazham deserted Perumal Nadar; that Perumal Nadar was taken care of by his sister-Annakili, during his last days; that in the year 1959, Perumal



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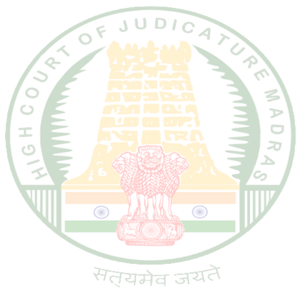

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Nadar executed a registered settlement deed settling all the properties in favour of Annakili; that the said Annapazham filed a suit in O.S.No.37 of 1959 before Sub Court, Tirunelveli for a declaration that she and A1 had the right over the property; that the said suit was decreed; that an appeal in A.S.No.177 of 1961 filed before the District Court, Tirunelveli and the Second Appeal filed before this Court, were dismissed; that the SLP challenging the judgment before the Hon'ble Supreme Court was also dismissed; that in the year 1965, Annakili, the mother of the deceased filed O.S.No.105 of 1965 before the Sub Court, Tirunelveli, praying for a declaration that all the properties of Perumal Nadar belonged to her and that the decree in the earlier suit referred above would not bind her; that the said suit was decreed; and that Annapazham filed an appeal in A.S.No.77 of 1971 before the District Court, Tirunelveli and while the appeal was pending, a compromise was arrived at between the parties, by which four properties were allotted to the share of Annapazham and 22 properties, including the disputed property, were allotted to the share of Annakili.



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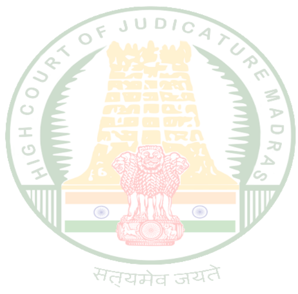
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(iii) Thereafter, there were no disputes between the parties, till 1983 when A1 filed a suit in O.S.No.82 of 1992, before the Sub Court, Tirunelveli, which was dismissed in the year 1991. A1 executed a settlement deed in respect of the disputed property in favour of A2. A2 filed a suit in O.S.No.146 of 1997 before the Sub Court, Nagercoil, against the deceased and the Annakili and the said suit was dismissed in the year 2007. The property was in the possession of the deceased and his mother throughout.

(iv) For the first time in 2013, an attempt was made by the accused to disturb the possession of the deceased. Hence PW9, the Manager of the deceased, who was taking care of the property, lodged a complaint to the Land Grabbing Cell. PW6, the Deputy Superintendent of Police, arranged for a compromise meeting, which was attended by A1, A3, A5, PW1, PW6 along with PW9 and Dr.Subbiah on 09.06.2013. Thereafter, since the accused were not willing for a compromise, a complaint was registered in Cr.No.57 of 2013 on 04.04.2013 against A1 and A2, for various offences



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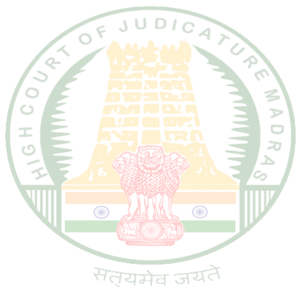
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including forgery, etc. A1 and A2 filed a petition for anticipatory bail, which was allowed and thereafter, the deceased filed a petition for cancellation of anticipatory bail.

(v) On 27.06.2013, A3, A4, A6 and others, caused damage to the fencing of the property. Another complaint was lodged against them which was subsequently registered in Cr.No.476 of 2013. All the accused were enraged by the act of the deceased in giving complaints against them and filing a petition for cancellation of anticipatory bail. Hence, according to the prosecution, the accused 1 to 4 felt that if the deceased is eliminated, they could enjoy the property without any hindrance, as the deceased would only be survived by two daughters and his wife, who would not be interested in the disputed property.

(vi) It is the further case of the prosecution that all the accused therefore entered into a conspiracy to eliminate the deceased and each of



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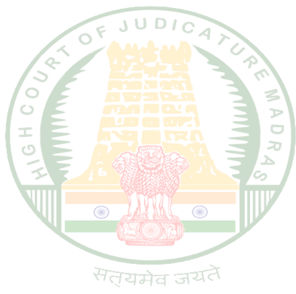
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them had their own reasons, to join in the conspiracy about which we would discuss a little later.

(vii) The first conspiracy meeting is said to have taken place in the first week of July 2013, between A3, A5, A6, A7 and A10 (A10 was granted pardon and turned into an Approver and examined as PW12) ; that a plan was made to engage the services of A8, A9 and PW12; that A7 told A5 that since A1 and A2 were the aggrieved persons, they should also join; that A3 called A1 and A2 for the meeting; and that they both joined the conspiracy and offered to give 50% of the property value to A5 and others, if Dr.Subbiah is done away with.

(viii) The second conspiracy meeting is said to have taken place on the disputed land in the last week of July 2013, in which A1 to A3, A5 to A9 and PW12 were present, wherein PW4 and PW5, land brokers were called to sell the property; and that when the brokers asked A5 as to why there was a board stating that the land belonged to Dr.Subbiah, A5 is said to have told



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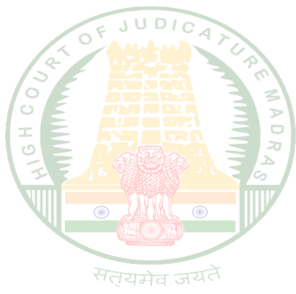
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them that Dr.Subbiah would soon be eliminated, for which all the accused laughed and nodded in approval.

(ix) It is the further case of the prosecution that after this meeting A1 and A3 started transferring cash to A5; and that the address details of the deceased Dr.Subbiah, his car details and his photographs, were given by A3 and A5 to A7, who in turn gave it to A8, A9 and PW12; that on 11.08.2013, A8, A9 and PW12 came to Chennai from Anjugramam Village and stayed in Bakkiyam Lodge in Sungaram Chetty Street upto 14.08.2013 to watch the movement of the deceased; that on 14.08.2013 they went to Billroth Hospital along with A7 where they met PW8, a friend of A7; that plan could not be executed on 14.08.2013; that during the first week of September, A8, A9, PW12 went to Tirupur along with A6 and A7 to meet DW2, who is the brother-in-law of A6; that A5 had sent Rs.6.5 Lakhs to DW2 in several instalments; and that DW2 withdrew and kept the said sum in cash; and that DW2 gave Rs.6.5 Lakhs to A6, who in turn distributed Rs.1.5 Lakhs each to A8, A9 and PW12 and kept the remaining Rs.2 Lakhs with him.



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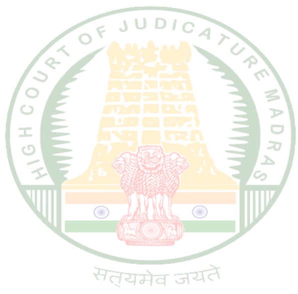
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(x) On 12.09.2013, A8, A9 and PW12 met A7, who gave them Rs.10,000/- each and using the said cash, A8, A9 and PW12 purchased a second hand pulsar bike from PW29 in Valliyur. The bike was sent by parcel service to Chennai and A9 accompanied the bike. A8 and PW12 reached Chennai in a Government bus and they stayed in Aruna Lodge upto 14.09.2013. They checked out from the hotel at 12 O' clock, left from the hotel around 12.45p.m.; that since the bike had a mechanical problem they took it to PW26 and repaired the bike; that after rectifying the defect, they reached the scene of the occurrence at 4.00 p.m; that A8 and PW12 went to the hospital and met the Secretary of the deceased PW34 and enquired with her as to when the deceased would come out of the hospital; that after confirming the presence of the deceased, they came to the place where the car of the deceased was parked, which was opposite to Billroth Hospital at about 5.00 p.m.; that at about 5.07 p.m., the deceased left the hospital and when the deceased attempted to enter his car, after adjusting his rear view



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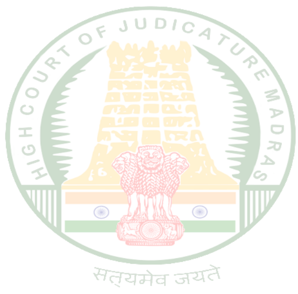
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mirror, A8 and A9 attacked the deceased indiscriminately and PW12 kept a watch and the bike ready for the accused to escape from the place.

(xi) PW1, the brother-in-law of the deceased came to know about the attack on the deceased and rushed to Billroth Hospital where the deceased was getting treatment. Subsequently, after enquiry with the persons including one Venkatesalu [not examined], who was working as a Watchman in one of the houses nearby, he went to E4-Abiramapuram Police Station and lodged a complaint [Ex.P1]. PW57, registered an FIR in Cr.No.1352 of 2013 for the offence under Section 307 IPC (Ex.P162).

(xii) PW57 thereafter went to the scene of the occurrence and to the hospital and examined PW1 at the police station once again. At about 9.00 p.m., he went to the scene of the occurrence and prepared the Observation Mahazar [Ex.P3] and Rough Sketch [Ex.P163]. At 10.00p.m., he seized the bloodstained earth [M.O.37] and the earth that was not bloodstained [M.O.38], in the presence of the witnesses-PW14 under seizure mahazar



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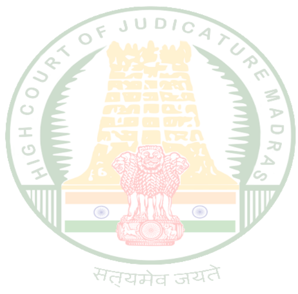

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[Ex.P4]. He thereafter came to know that the occurrence was captured by a CCTV camera found in an apartment by the name "Shreshta Subhashree" and copied the footage relating to the occurrence on a pen-drive. He examined other witnesses and recovered the dress materials of the deceased under Form-91 [Ex.P164]. The dress materials were marked as M.O.39 to M.O.42.

(xiii) In the complaint, PW1 had referred to the enmity between the family of the accused viz., A1 to A4 on the one hand and the deceased on the other hand. Therefore, PW57 formed a secret special team to apprehend the accused and to investigate into the offence. PW57 continued his investigation until 18.09.2013, when he was transferred to the control room and the investigation was handed over to PW55-Elangovan. Thereafter, PW55 again took up the investigation on 27.09.2013, examined a few witnesses and handed over the investigation to PW57, who conducted the investigation for two days and handed over the investigation to PW55 on



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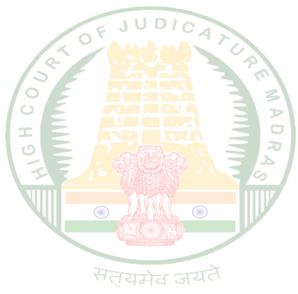
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29.09.2013. Thereafter, PW57 once again took up the investigation on 14.02.2014 and continued the investigation till the filing of the final report.

(xiv) PW55 took up the investigation on 18.09.2013 as stated earlier and on 19.09.2013, he made efforts to record a statement from the deceased through a Magistrate. However, since the deceased was not conscious, he could not record the statement. On 23.09.2013, PW55 received the intimation that the deceased had passed away. He went to the hospital and sent the body for a postmortem to Royapettah Government Hospital. He examined the other witnesses, conducted an inquest and prepared the inquest report [Ex.P150]. He altered the provisions to Section 302 IPC and sent the alteration report [Ex.P160] to the Court. He examined other witnesses on 25.09.2013. A3 and A4 surrendered before the XXIII Metropolitan Magistrate, Saidapet. On 27.09.2013 he filed a petition to take the accused into police custody. On 29.09.2013, the Special team brought A1 and A2 for enquiry. PW55 arrested both of them, recorded their confessions and produced them before the Magistrate for judicial remand. He examined



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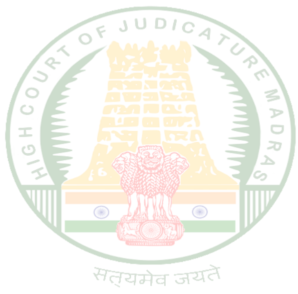
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PW13. On 09.10.2013, he wrote letters to the Association of the apartment-owners of Shreshta Subhashree apartments and also to the RR Donnelley Company to obtain the hard disc containing the recording from the CCTV cameras. On the same day, the President of Shreshta Subhashree Apartment Owners' Association, one Leela Natarajan [PW25] handed over the hard disc to PW57, which was seized by him under seizure mahazar [Ex.P28]. The hard disc was marked as M.O.9. On the same day, the Security Manager of R.R.Donnelley, one Dayalan (not examined) handed over the hard disc [M.O.10] which was seized under the Mahazar [Ex.P29]. He examined both of them and he sent the hard discs under Form-95 to the Court on 10.10.2013. On 22.10.2013, he made a requisition to the learned XXIII Metropolitan Magistrate, Saidapet to send the hard discs for examination. On the same day, an order was passed and the hard discs [M.O.9 and M.O.10] were sent to the Forensic Science Laboratory at Myalpore. He thereafter handed over the investigation to PW56.



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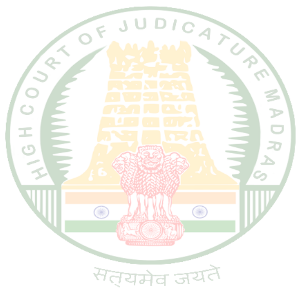
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(xv) PW56 received a letter from the Forensic Science Laboratory stating that the hard discs cannot be examined in the absence of a DVR. He sought for the DVR from the watchman (not examined) of the Shreshta Subhashree apartments, who told him that it was scrapped. He collected the call detail records of the accused A1 to A4. On 29.01.2014, he once again examined PW1, PW13 and PW9. From their further statement and on secret information, he ascertained that A7 to A10 were also involved in the offence and arrested them at about 6.00 p.m., on the same day at a bus stop near Jain College, Thuraipakkam, Chennai. He recorded the confessions of all the accused A7 to A10 and on the confession of A8, he seized a black-coloured shoulder bag [M.O.3], a bloodstained shirt [M.O.44], and a bloodstained knife [M.O.1 series] under seizure mahazar [Ex.P19] from a dilapidated building near the Tahsildar's office near Chamier's Road, Chennai. On 31.01.2014, he made a requisition for the conduct of Test Identification Parade for witnesses, Vinothkumar [PW2], Muthuvel [PW3] and Gopinath [PW9]. He thereafter took the accused into police custody and recorded their further confession. On 08.02.2014, he examined the mechanic



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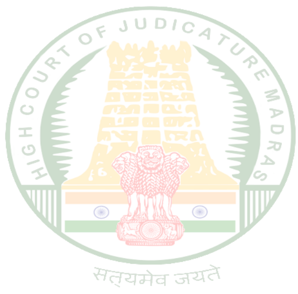

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[PW26], who is said to have repaired the bike of the accused on the date of the occurrence (PW26 was identified by the accused) and also examined the Lodge Managers, where the accused stayed when they were in Chennai in August and September 2013.

(xvi) In the meanwhile on 06.02.2014, the Test Identification Parade was conducted by the learned XVI Metropolitan Magistrate, George Town, for the eyewitnesses PW2, PW3 and for PW9-the manager of the deceased. On 12.02.2014, he took the accused to the scene of the occurrence for a demonstration of the occurrence and video-graphed the same. Thereafter, he requested PW25, the President of the Shreshta Subhashree apartment Association to hand over the footage relating to the demonstration, which was recorded in a CD, marked as M.O.14, the video recorded by PW56 was stored in a CD marked as M.O.34. He thereafter examined the other witnesses including PW4 and PW53 and handed over the investigation to PW57 to 14.02.2014.



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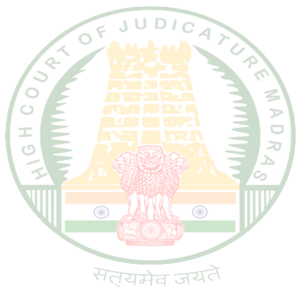
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(xvii) After PW57 took up the investigation for the second time, he recorded the further statement of PW53 on 15.02.2014. He obtained the Accident Register of the deceased from the Royapettah General Hospital (Ex.P147). He examined the Administrative Officer Ravi (not examined) and other witnesses from Billroth Hospital. Though he took efforts to locate the pulsar bike used by the accused at the time of the occurrence, he could not succeed; he obtained the Section 164 (5) Cr.P.C. statements of PW2, PW3 and PW9 recorded by the learned XVI Metropolitan Magistrate. On 13.03.2014, A6 was produced before him by one Muthuraj (PW7) to whom A6 is said to have given an extra judicial confession. He arrested A6. On 21.03.2014, on the orders of the XXIII Metropolitan Magistrate, Chennai, he sent the hard disc, demo CDs along with time chart prepared by him and also the photographs to the Truth Labs, where PW54 was working on 28.03.2014. On 10.12.2014, he arrested and recorded the confession of A5-William, the admissible portion of which was marked as (Ex.P10). He seized the cell phone, marriage album (M.O.5), Marriage CD (M.O.6) and visiting card (M.O.8) of Dr.S.Subbiah on the confession of A5. On



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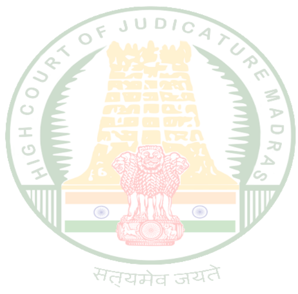
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03.02.2015, he collected the documents relating to bank transactions between A5-William and DW2-Veeramani. He also collected the documents of title relating to the disputed property on 13.04.2015 and thereafter, after examination of other witnesses, collection of documents and the reports of the Forensic Laboratory, Ex.P170 to Ex.P173, he filed a final report on 06.05.2015 for the offence under Sections 120-B, 109, 341, 302 r/w 34 of the IPC before the XXIII Metropolitan Magistrate against accused A1 to A9.

3. On the appearance of the appellants, the provisions of Section 207 Cr.P.C., were complied with, and the case was committed to the Court of Session in S.C.No.348 of 2015 and was made over to the learned I Additional Sessions Judge, City Civil Court, Chennai, for trial. The trial Court framed charges against the appellants and when questioned, the appellants pleaded 'not guilty'. During the trial, A10 was granted pardon and examined as PW12.



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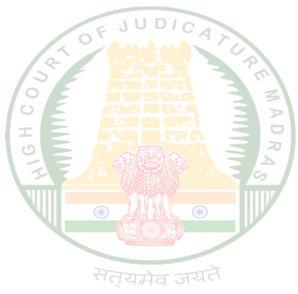
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4. To prove the case, the prosecution examined 57 witnesses as P.W.1 to P.W.57, marked 173 exhibits as Exs.P1 to P173, and marked 42 Material Objects as M.O.1 to M.O.42. When the appellants were questioned, u/s.313 Cr.P.C., on the incriminating circumstances appearing against them, they denied the same and some of them chose to give a separate statement. The appellants/accused examined 3 witnesses as D.W.1 to D.W.3 and marked 7 exhibits as Exs.D1 to D7. Court Exhibits viz., C1 to C5, were also marked.

5. On appreciation of oral and documentary evidence, the trial Court found that the prosecution had established the case beyond reasonable doubt and held the accused/A1 to A9 guilty of the offence charged against them and convicted and sentenced them as follows:

| ***Accused No.*** | ***Offence under Section*** | ***Sentence imposed*** |
|---|---|---|
| A1 | 120-B IPC | To death and that he be hanged by the neck, till he is dead, subject to confirmation by the Hon'ble High Court of Madras, and to pay a fine of Rs.50,000/- in default to undergo one year SI. |
| | 302 r/w 120-B IPC | To death and that he be hanged by the neck, till he is dead, subject to confirmation by the Hon'ble High Court of Madras, and to pay a fine of Rs.50,000/- in default to undergo one year SI. |



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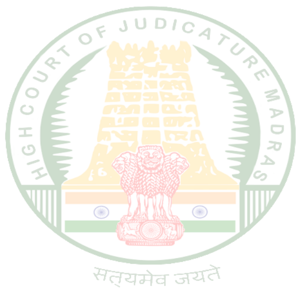

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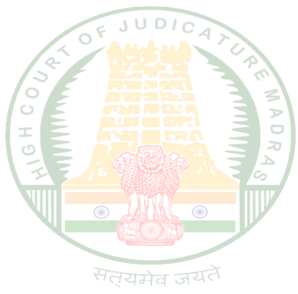
| ***Accused No.*** | ***Offence under Section*** | ***Sentence imposed*** |
|---|---|---|
| A2 | 120-B | To undergo imprisonment for life and to pay a fine of Rs.50,000/-, in default to undergo one year SI. |
| | 302 r/w 120-B IPC | To undergo imprisonment for life and to pay a fine of Rs.50,000/-, in default to undergo one year SI. |
| A3 | 120-B IPC | To death and that he be hanged by the neck, till he is dead, subject to confirmation by the Hon'ble High Court of Madras, and to pay a fine of Rs.50,000/- in default to undergo one year SI. |
| | 302 r/w 120-B IPC | To death and that he be hanged by the neck, till he is dead, subject to confirmation by the Hon'ble High Court of Madras, and to pay a fine of Rs.50,000/- in default to undergo one year SI. |
| Sentences were directed to run concurrently. | | |

| ***Accused No.*** | ***Offence under Section*** | ***Sentence imposed*** |
|---|---|---|
| A4 | 120-B r/w 109 IPC | To death and that he be hanged by the neck, till he is dead, subject to confirmation by the Hon'ble High Court of Madras, and to pay a fine of Rs.50,000/- in default to undergo one year SI. |
| | 302 r/w 120-B IPC | To death and that he be hanged by the neck, till he is dead, subject to confirmation by the Hon'ble High Court of Madras, and to pay a fine of Rs.50,000/- in default to undergo one year SI. |
| A5 | 120-B IPC | To death and that he be hanged by the neck, till he is dead, subject to confirmation by the Hon'ble High Court of Madras, and to pay a |



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| ***Accused No.*** | ***Offence under Section*** | ***Sentence imposed*** |
|---|---|---|
| | | fine of Rs.50,000/- in default to undergo one year SI. |
| | 302 r/w 120-B IPC | To death and that he be hanged by the neck, till he is dead, subject to confirmation by the Hon'ble High Court of Madras, and to pay a fine of Rs.50,000/- in default to undergo one year SI. |
| A6 | 120-B | To undergo imprisonment for life and to pay a fine of Rs.50,000/-, in default to undergo one year SI. |
| | 302 r/w 120-B IPC | To undergo imprisonment for life and to pay a fine of Rs.50,000/-, in default to undergo one year SI. |
| A7 | 120-B IPC | To death and that he be hanged by the neck, till he is dead, subject to confirmation by the Hon'ble High Court of Madras, and to pay a fine of Rs.50,000/- in default to undergo one year SI. |
| | 302 r/w 120-B IPC | To death and that he be hanged by the neck, till he is dead, subject to confirmation by the Hon'ble High Court of Madras, and to pay a fine of Rs.50,000/- in default to undergo one year SI. |
| A8 | 120-B IPC | To death and that he be hanged by the neck, till he is dead, subject to confirmation by the Hon'ble High Court of Madras, and to pay a fine of Rs.50,000/- in default to undergo one year SI. |
| | 302 r/w 34 r/w 120-B IPC | To death and that he be hanged by the neck, till he is dead, subject to confirmation by the Hon'ble High Court of Madras, and to pay a fine of Rs.50,000/- in default to undergo one year SI. |
| | 341 IPC | To undergo one month SI. |



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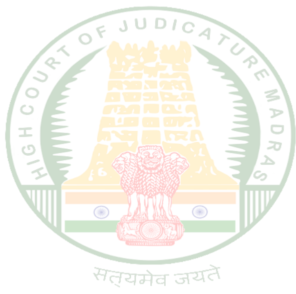

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| *Accused No.* | *Offence under Section* | *Sentence imposed* |
|---|---|---|
| | 302 IPC | To death and that he be hanged by the neck, till he is dead, subject to confirmation by the Hon'ble High Court of Madras, and to pay a fine of Rs.50,000/- in default to undergo one year SI. |
| A9 | 120-B IPC | To death and that he be hanged by the neck, till he is dead, subject to confirmation by the Hon'ble High Court of Madras, and to pay a fine of Rs.50,000/- in default to undergo one year SI. |
| | 302 r/w 34 r/w 120-B IPC | To death and that he be hanged by the neck, till he is dead, subject to confirmation by the Hon'ble High Court of Madras, and to pay a fine of Rs.50,000/- in default to undergo one year SI. |
| | 341 IPC | To undergo one month SI. |
| | 302 IPC | To death and that he be hanged by the neck, till he is dead, subject to confirmation by the Hon'ble High Court of Madras, and to pay a fine of Rs.50,000/- in default to undergo one year SI. |
| Sentences were directed to run concurrently. | | |

Hence, the accused/A1 to A9 have preferred these appeals challenging the said conviction and sentences.

6. Heard the learned Special Public Prosecutor, appearing for the State and the respective learned senior counsels and learned counsels appearing for accused A1 to A9.



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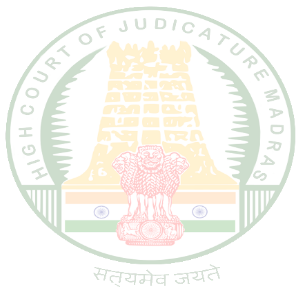
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**Submissions of the learned counsel for A1, A2, A3 and A5:**

7. Mr.Yug Mohit Chaudhry, learned counsel assisted by Mr.G.Sriram and Mr.Karuppasamy Pandiyan, learned counsels for A1, A2, A3 and A5 made both oral and submitted written submissions, which are broadly as follows:

(a) two watchmen and an autorickshaw driver, according to the investigation, who were eyewitnesses and whose statements were recorded immediately after the occurrence by the investigating officer were not examined by the prosecution. Instead two other witnesses whose statements were either recorded belatedly or sent to Court belatedly were examined as eyewitnesses. PW3, whose first statement was said to have been recorded on 16.09.2013, was sent to Court only on 06.05.2015. PW3, was examined first only on 24.01.2014; and his statement was despatched to the Court much later.



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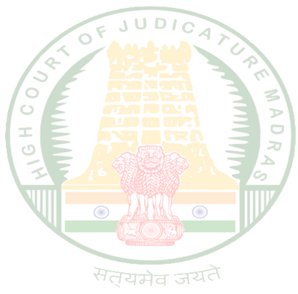
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(b) A1 to A4 were sought to be implicated under suspicion. Fearing harassment they surrendered voluntarily and were released on statutory bail in December 2013 and there was no progress in the investigation till then.

(c) On 06.02.2014, one Balakrishnan was appointed as DCP of the Mylapore Range and E4-Abiramapuram Police Station was under his jurisdiction. The said Balakrishnan married one of the daughters of Dr.S.Subbiah, some time later. After the said Balakrishnan assumed office, witnesses started appearing suddenly from nowhere. PW53's statement was recorded on 10.02.2014, to make it appear that he had overheard the conspiracy meeting between the accused during the first week of July 2013 in the office of A5. There is no explanation by the prosecution as to how they discovered PW53 as a witness to the conspiracy. PW53 never went to the police station and the manner in which his statement was recorded would show the artificiality in the prosecution case. A statement was recorded on 10.03.2014 from PW4 to show that a conspiracy meeting was held in the last week of July 2013 while the accused were at Dr.Subbiah's land. This



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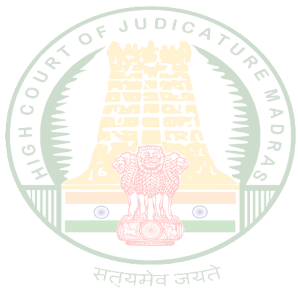
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belated statement was sent to Magistrate only on 16.05.2015. Similarly, a further statement was obtained on 11.12.2014 from PW4, without any new information and it was made to appear that PW5 was also present at the conspiracy meeting in the 2nd week of July 2013 on the next day i.e., 12.12.2014, PW5's statement was recorded, which is similar to PW4's statement and that both of these witnesses cannot be believed.

(d) (i) On 20.09.2018, the II Additional Sessions Judge was assigned the full additional charge of VII Additional Sessions Judge, Chennai. PW12 who was originally arraigned as A10 had moved an application on 03.10.2018 before the trial Court, for making him an Approver. On 12.10.2018, pardon was granted to the A10. This application was moved by A10 after the examination of PW11. After granting pardon to A10, the trial Court Judge sent a letter to the High Court stating that she had appeared for Mr.Balakrishnan, the then Deputy Commissioner of Police, who is the son-in-law of the deceased, as his lawyer before the family Court and requested the High Court to transfer the case to some other Judge. The High Court



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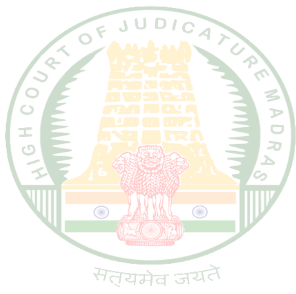
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thereafter, transferred the case to 1st Additional Sessions Judge on 28.11.2018. This would show that the learned Judge who granted pardon to A10 was biased and her own admission confirms it.

(ii) The letter of the trial Judge raises an apprehension of bias and when any judgment, order or proceedings is tainted by bias, it would be a nullity and the pardon therefore granted is vitiated. The learned counsel relied upon the following judgments in this regard:

(i) Rupa Ashok Hurra v. Ashok Hurra, (2002) 4 SCC 388;

(ii) P.K.Ghosh v. J.G.Rajput, (1995) 6 SCC 744;

(iii) State of Punjab v. Davinder Pal Singh Bhullar, (2011) 14 SCC 770,;

(iv) Ranjit Thakur v. Union of India (1987) 4 SCC 611;

(v) Ramesh Chandra v. Delhi University (2015) 5 SCC 549;

(vi) S.Parthasarathi v. State of A.P., (1974) 3 SCC 459;

(vii) Ranjit Thakur v. Union of India (1987) 4 SCC 611;

(viii) Union of India v. B.N.Jha, (2003) 4 SCC 531; and

(ix) K.Sundara Rajan v. Deputy Inspector General of Police, Central Range, Tiruchirapalli, (1971) SCC OnLine Mad 178.



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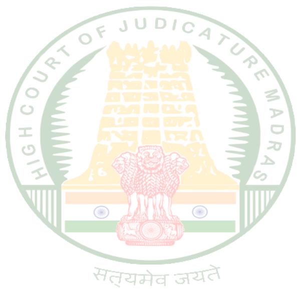
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(iii) The trial Judge had recorded Section 164 Cr.P.C. statement of the accused before granting pardon under Section 307 Cr.P.C., which is contrary to the procedure prescribed under the Code. The trial Judge who was an Additional Sessions Judge, who was not empowered to record a statement under Section 164 Cr.P.C., and it was the Magistrate who could record the statement. This statement was also recorded in chambers to suit the prosecution case and to fill up the gaps and cover up the deficiencies.

(e) The evidence of PW12 is an improvement from the first confession given to police. There are several contradictions and omissions which are material, between the confession given before police and the deposition before the Court. That apart, PW12 would state in his police confession that he had no direct knowledge of the conspiracy and that he came to know about the conspiracy from A8 and A9. However, in the deposition he would state as if he had personal knowledge and was present in the conspiracy meetings. PW12 had also stated in his confession before the police that the conspiracy took place in August 2013, which is contrary to the prosecution



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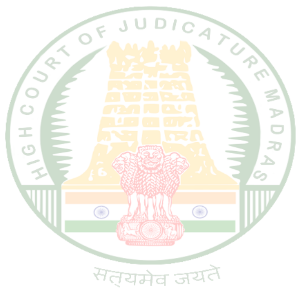
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case. The learned counsel also made a chart containing the omissions and contradictions in his written submissions, which according to him would show that in respect of several material facts, the approver -PW12 has made improvements.

(f) PW12 had no remorse and throughout he had cross examined the witnesses and denied the evidence against him. In fact, on 30.08.2015, he had also made a complaint against the then Presiding Judge. Therefore the reason given by the approver for making an application to treat him as an approver, is far from the truth and the grant of pardon was an incentive offered by the prosecution to obtain evidence to suit their case.

(g) The approver, was also examined in the chambers of the Presiding Judge, which also throws a doubt with regard to the voluntariness of the confession. The time for reflection was not given to him and for that reason also, this evidence has to be rejected.



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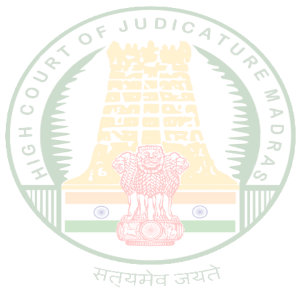

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(h) The learned counsel further pointed out to the provisions of the Evidence Act viz., Section 133 and illustration (b) to Section 114 and submitted that an approver, who is willing to save his own skin, is an unreliable witness and the rule of prudence demands that his evidence has to be corroborated in material particulars. Further, the evidence of the approver has also to be corroborated in respect of the involvement and participation of each of the accused. The learned counsel relied upon the following judgments:

(i) Haroon Haji Abdulla v. State of Maharashtra, (1968) 2 SCR 6418;

(ii) Dagdu v. State of Maharashtra, (1977) 3 SCC 68;

(iii) A.Devendran v. State of Tamil Nadu, (1997) 11 SCC 720;

(iv) Bhiva Doulu Patil v. State of Maharashtra, (1963) 3 SCR 830;

(v) Muluva v. State of MP, (1976) 1 SCC 37; and

(vi) Punjab v. Praveen Kumar, (2205) 9 SCC 769.

(i) The witnesses relied upon by the prosecution to corroborate the evidence of PW12 are equally untrustworthy. Learned counsel submitted that in this case, the prosecution has relied upon too many chance witnesses. That apart in this case, the evidence of witnesses, giving improbable



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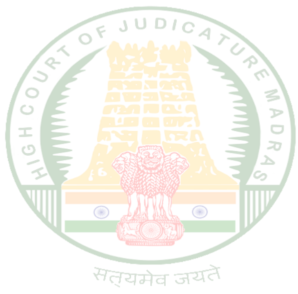
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versions, as if the conspiracy meetings happened in the public which are normally done in secrecy, was relied in support of the prosecution case.

(j) PW4 and PW5's evidence is artificial and it is opposed to common sense and human conduct to say that the accused had conspired to commit such a grave offence in the presence of strangers. That apart, both of these witnesses were examined belatedly, after the DCP-Balakrishnan took over the case. The reading of the evidence of PW4 and PW5 would show how the investigation officer had stooped down to procure witnesses to suit their case.

(k) PW53, a witness to the conspiracy meeting said to have taken place in the 1st week of July, has not stated as to how he became a client of A5. He was a chance witness and the explanation offered for his presence appears improbable. Neither the prosecution, nor PW53, has stated as to how the police discovered the fact that the PW53 was a witness to the conspiracy. Further, PW53 was a stranger to the other accused except A5



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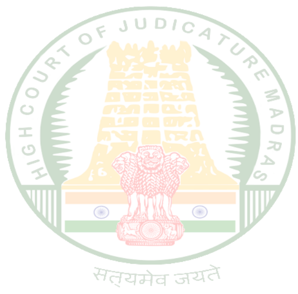
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and no test identification parade was conducted by the prosecution. His evidence is also artificial. He was examined belatedly by the police on 10.02.2014, which reached the Magistrate on 16.08.2015.

(l) The prosecution relies upon certain money transfers by A1 and A3 to A5 and in turn to DW2 for paying the assailants A8 to A10 (PW12). The accused do not dispute the bank transactions and the payments made to DW2. However, the accused deny that the money transferred to DW2 was meant for payment to the accused. Though DW2 was examined during the investigation, the prosecution failed to examine him as a witness. The defence examined him as DW2.

(m) The bank statements and the evidence of PW37 elicited in the cross examination and the other evidence on record would show that the transfer of money has nothing to do with the alleged offence.



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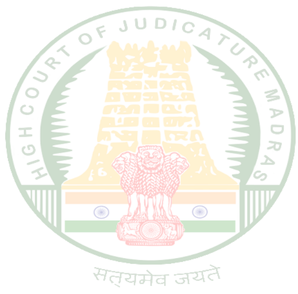

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(n) The evidence of DW2 is more reliable than the evidence of PW37. PW37's statement was recorded on 24.02.2015 to the effect that he witnessed the payment of money by DW2 to A6, who in turn distributed to A8 to A10 (PW12). PW37 who was a stranger to A8 to A10 (PW12) had not identified the accused in the Test Identification Parade. That apart, PW37's evidence is not only artificial, but, opposed to common sense. The learned counsel also pointed out to the explanation offered by the accused during their 313 questioning and the evidence of DW2 to show that the money was for helping two youngsters by name Maheswaran and Babu who were running a company called 'CNG Textiles'. Though, the investigating officer [PW57] had examined Maheswaran and Babu, during the investigation, their statements were suppressed for reasons best known to the prosecution and submitted that the explanation offered by the accused is probable and therefore should be accepted. He also submitted that the defence witnesses are entitled to equal treatment and should not be looked upon with suspicion and relied upon the following decisions:

(i) State of Haryana v. Ram Singh, (2002) 2 SCC 426;

(ii) Dudh Nath Pandey v. State of U.P., (1981) 2 SCC 166;



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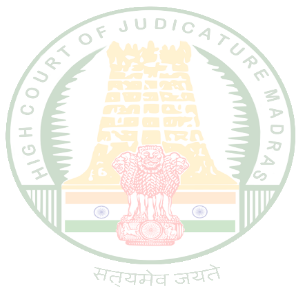
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(iii) State of U.P.v. Babu Ram, (2000) 4 SCC 515; and

(iv) Munshi Prasad v. State of Bihar, (2002) 1 SCC 351.

(o) The CDRs of all the accused were collected by the police officers. However, no nodal officer was called by the prosecution and strangely, the police officer who collected this information issued 65-B certificate. This was objected to by the defence as could be seen from the evidence of PW45. PW45 also admits that he had no idea as to how these documents were downloaded and hence there cannot be any reliance on the CDRs marked by PW45.

(p) The extra judicial confession said to have been given by A6 to PW7 is sought to be relied upon by the prosecution. The extra judicial confession by its very nature, is a weak piece of evidence. There is no pre-existing relationship between A6 and PW7 to trust him. The learned counsel pointed out to the evidence of PW7 to impress upon us that PW7 also was introduced by the police to suit their case. In any case, the learned counsel submitted that the said confession cannot be used as against the co-accused



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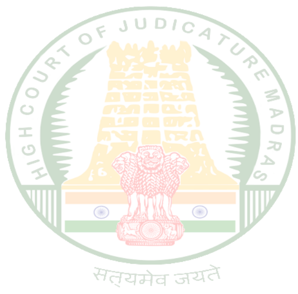
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and could be used only for the purpose of lending assurance to the other evidence on record. As regards the appreciation of extra judicial confession, the learned counsel relied upon para 15 of the judgment of the Hon'ble Supreme Court in Punjab Vs. Bhajjan Singh, (1975) 4 SCC 472. As regards the value of the extra judicial confession as against co-accused, the learned counsel relied upon the following judgments:

(i) Pancho v. Haryana, (2011) 10 SCC 165;
(ii) Sahadevan v. State of Tamil Nadu, (2012) 6 SCC 406;
(iii) Rahim Beg v. UP, AIR 1973 SC 343;
(iv) Sandeep v. Haryana, (2001) 9 SCC 41; and
(v) Heramba Brahma v. Assam, AIR 1982 SC 1595.

(q) As regards motive, the learned counsel submitted that it is conceded that there was a bitter property dispute between the two families. However, the investigation never considered the possibility of any other alternative hypothesis. They prejudged the whole issue based on the complaint given by PW1, the brother-in-law of the deceased and who was an Income Tax Appellate Tribunal member. PW1 was well connected and he had almost conducted a private investigation and was guiding the



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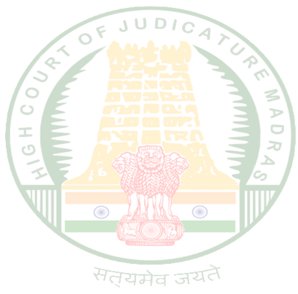
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investigating officers at every stage. In fact A7 to A10 were arrested by the investigating officer without any material evidence whatsoever and only on the information given by PW1, who would not state as to how he got that information.

(r) The learned counsel also pointed out to the evidence of the eyewitnesses and how they cannot be relied upon. He pointed out to the portions of evidence in the cross examination of investigation officers wherein all the investigation officers have denied the fact that the DCP-Balakrishnan was heading the Mylapore Range. They also denied the relationship between the DCP-Balakrishnan and the daughter of the deceased. This conduct of the investigation officers, would clearly establish that they had something to hide and were guilty of acting according to the directions of DCP-Balakrishnan and submitted that all the investigation officers had not only acted under the directions of PW1 and DCP-Balakrishnan, but had also made false statements before the Court.



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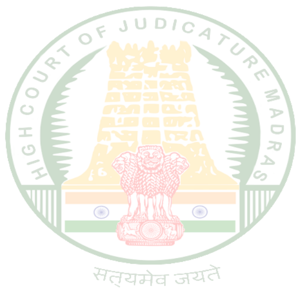
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**8. Submissions of the learned senior counsel for A4:**

(i) Mr.Abudu Kumar Rajarathinam, learned senior counsel for A4 submitted that A4 was charged for the offence under Sections 120-B r/w 109 and 302 r/w 120-B of the IPC. He further submitted that the prosecution relied upon the evidence of PW4, PW12, PW13, PW38 and PW57 and exhibits Ex.P46, Ex.P47, Ex.P48 and Ex.P169 to implicate A4.

(ii) The learned senior counsel submitted that even according to the prosecution, A4 was not present in the 1st conspiracy meeting. As regards the second conspiracy meeting, it is the prosecution case that while the other accused were discussing about their plan in the presence of PW4 and PW5, A3 got a call from A4, and A3 is said to have told A4 about the plan. However, he pointed to the evidence of PW4 and PW12 and submitted that they have not stated about the alleged phone call. PW5 had stated so which is an introduction by the prosecution to implicate A4. Thus he submitted that these witnesses were examined belatedly during investigation and made to depose falsely.



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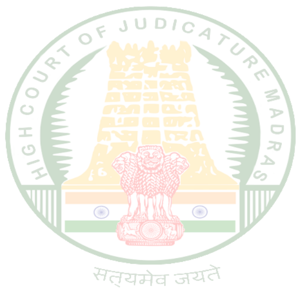
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(iii) The learned senior counsel further submitted that the other evidence relied upon by the prosecution is the evidence of PW13, who had deposed that A4 enquired her about Dr.Subbiah in the first week of September 2013. However, strangely PW13 did not inform the police about such an enquiry made by A4 till 02.12.2013 and this is also an afterthought by the prosecution.

(iv) The learned senior counsel also submitted that the prosecution attempted to prove through some bank statements that A4 had withdrawn some cash from an ATM in Chennai during the 2nd week of September 2013 to prove his presence in Chennai. However, Ex.P169 relied upon by the prosecution is only a reply sent by the officials of ICICI Bank to the police to a questionnaire, and such a document would be hit by Section 161 of Cr.P.C, in the absence of the examination of the authorised signatory.



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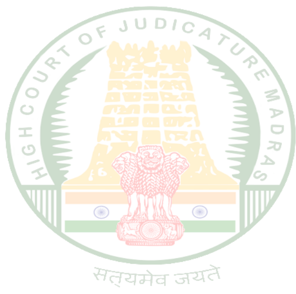
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(v) The learned senior counsel further added that likewise, the prosecution had examined PW38 to show that A4 was absent in Bangalore, which is his usual place of residence during the relevant time. The prosecution has not examined his immediate superior, to whom he reported, to prove his absence. The muster roll was not produced by the prosecution and therefore that aspect was also not established by the prosecution and submitted that the evidence of the witnesses to connect A4 to the alleged conspiracy cannot be believed.

**9. <u>Submissions of the learned counsel for A6:</u>**

(i) Mr.Jayanth Muth Raj, learned counsel appearing for Mr.Prabhu Ramasubramaniam, learned counsel for A6 reiterated that PW53, PW4 and PW5 cannot be relied upon. He submitted that PW53 in fact had not stated about the presence of A6 in the house of A5. That apart PW4 and PW5 have made contradictory statements with regard to how they reached the land, where the second conspiracy was allegedly held and therefore, they cannot be relied upon to prove conspiracy.



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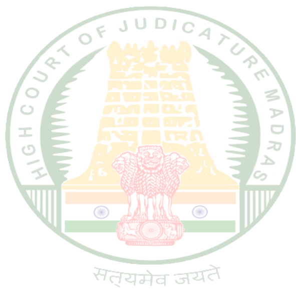
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(ii) The learned counsel further adopted the arguments made by the learned counsel for A1, A2, A3 and A5, to submit that PW37 a chance witness, cannot be believed. He also relied on the explanation offered by A6 during his Section 313 Cr.P.C. questioning.

(iii) The learned counsel further submitted that there is no reference to A6 in the confessions of A8, A9 and A10 and his presence in the conspiracy meetings is introduced as an afterthought. Learned counsel also submitted that the extra judicial confession given by A6 to PW7 is also improbable and reiterated that there was absolutely no connection between PW7 and A6; that there was no reason for A6 to trust and confess to PW7 about the conspiracy; and that the occurrence was at the relevant point in time very sensational and no accused would dare to discuss about it with a stranger. This is yet another attempt by the prosecution to plant witnesses to suit their case and relied upon the citations on the law relating to the appreciation of extra judicial confession.



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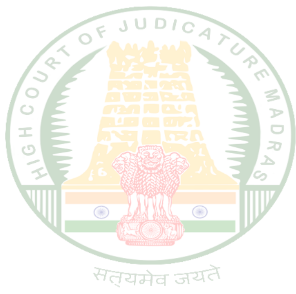
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**10. Submissions of the learned senior counsel for A7:**

(i) Mr.John Sathyan, learned senior counsel appearing for Mr.P.Divakar, learned counsel for A7 submitted that A7 is a medical Doctor by profession and was working in ESI Hospital at Tirunelveli. He is well to do and he himself had several properties and that there was no need for him to engage hirelings to obtain a share in the property of Dr.Subbiah said to have been offered by A1 and others for doing away with Dr.Subbiah. The learned senior counsel submitted that A7 is sought to be projected as a link between the accused who had a motive and the alleged henchmen. He reiterated the submissions made by the other learned senior counsel and submitted as to why PW4, PW5 and PW53 who spoke about the link, cannot be believed.

(ii) That apart, prosecution had relied upon the evidence of PW8, who had allegedly seen A7 in the company of A8, A9 and A10 on 14.08.2013 near the hospital and when PW8 enquired as to why A7 was present, A7 is



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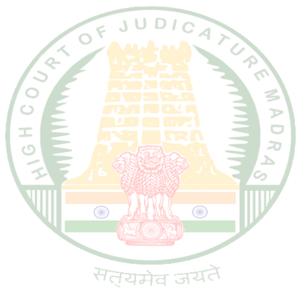
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said to have told him that he came in connection with Dr.Subbiah's case. The learned senior counsel submitted that his evidence on the very reading is artificial and A7 would not be openly proclaiming about the conspiracy or saying anything about it, even assuming that he was part of it.

(iii) The learned senior counsel also submitted that PW8 was examined at Kanimadam along with PW5 and in the absence of any material to show as to how the investigating officer discovered that PW8 saw A7 to A9 and PW12 together on 14.08.2013, PW8 cannot be believed. That apart, PW8's Section 161 Cr.P.C. statement also was sent to Court belatedly along with the final report. The learned counsel also attacked Ex.P166 and Ex.P167, which were printouts taken from the portal of the transport department and submitted as to how those documents by themselves would not prove any link between A7 and the other accused.

(iv) The learned senior counsel submitted that PW33 examined by the prosecution to prove A7's association with hirelings A8 to A10 does not



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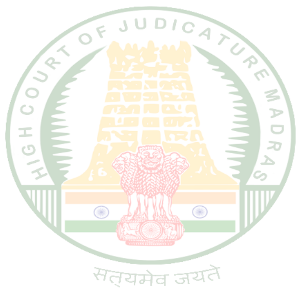
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advance the prosecution case in any manner. PW33 was also examined belatedly, and the documents relied upon by the prosecution were not marked through PW33 and hence, the accused had no opportunity to cross examine PW33 with regard to those documents. The learned senior counsel therefore submitted that in the absence of an opportunity to attack these documents, the prosecution cannot rely upon those documents which were marked through the investigating officer. The learned counsel also assailed the manner in which A7 was arrested even without any evidence and that it was a case of putting the cart before the horse.

(v) The learned senior counsel also pointed out the dates on which the witnesses' statements were recorded and the dates when they were despatched to the Magistrate to establish the artificiality in the prosecution case and their tendency to introduce false witnesses. The learned senior counsel also attacked the manner in which PW12 was granted pardon besides the bias of the learned Judge.



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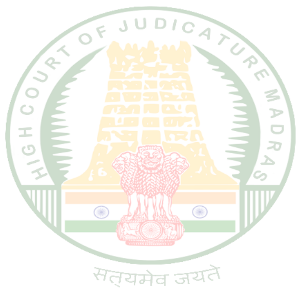
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(vi) The learned senior counsel therefore submitted that this is not a case of collection of evidence but a case of creation of evidence where all the witnesses who speak about the alleged involvement of A7 were examined by the police only after their arrest. The learned counsel also submitted that A1 to A4 after their surrender were taken into police custody had given confessions and in none of their confessions, the involvement of A7 was spoken to. The learned senior counsel made the following submissions with regard to the grant of pardon under Section 307 Cr.P.C.

(a) The Additional Sessions Judge has no power to grant pardon under Section 307 of the Cr.P.C.

(b) The learned Judge in any case ought not to have accepted an application directly from the accused.

(c) The pardon proceedings have not been exhibited by the prosecution

(d) It is only the prosecution that can choose a person who had a lesser role in the offence to grant pardon to him.



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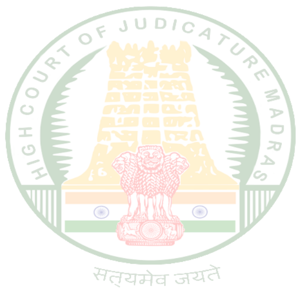
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(e) there is nothing on record to show that the Judge had explained to the approver that in the event of the Judge refusing to grant pardon the statement given by the accused can be used against him.

The learned senior counsel therefore submitted that the evidence adduced by the prosecution cannot be accepted to hold A7 guilty of the conspiracy.



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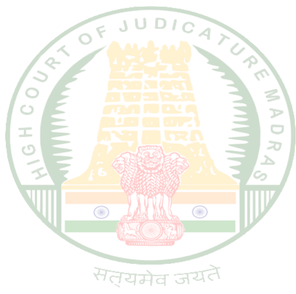

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**11. Submissions of the learned senior counsel for A8:**

(i) Mr.Gopalakrishna Lakshmana Raju, learned senior counsel appearing for Mrs.R.Radha Pandian, for A8 made both oral and written submissions, which are broadly as follows:

(a) that A8 totally denies the prosecution case as regards the alleged occurrence;

(b) that the deceased did not sustain injury as alleged and it is not a homicide.

(c) an accident has been converted to homicide.

(d) the investigation got the help of the media to make it appear that it was case of homicide.

(e) A7 to A10 were made accused and arrested without any investigation and it was only after their arrest witnesses were examined.

(f) The investigating officers were only puppets in the hands of PW1, DCP-Balakrishnan, PW9-Manager of the



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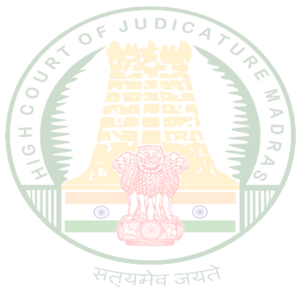

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deceased and PW13-wife of the deceased and their investigation is therefore biased and faulty.

(g) PW12 who was examined during the middle of the trial, also cannot be trusted in view of the inherent improbabilities in his evidence.

(ii) The learned senior counsel submitted that the motive alleged by the prosecution has not been established; that the land in dispute was comprised in S.No.758/8 and 759/7A, Anjugramam Village that the Patta for those two lands stood in the name of several persons and that it was not the exclusive property of Dr.Subbiah and relied upon Ex.P168. The learned senior counsel also submitted that the evidence of PW7 would suggest that the accused demanded only 1/3rd of the property during mediation and therefore the prosecution case that in order to grab the entire property, the accused caused the murder of the deceased is unbelievable.



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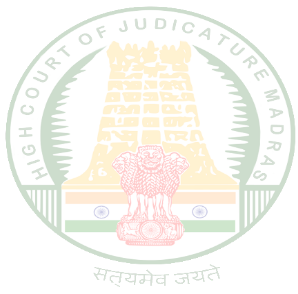
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(iii) The learned counsel submitted that one Ravichandar, Administrative officer was the first to give information, as could be seen from the evidence of PW49-Doctor who made entries in the accident register, was not examined. The learned counsel also submitted that ambulance was not used to transport the deceased to the hospital as the occurrence took place near the hospital. The entries in the AR copy Ex.P149 which also reached the Court only on 13.04.2015 though recorded on 14.08.2013 does not refer to 108 ambulance and the alleged ambulance driver was also not examined. The ambulance was introduced only to shift the scene of the occurrence. The place of occurrence is also doubtful, as could be seen from the evidence of PW2, who says that it took place near Door No.30/59, which is contrary to the prosecution case that it took place near Door No.59/30.

(iv) Though it is the case of the prosecution that A9 and A10 went to the hospital before the occurrence to verify that if Dr.Subbiah was in the



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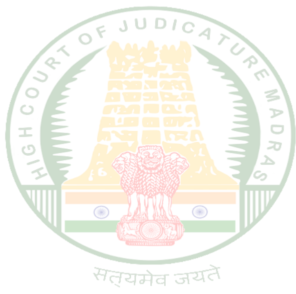
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hospital, and a CCTV was available at the hospital, the CCTV footage was not collected.

(v) The learned senior counsel submitted that though PW34, who was a Secretary to the deceased was examined to show that the accused came and enquired, no Test Identification Parade was conducted by the prosecution, as both the accused were strangers to her. That apart, she was examined only on 12.02.2014.

(vi) The learned senior counsel submitted that the CCTV footage relating to the occurrence, which was copied on a pen-drive Ex.P155, is not continuous and is only for a specific period and no authenticity can be given to such a document. The hard disc admittedly, was not playable and the forensic science lab rightly sent back the hard disc as they could not detect anything in the absence of DVR. The prosecution has not explained as to why a private agency i.e., Truth Labs, Bangalore was engaged which is



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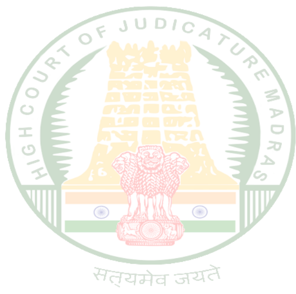
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contrary to Section 79-A of the Information Technology Act and they were not the authorised agencies as per the Act.

(vii) Ex.P155 which is said to have been taken by PW54, an employee of Truth Labs, as a backup, was not filed along with the final report. It was produced in the middle of the trial by the investigating officer. Further, PW2 and PW3, the eyewitness had also not identified the accused from the CCTV footage marked as Ex.P155.

(viii) The learned senior counsel submitted that in Ex.P149 (Accident Register), it is stated vaguely that the deceased suffered an head injury. The type of injury, the description and the weapon used has not been stated in Ex.P149. The nature of treatment given by the Doctor and the case records relating to it have been suppressed by the prosecution. Apart from the vague description of a head injury, there is reference to another laceration injury. Even in the death intimation Ex.P146, there is no reference to cut injuries and the deceased is said to have died due to septic, shock / diabetis melitus.



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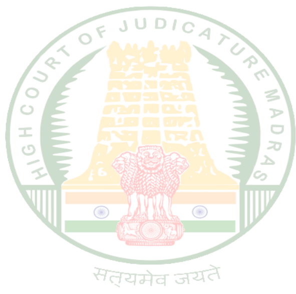
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Therefore, the opinion given by the postmortem doctor that the deceased suffered only cut injuries cannot be accepted. Since the nature of injuries has not been clearly spelt out at the earliest point of time, the nature of treatment given has been suppressed and the final opinion as regards the cause for death mentioned in the death intimation report is septic shock and diabetic mellitus, the offence under Section 302 of the IPC cannot be said to be made out.

(ix) As regards the reliability of Ex.P155 and the comparison of gait appearance of the accused by PW55, the learned senior counsel made the following submissions:

> (a) Though, the Tamil Nadu Forensic Sciences Laboratory could not open the hard disc in the absence of DVR, PW54 has not explained as to how 'Truth Labs' could open the hard disc. That apart, Ex.P155 is not a complete video and is a truncated one, which cannot be relied upon. Though a camera was shown in the Observation Mahazar at CEEBROS



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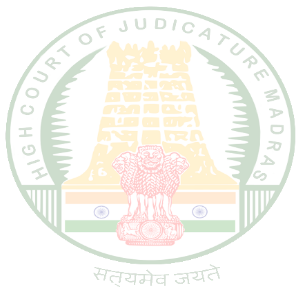

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Apartments and was not shown in Shreshta Subhashree Apartments, the prosecution has not taken any effort to collect the footage either from CEEBROS Apartments or from the Billroth Hospital.

(b) The gait appearance report [Ex.P157] by PW54, who is not an anthropologist and is not competent to give such a report cannot be relied upon. In any case it is only an opinion. That apart, the accused ought not to have been compelled to make the demonstration and therefore, the comparison based on the illegal action of the investigating officer is consequentially illegal and no reliance can be placed on the report.

(c) When the accused sought for cloned copies of the hard disc, the same could not be supplied by the Truth Labs which would also raise doubt with regard to PW54's evidence that she took a backup copy on the pendrive.



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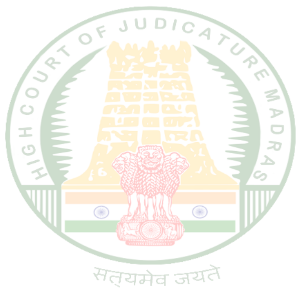

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(x) The learned senior counsel submitted that both PW2 and PW3, who claimed to be eyewitnesses, are chance witnesses and totally unreliable. Though, PW2's statement was recorded according to the prosecution on 16.09.2013, his statement reached the Court only when the final report was filed. Further, PW2 in his 164 statement has stated that he went to the police station 10 or 15 days after the occurrence, which falsifies the prosecution case that he was examined two days after the occurrence. He had also not produced any document to establish that he was permitted to drive the TATA ACE, which he had allegedly brought to the scene of the occurrence. The learned senior counsel also pointed out to several infirmities in his evidence to attack his version.

(xi) Similarly the learned senior counsel pointed out the delay in the examination of PW3 and as to how his evidence is also unreliable. The learned senior counsel further pointed out that eyewitnesses whose statements were recorded immediately after the occurrence and sent to the Court without any delay have not been examined by the prosecution.



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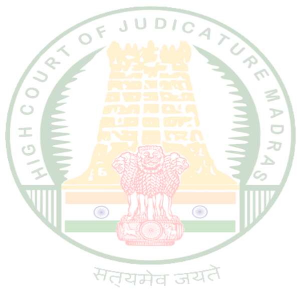
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However, PW2 and PW3, whose statements were recorded belatedly were chosen by the prosecution to give evidence to suit their case. There are contradictions in the evidence of PW2 and PW3 and more particularly, both PW2 and PW3 have not stated about Dr.Subbiah adjusting the rear view mirror. That apart, PW2's version that he came to buy old air conditioners, has not been corroborated as the prosecution has not examined the house owner who had offered the old air conditioners to PW2. PW3 need not have come to that road and could have easily parked the car near HDFC Bank and hence his presence is highly doubtful. Though PW2 claims that he called the ambulance, there is no evidence to prove the same. Further, the *overt acts* attributed to the accused by the witnesses PW2 and PW3 do not correspond to the medical evidence.

(xii) The learned senior counsel submitted that according to the prosecution, A8 had signed some documents to show his relationship with A7. However all the documents produced by the prosecution are xerox copies and in fact PW33 has not stated in his deposition that A8 has signed



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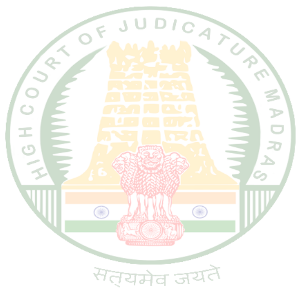
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as a witness. PW4, PW5 and PW53 were not earlier known to A8. However the prosecution failed to conduct the test identification parade.

(xiii) The learned senior counsel also pointed out to the evidence of PW12 and submitted that he is unreliable. His evidence is neither reliable nor corroborated in any aspect, much less the material particulars and reiterated the submissions made by the other counsels on why PW12 cannot be relied upon. PW12 would admit in his evidence that he did not gain monetarily out of this whole episode, which is contrary to the prosecution case that he was paid money. The purchase of a two-wheeler, is also a story spun by the prosecution, as no documents were marked to prove the purchase. The two- wheeler was not seized and produced before the Court.

(xiv) The learned senior counsel submitted that though two witnesses were examined to show that the accused signed in the Bakkiyam lodge register where they had allegedly stayed on 10.08.2013, their signatures were neither sent for any expert opinion nor identified by any person, who



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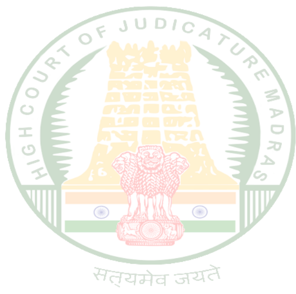

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was acquainted with his signature. PW27 and PW28, the employees of Aruna lodge admitted that the Arrival Register, though maintained, was not produced and what was produced were only ledgers.

**12. <u>Submissions of the learned senior counsel for A9:</u>**

Mr.R.Shunmugasundaram, learned senior counsel appearing for A9 made the following submissions.

(i) Though it is alleged that A9 participated in both the conspiracy meetings. PW53 has not spoken about the presence of A9 in the 1st conspiracy meeting. PW4, PW5 and PW12 have spoken about the presence of A9 in the 2nd conspiracy meeting. 22 witnesses have named A9 and none of the witnesses can be believed. PW1, PW9 and PW13 would state that on enquiry and secret information, they came to know that A8, A9 and A10 executed the attack and they were engaged by A7. However, the investigating officer has not disclosed the source or nature of the information. That apart, the versions of PW1 and PW13 who gave information to the Investigating officer are also hearsay.



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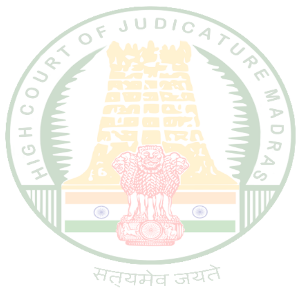
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(ii) Even in the complaint one Annapazham, the mother of A1 is named, which shows the tendency of the complainant to implicate falsely. PW57 however dropped the name of Annapazham in the final report. The entire case is based on surmises, conjectures and suspicion. Both PW1 and PW13 would assert that it was the accused who were involved in the murder, thereby preventing/restricting the police from investigating from any other angle, though PW55 and PW56 admitted to the enmity of the deceased with other persons also.

(iii) In order to establish A9's association with A7, PW33 and PW8 were examined by the prosecution. PW33 sold his property to one Raja, who was not examined and xerox copies of Ex.P40 and Ex.P41 were marked by the prosecution. Oral evidence is sought to be given contrary to the recitals of the documents, which is barred under Section 94 of the Indian Evidence Act. The author of Ex.P41 was not examined.



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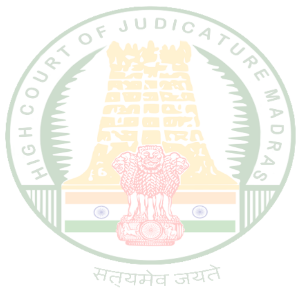
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(iv) PW4 and PW5 are chance witnesses and they are from the neighbouring District and there is no reason for the accused to engage their services. Their evidence is highly improbable, as could be seen from their belated examination and their conduct. They were not I.T. Assessees and did not have a bank account also.

(v) PW4 and PW12 say that they saw a name board in the land during the 2nd week of July 2013, when the second conspiracy meeting is said to have taken place. However, PW9 would admit that even on 23.06.2013, he had lodged a complaint stating that the name board was stolen and the FIR was registered on 22.09.2013 in Ex.P150. The conspiracy meeting is therefore unbelievable.

(vi) In the registers maintained at Bakkiyam Lodge, Ex.P31, Ex.P32 and Ex.P33, it was mentioned that only two persons stayed whereas, according to the prosecution, three persons stayed.



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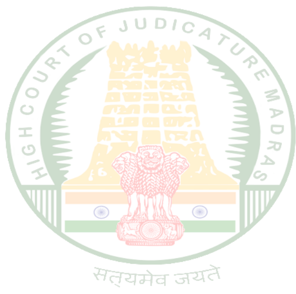

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(vii) PW8 met A7 according to the prosecution on 14.08.2013 along with A8 and A9 and when PW8 asked A7, A7 said to have told PW8 that they came for Subbiah's matter, which version is improbable and opposed to human conduct. No person who had entertained a wish to commit an offence like murder, would be openly proclaiming to third parties about their intention.

(viii) The purchase of a two-wheeler on 12.09.2013 is also improbable, as the registers maintained by the showroom Ex.P38 and Ex.P39, would show that the sale was made on 13.09.2013 and therefore, the alleged transport of the vehicle on 12.09.2013 is false. That apart, though a ticket was marked to show the travel of the accused by bus on 12.08.2013, no receipt was produced to suggest that a vehicle was transported by bus. PW38, who speaks about the travel of A9 on 12.08.2013, would say that there is a separate booking required for bikes which was not produced. Further the witnesses say that they saw a red-coloured bike, but, as per Ex.P38 it was a black-coloured bike. PW27 and PW28, the employees of



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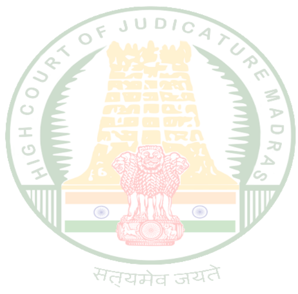
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Aruna Lodge, where the accused is stated to have stayed do not say that they saw a Pulser Bike and therefore it is a concocted story by the prosecution.

(ix) PW26, the mechanic's evidence is also artificial, since, he would state about the registration number of the vehicle six months later and to a specific query in the cross examination, he would state that he could not remember the registration details of any other vehicle, that had come for repair at the same time.

(x) PW2, a chance witness who claims that he came in a Tata Ace vehicle, has not revealed the registration number of the vehicle and only in the cross examination he chose to reveal the same. As per Rule 223 of the Motor Vehicles Rules, 1989, he is bound to maintain a Goods Carriage Register and he must be authorised to use the vehicle of the owner. There is no such authorisation produced by the prosecution. That apart, no trip sheets of PW2 was marked. Though he claims that he was examined on 16.09.2013, his evidence is unreliable since, in the said Section 161 Cr.P.C.



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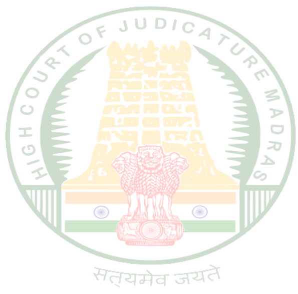
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statement, he had referred to the death of Subbiah, though Dr.Subbiah was alive at that time. The prosecution version that the statement of PW2 could not be sent to Court immediately because of the transfers of the investigating officers, cannot be believed as statements of several witnesses, including the statements of certain eyewitnesses, who were not examined by the prosecution during the trial, were sent immediately to Court.

(xi) PW3 is said to have come to the place to furnish particulars to HDFC Bank on a second Saturday at 5.00pm, which is improbable as all private banks either work half-a-day on Saturday or do not work at all. He was examined belatedly in February 2014. Further one Gopinath, PW3's friend who was known to the deceased, was not examined by the prosecution.

(xii) The Test Identification Parade was also not conducted by the jurisdictional Magistrate i.e., XXIII Metropolitan Magistrate for the reasons best known to the prosecution and was instead conducted by the XIV



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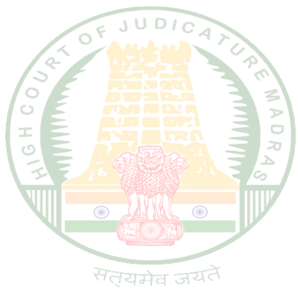
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Metropolitan Magistrate [PW51]. That apart, PW51 had recorded the Section 164 Cr.P.C. statements of PW2, PW3 and PW9, which is also inappropriate. The proceedings of PW51 would indicate that the complexion and the physical appearance of all three accused are different. However, all three accused along with other dummies, were made to stand together, which is contrary to the established guidelines for the conduct of Test Identification Parade and hence, the proceedings of the Test Identification Parade also cannot be relied on.

(xiii) The conduct of the investigating officer in sending the hard disc to a private lab, is highly condemnable. This practice has been criticised by the Courts repeatedly especially in the case of Truth Labs in ***Mariam Fasihuddin and Another v. State by Adugodi Police Station and Another***, reported in **2024 SCC OnLine SC 58; *Canara Bank v. United India Insurance Co. Ltd., and Others,*** *reported in* **2020 (3) SCC 455;** and ***K.Venkateshwaran v. S.Baskaran and 3 others, [Crl.R.C. (MD) No.35 of 2016 decided on 17.02.2021].*** Therefore, no credibility can be given to the



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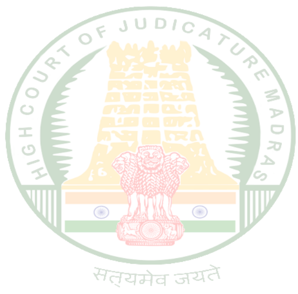

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evidence of PW54 or Ex.P155. The Government laboratories had returned the hard disc stating that it could not be decoded in the absence of DVR. However, it is the case of the prosecution that DVR was scrapped, but the prosecution has not let in evidence to substantiate that version. PW25, the Secretary of the Shreshta Subhashree apartment, also does not say anything about scrapping of the DVR. On the contrary, the investigating officer states that he came to know through a watchman of the premises that the DVR was scrapped and he was also not examined. Further when the accused sought cloned copies of M.O.9-Hard Disc it was sent to PW54, who in turn had stated that there was a mechanical failure and it was not possible to take cloned copies of M.O.9-Hard Disc.

(xiv) PW54 is incompetent to assess the gait pattern and in any case, her report is inadmissible since the act of the investigating officer in directing the accused to enact the occurrence is illegal.



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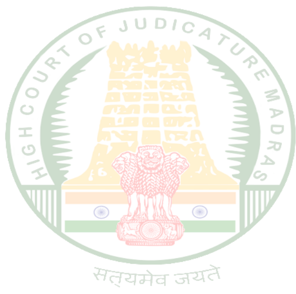

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(xv)The learned senior counsel relied upon the provisions of the Identification of Prisoners Act and Section 54-A of Cr.P.C. in support of his submissions, besides the judgment of Hon'ble Supreme Court in (2014) 12 SCC 133 [Prakash v. State of Karnataka].

(xvi) The observation Mahazar and the rough sketch would all indicate that no camera is shown in Shreshta Subhashree apartment, whereas a camera is shown in CEEBROS apartments. No plausible explanation has been given as to why the CCTV footage from the CEEBROS apartments was not collected.

(xvii) PW34, who had allegedly seen A9 and A10 at the hospital, when they came to verify if Dr.Subbiah was present in the hospital, did not inform the police when she was examined in February 2014 for the first time and her reason for not saying so was that she was sad and weeping all along for Dr.Subbaiah's death. Besides the fact that PW34 is unbelievable, the prosecution had not chosen to obtain CCTV footage from the hospital,



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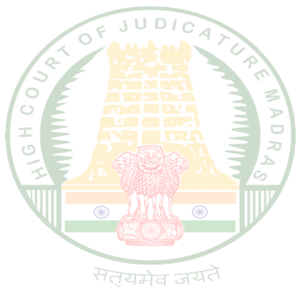
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which could have been the best evidence to prove the presence of A9 and A10 at the hospital.

(xviii) PW37, the Taxi driver who is said to have witnessed payment of money by DW2 to A6 and the other assailants, is a chance witness and it is unbelievable as money would not be handed over to the assailants pursuant to conspiracy in the presence of third parties.

(xix) PW12-the pardon proceedings have not been exhibited by the prosecution. The prosecution has failed to prove that PW12 had offered to make a full and true disclosure of facts. PW12's evidence is unreliable and uncorroborated. The application seeking to accept A10 as an approver, ought to have been initiated by the prosecution and not by the accused himself. It is for the prosecution to choose the approver depending on the role played by them and considering the other aspects of the case for a grant of pardon.



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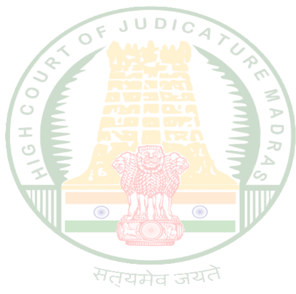

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(xx) Hence, the evidence of witnesses viz., PW2 and PW3 cannot be believed and PW12 is unreliable and uncorroborated. The other witnesses have been cooked up by the prosecution to find corroboration for PW12's evidence. The statement of witnesses has been sent to Court belatedly. The implication of the accused was not based on the materials collected. The evidence was created to suit the case and therefore, submitted that A9 is entitled for acquittal.

**13. <u>Submissions of the learned Special Public Prosecutor:</u>**

(i) Mr.G.Prabhakaran, learned Special Public Prosecutor, made the following submissions to show that the prosecution had established its case and also in response to the arguments of the defence counsels.

(ii) The learned Special Public Prosecutor made his submissions under the following heads which are reiterated in his written statements. The gist of which is as follows:



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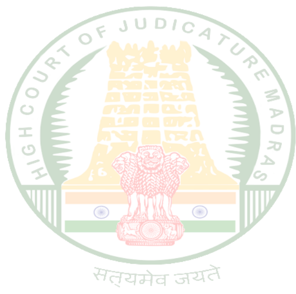

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**A.Motive:** There was a bitter dispute over the property comprised in S.Nos.759/7A and 758/8 and there were civil litigations pending between the families of the deceased and A1; that the dispute became intensified in the year 2013; that in April 2013, a complaint was lodged by the deceased before the Land Grabbing Prevention Cell; that on 09.06.2013, a meeting took place between the deceased, A1, PW6, PW10 and others wherein there was a quarrel and the deceased refused to give any share as demanded by the accused; that the deceased thereafter intensified his action against the accused by filing the petition for cancellation of Anticipatory Bail, etc; and that this provoked the accused to do away with the deceased and that the motive has been established by the prosecution through the evidence of PW1, PW6, PW9, PW10, PW12, PW13, PW50 and PW52.

**B. Nexus between the accused:**

(i) **Nexus of A1 to A4 with A5**:That A1 to A4 were neighbours of A5 and both A3 and A4 were childhood friends of A5; that A5 took an active part in the peace meeting held on 09.06.2013, as a lawyer; that he was also



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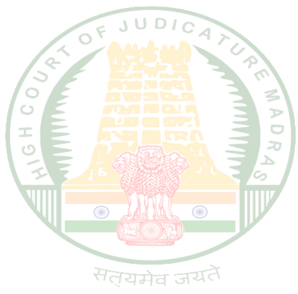
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an accused in the complaint filed for causing damage to the fencing of the disputed property.

(ii) **Nexus of A1 to A5 with A6:** A6 was a close friend of A5 and was also a neighbour of A1 to A4; that A6 had monetary transactions with A5 and he had also shown keen interest in supporting the family of A1 to A4 in the dispute between them and the deceased; and that A6's association with A5 is proved through the evidence of PW7, PW12, PW37 and DW2.

(iii) **Nexus of A5 with A7:** A5 also was closely associated with A7; that there is evidence to show A7 participated in the marriage of A5; that A7 had sent his Fortuner car to A5 for being used in his Marriage Reception; and that A7 sold his Alto Maruthi car which was in the name of his wife to A5 for half the price. The marriage album and the video would show A7's participation in A5's marriage; and that apart PW5, PW8 and PW3 have all spoken about the association of A7 with A5.

(iv) **Nexus of A7 with A8 to A10 (PW12):** Besides the evidence of PW12, PW3 has spoken about the nexus, which is corroborated by the



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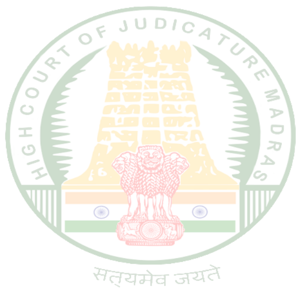
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documents Ex.P40, Ex.P41 and Ex.P165 as well as the CDRs (Ex.P112 to Ex.P145) marked through PW45 which show that the accused were talking to each other a number of times.

**C. The belated examination of witnesses:**

(i) The learned Special Public Prosecutor submitted that belated examination of witnesses, by itself, cannot render the witness unreliable; that if the prosecution had explained the reason for belated examination and the belated despatch of the statements to the Court, then the evidence of witnesses cannot be brushed aside.

(ii) The prosecution through the evidence of investigating officer has explained the reason for the belated examination of PW2 to PW5, PW8 and PW53 and such an explanation is plausible. The learned Special Public Prosecutor also submitted that since the first investigating officer and the other investigating officers were repeatedly transferred; the action taken against the Sub-Inspector of Police, who attempted to arrest A3 and A5 at



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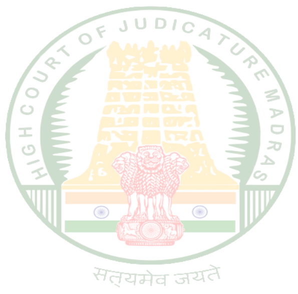
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the High Court premises, created panic amongst the investigating officers and due to the same, there was a delay in sending the statements.

(iii) The allegation that the then Deputy Commissioner of Police Mr.Balakrishnan, had influenced the investigation is unfounded and pointed out that his marriage with the daughter of the deceased was an arranged marriage, which took place on 23.01.2015 and that most of the witnesses were examined before he took charge as the DCP and some of the witnesses were examined before his marriage with the daughter of the deceased and only 7 witnesses were examined after the marriage and therefore, submitted that the allegation of biased investigation under the influence by DCP-Mr.Balakrishnan, is a desperate attempt by the defence to attack the prosecution evidence.

**D. Legality of pardon proceedings:**

(i) The act of granting pardon by the trial Judge is not vitiated by bias or any illegality. Since the Presiding Officer in the trial court was



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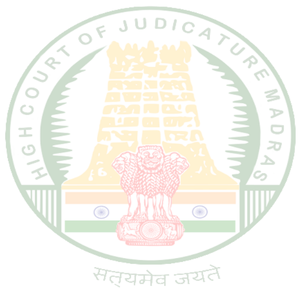
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transferred, the II Additional Sessions Judge was given additional charge by this Court on 20.09.2018. On 03.10.2018, A10 filed the application under Section 307 Cr.P.C; that the learned Judge posted the petition on five dates thereafter and finally posted the case on 12.10.2018; that thereafter, the learned Judge wrote a letter to the High Court that since she had held a vakalath as a lawyer (earlier) in a family Court proceedings for the DCP-Mr.Balakrishnan, who is the son-in-law of the deceased, it would be inappropriate for her to continue with the trial; that there is no material that the learned Judge was aware while granting the pardon proceedings that the said DCP-Mr.Balakrishnan married the daughter of the deceased; and that she might have known about the fact only after the grant of pardon and therefore, no bias can be attributed to the learned Judge.

(ii) The proceedings relating to the grant of pardon is neither an enquiry nor a trial and is only a quasi judicial administrative function and therefore, the action taken by the learned judge in tendering pardon is not vitiated, as no discretion is vested with the trial Judge, while granting pardon



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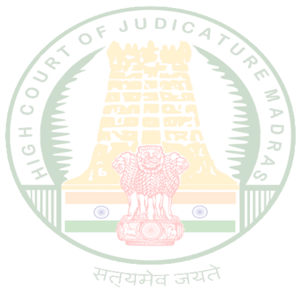

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and it is the prerogative of the prosecution to choose a particular accused for grant of pardon.

(iii) Further the accused were aware of the letter written by the Judge to the Registry of this Court and they did not question the same earlier, which would show that they had waived their right to question the pardon proceedings.

(iv) The learned Additional Sessions Judge is empowered to grant pardon and he relied upon the following decisions in support of the submission.

> "i. Ijjatulla Akanda v. Emperor [1994 ILR 280 (Calcutta Series)]
> ii. Abdul Mannan and Others v. State of WB [(1996) 1 SCC 665]

The Sessions Court granting pardon under 307 Cr.P.C., is bound to comply only with conditions stipulated in 306 (1) Cr.P.C., and the other clauses in



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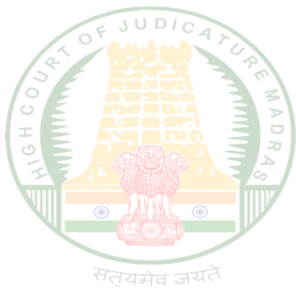

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306 Cr.P.C., are not applicable to a pardon granted under Section 307 Cr.P.C., and relied upon the following judgments.

"i. Sathish Kumar v. State [Crl.A.No.510 & 551 of 2017]
ii. Jasbir Singh v. Vipin Kumar Jaggi [(2001 8 SCC 289)]

(v) The learned Special Public Prosecutor also relied upon the following judgments in support of his submissions.

"i. Narayan Chetanram Chaudhary v. State of Maharashtra [2000 (8) SCC 457]
ii. A.Devendran v. State of Tamil Nadu [(1997) 11 SCC 720]
iii. Santosh Kumar Satish Bhushan Bariyar v. State of Maharashtra [(2009) 6 SCC 498 ]

(vi) The learned Special Public Prosecutor also further submitted that the evidence of the approver cannot be disregarded merely because, he had not chosen to apply for a grant of pardon immediately after he repented and developed remorse and relied upon the following decisions.

"i. Narayan Chetanram Chaudhary v. State of Maharashtra [2000 (8) SCC 457]



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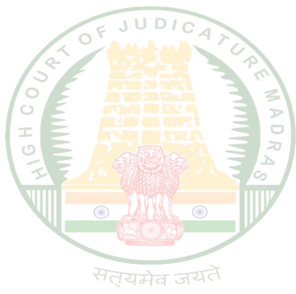

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ii. Mrinal Das and others v. State of Tripura [(2011) 9 SCC 479]

(vii) The learned Special Public Prosecutor therefore submitted that the trial Court had complied with all the procedures and merely because the pardon proceedings were not exhibited, which is a judicial proceeding, the evidence of the approver cannot be rejected and relied upon the following judgments.

i. Ranadir Basu v. State of WB [2000 (3) SCC 254]
ii. Madi Ganga v. State of Orissa [1981 (2) SCC 224]

**E. Appreciation of the evidence of PW12 – Approver:**

(i) As regards the appreciation of the evidence of PW12 (Approver), the learned Special Public Prosecutor made the following submissions.

(ii) The provisions of Section 133 and illustration (b) to Section 114 of the Indian Evidence Act would make it clear that the evidence of an approver cannot be approached with the presumption that he would not



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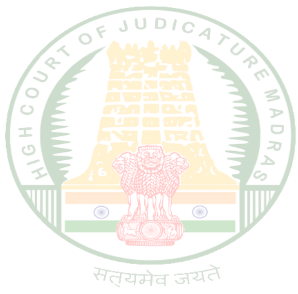
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speak the truth, as an approver having participated in the crime, would be in a better position to know about the entire dimension of the crime with specific details.

(iii) He further argued that the tests of reliability and corroboration cannot be viewed as two independent tests and that reliability can also be tested in the light of corroborative evidence and the double test for appreciating approver's evidence, is no longer a good law. He relied upon the following judgments in support of his submissions.

i. Major E.G.Barsay v. State of Bombay [1961 SCC Online SC 30].

ii Kanbi Karsan Jadav v. State of Gujarat [1962 Supp (2) SCR 726]

iii. State of Andhra Pradesh v. Cheemalapati Ganeswara Rao and another [1963 SCC Online SC 38]

iv. Chandra Prakash v. State of Rajasthan [(2014) 8 SCC 340]



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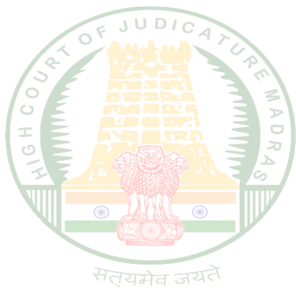
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(iv) The learned Special Public Prosecutor pointed out to Section 156 of the Indian Evidence Act and submitted that the Courts should look for corroboration of such a nature which would make the story projected by the approver believable and submitted that if corroboration is sought for all the facts spoken by the approver *qua* the accused and *qua* the crime, then there is no necessity to examine the approver and pointed out to the recent judicial trend in appreciating an approver's evidence by relying upon the following judgments.

i. Narayan Chetanram Chaudhary v. State of Maharashtra [2000 (8) SCC 457]
ii. Kanbi Karsan Jadav v. State of Gujarat [ 1962 Supp (2) SCR 726]
iii. State of T.N. v. Suresh [(1998) 2 SCC 372, para 21 and 22].
iv. K.Hasim v. State of Tamil Nadu [(2005) 1 SCC 237]
v. A.Devendran v. State of Tamil Nadu [(1997) 11 SCC 720]

(v) The learned Special Public Prosecutor further submitted that the confessions given by the accused-approver during the investigation cannot be treated as Section 162 Cr.P.C. statement and be used for the purpose of



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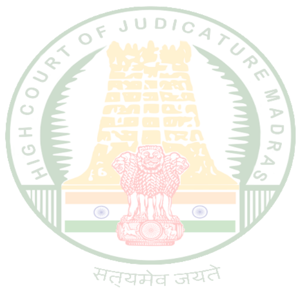

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contradiction and submitted that since the confession is inadmissible under Sections 24 and 25 of the Indian Evidence Act, those statements cannot be said to be a statement containing true facts and hence cannot be used for the purpose of contradiction and relied upon the judgment of the Hon'ble Supreme Court in Madan Mohan Lal v. State of Punjab (1970 (2) SCC 73) and the judgment of a Division Bench of Orissa High Court in State of Orissa v. Bishnu Charan Muduli (1985 SCC OnLine (Ori) 94).

(vi) The learned Special Public Prosecutor further submitted that the ratio laid down in Sarwan Singh's case (Sarwan Singh v. The State of Punjab [1957 AIR 637 : 1957 SCC OnLine SC 1) and Lal Chand's case (Lal Chand v. State of Haryana [1984(1) SCC 686]) may not be applicable to the facts of the instant case and submitted that the facts are distinguishable.

(vii) The other submissions with regard to delay in filing the application of the approver after remorse and that there was pressure and inducement by the police, would have no bearing, if the evidence of the



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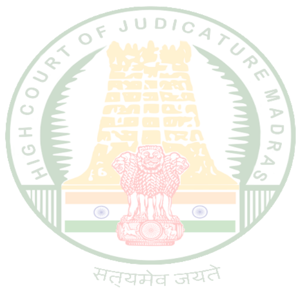
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approver is reliable and the approver has made a full and true disclosure of the facts known to him.

(viii) The learned Special Public Prosecutor pointed out the evidence of PW12-Approver and submitted as to how the evidence is consistent with the other evidence on record; that he had no bad antecedents; that he was a well educated person; and that in the absence of any evidence, to show that his evidence is improbable, he can be believed.

**F. Conspiracy:**

(i) As regards conspiracy, the learned Special Public Prosecutor relied upon the following witnesses.

(a) PW3, an eyewitness who overheard the conversation between the accused A8, A9 and PW12, just before the occurrence.

(b) PW53, who speaks about the conspiracy meeting held in A5's office, during the 1st week of July 2013.



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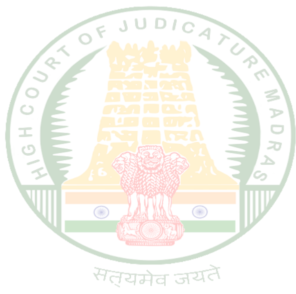
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(c) PW4 and PW5 who were witnesses to the conspiracy held in the last week of July in the disputed land.

(d) PW7, who speaks about the extra judicial confession given by A6

(e) PW8 who speaks about the meeting with A7 to A9 on 14.08.2013 wherein A7 had told him that they had come for Subbiah's issue.

(ii) The learned Special Public Prosecutor submitted that PW12's evidence coupled with the evidence of the above witnesses prove the existence of conspiracy, as also the involvement of the accused in the conspiracy. He relied upon Section 10 of the Indian Evidence Act and the following judgments in support of the said submissions

i. Tribhuvan Nath v. The State of Maharashtra [(1972) 3 SCC 511]
ii. Bhagwandas Keshwani v. State of Rajasthan [(1974) 4 SCC 611]
iii. State v. Nalini – [(1999) 5 SCC 253]



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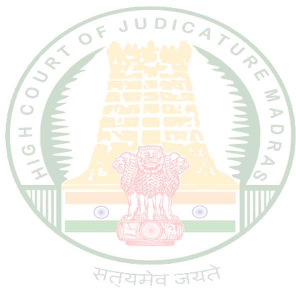

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iv. Sheikh Sintha Madhar @ Jaffer @ Sintha v. State [(2016) 11 SCC 265]

v. Mohd. Naushad v. State [2023 SCC OnLine SC 784]

**G. Money Trail:**

(i) As regards the money trail, the fact of the transfer of money, is not disputed by the defence and the learned Special Public Prosecutor mainly submitted that all the accused gave inconsistent explanations with regard to the nature of the transactions, which would show that they have given a false explanation.

(ii) The learned Special Public Prosecutor listed out the inconsistent explanations and submitted how they were false.

(iii) The learned Special Public Prosecutor also submitted that the false explanation would offer an additional link in the chain of circumstances to prove the guilt of the accused in the charge of conspiracy.



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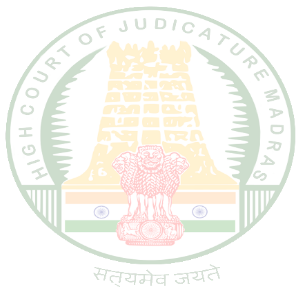
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**H. Call Detail Record:**

(i) As regards the Call Detail Record (CDR), the learned Special Public Prosecutor submitted that PW45 was working as a Sub Inspector of Police, Cyber Crime Unit and he had received the CDRs from the concerned service providers. From the mails sent by all the service providers he personally took the printout from all the mail attachments and issued a certificate under Section 65B of the Indian Evidence Act and therefore, CDRs [Ex.P112 to Ex.P145] are admissible and can be relied upon by the prosecution.

(ii) As regards the objection raised by the defence regarding the marking of Ex.P112 to Ex.P145, the learned Special Public Prosecutor submitted that the defence had not objected to the certificates under Section 65B of the Indian Evidence Act issued by PW45 and had not stated that Section 65B certificates ought to have been issued only by the nodal officers. In view of the march of law, from Navjot Sandhu's case (State (NCT of Delhi v. Navjot Sandhu [(2005) 11 SCC 600]) in the year 2005 to



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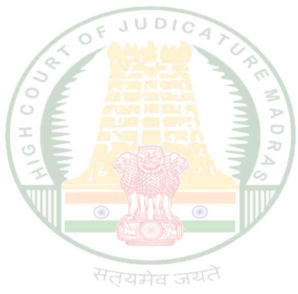
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Arjun Panditrao's case (Arjun Pandirao Khotkar v. Kailash Kushanrao Gorantyal [AIR 2020 SC 4908]) in the year 2020, which were summed up by this Court in Yuvaraj's case (Yuvaraj v. State [2023 SCC OnLine Mad 3621] para 202 (f)), in the absence of any objection with regard to non-production of Section 65B certificates issued by the nodal officers at the earliest point of time, the same cannot be raised at the appellate stage. He further submitted that Section 88-A of the Indian Evidence Act raises a statutory presumption with regard to sending and receiving of electronic messages transmitted through originators and as to the contents of such documents.

**I. Occurrence:**

(i) As regards the occurrence, the learned Special Public Prosecutor submitted that PW2 and PW3 the eyewitnesses are independent witnesses; that they have no grudge against the accused; that they are men of status; that they have no bad antecedents; that they have explained the reason for their presence at the scene of the occurrence; that they have identified the



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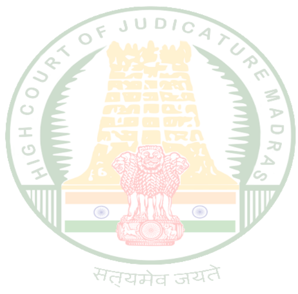
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accused in the Test Identification Parade; and that their evidence is corroborated by PW12 and by the CCTV footage, besides the gait appearance report given by PW54. Their evidence cannot be discarded stating that they are chance witnesses. He relied upon the following judgments:

i. Rana Pratap v. State of Haryana [1983 (3) SCC 327]
ii. Sachaji Lal Tiwari v. State of UP [2004 (11) SC 410]
iii. Chanakaya Dhibar (dead) v. State of WB [2004 (12) SC 398]

(ii) The learned Special Public Prosecutor further submitted that the version of the eyewitnesses cannot be disregarded merely because their Section 161 Cr.P.C. statements were despatched to the Court belatedly.

(iii) The learned Special Public Prosecutor further submitted that the evidence of PW2 and PW3 is also corroborated by medical evidence, besides the CCTV footage marked as Ex.P155. He also would submit that the sending of M.O.9, a hard disc to a private lab viz., Truth Labs is not



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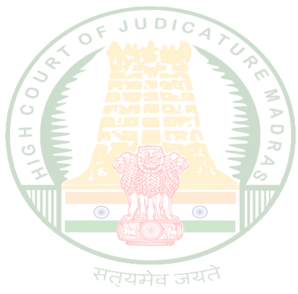
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illegal and it was done after obtaining orders from the learned Magistrate. Truth Lab is a competent lab and has facilities and there is no fault in sending it to the said lab.

(iv) The learned Special Public Prosecutor further submitted that the demonstration of the accused at the scene of the occurrence is not prohibited and relied upon the judgment in Ritesh Sinha v. State of UP [AIR 2019 SC 3592] and submitted that Section 5 of the Identification of Prisoners Act and Section 54 A of Cr.P.C., would not be a bar for asking the accused to demonstrate the occurrence.

**J. Role played by each accused:**

As regards the role played by each of the accused, the learned Special Public Prosecutor listed various acts which were established by the witnesses.



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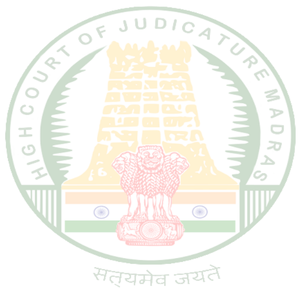
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14. We have heard the rival submissions and perused all the relevant records placed before us.

15.(i) Before we embark upon the evidences placed before us and arrive at a conclusion, we would like to touch upon the death sentence imposed by the trial Court to 7 of the 9 accused before it, which have been referred to the High Court for confirmation.

(ii) The circumstances under which a death sentence can be imposed and the test determining the imposition of death sentence have been dealt with by the Hon'ble Supreme Court in several of its decisions and the unanimous view in these decisions are that, such imposition of sentence would be to the "rarest of rare case". In one of the earliest decisions of the Constitutional Bench of Five Judges of the Hon'ble Supreme Court in the case of ***Bachan Singh Vs. State of Punjab*** reported in ***(1980) 2 SCC 684,*** such a proposition to impose death sentence to a rarest of rare case, was reiterated by a majority of Four Judges, holding that both the "aggravating



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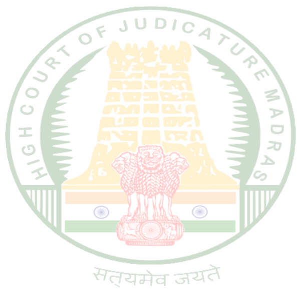
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circumstances" in the manner in which a murder was committed, as well as the "mitigating circumstances" touching upon the mental condition of the accused, as well as the possibility of his reformation among other factors, were highlighted, in the following manner:-

> *"**202.**..... Dr Chitale has suggested these "aggravating circumstances":*
>
> *"Aggravating circumstances: A court may, however, in the following cases impose the penalty of death in its discretion:*
>
> *(a) if the murder has been committed after previous planning and involves extreme brutality; or*
>
> *(b) if the murder involves exceptional depravity; or*
>
> *(c) if the murder is of a member of any of the armed forces of the Union or of a member of any police force or of any public servant and was committed—*
>
> *(i) while such member or public servant was on duty; or*
>
> *(ii) in consequence of anything done or attempted to be done by such member or public servant in the lawful discharge of his duty as such member or public servant whether at the time of murder he was such member or public servant, as the case may be, or had ceased to be such member or public servant; or*
>
> *(d) if the murder is of a person who had acted in the lawful discharge of his duty under Section 43 of the Code of Criminal Procedure, 1973, or who had rendered assistance to a*



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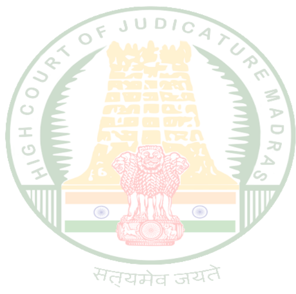
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*Magistrate or a police officer demanding his aid or requiring his assistance under Section 37 and Section 129 of the said Code.”*

***203.*** *Stated broadly, there can be no objection to the acceptance of these indicators but as we have indicated already, we would prefer not to fetter judicial discretion by attempting to make an exhaustive enumeration one way or the other.*

***204.*** *In Rajendra Prasad [(1979) 3 SCC 646 : 1979 SCC (Cri) 749] , the majority said: “It is constitutionally permissible to swing a criminal out of corporeal existence only if the security of State and Society, public order and the interests of the general public compel that course as provided in Article 19(2) to (6)”. Our objection is only to the word “only”. While it may be conceded that a murder which directly threatens, or has an extreme potentiality to harm or endanger the security of State and Society, public order and the interests of the general public, may provide “special reasons” to justify the imposition of the extreme penalty on the person convicted of such a heinous murder, it is not possible to agree that imposition of death penalty on murderers who do not fall within this narrow category is constitutionally impermissible. We have discussed and held above that the impugned provisions in Section 302 of the Penal Code, being reasonable and in the general public interest, do not offend Article 19, or its “ethos” nor do they in any manner violate Articles 21and 14. All the reasons given by us for upholding the validity of Section 302 of the Penal Code, fully*



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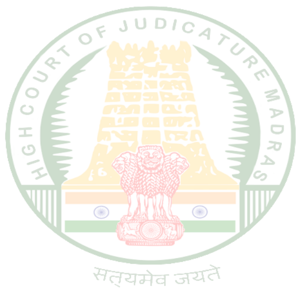
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*apply to the case of Section 354(3), Code of Criminal Procedure, also. The same criticism applies to the view taken in Bishnu Deo Shaw v. State of W.B. [(1979) 3 SCC 714 : 1979 SCC (Cri) 817] which follows the dictum in Rajendra Prasad [(1979) 3 SCC 646 : 1979 SCC (Cri) 749].*

*....*

***206.** Dr Chitale has suggested these mitigating factors:*

*"Mitigating circumstances.—In the exercise of its discretion in the above cases, the court shall take into account the following circumstances:*

*(1) That the offence was committed under the influence of extreme mental or emotional disturbance.*

*(2) The age of the accused. If the accused is young or old, he shall not be sentenced to death.*

*(3) The probability that the accused would not commit criminal acts of violence as would constitute a continuing threat to society.*

*(4) The probability that the accused can be reformed and rehabilitated. The State shall by evidence prove that the accused does not satisfy the conditions (3) and (4) above.*

*(5) That in the facts and circumstances of the case the accused believed that he was morally justified in committing the offence.*

*(6) That the accused acted under the duress or domination of another person.*



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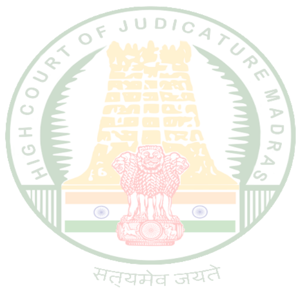
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*(7) That the condition of the accused showed that he was mentally defective and that the said defect impaired his capacity to appreciate the criminality of his conduct."*

***207.*** *We will do no more than to say that these are undoubtedly relevant circumstances and must be given great weight in the determination of sentence. Some of these factors like extreme youth can instead be of compelling importance. In several States of India, there are in force special enactments, according to which a "child", that is, "a person who at the date of murder was less than 16 years of age", cannot be tried, convicted and sentenced to death or imprisonment for life for murder, nor dealt with according to the same criminal procedure as an adult. The special Acts provide for a reformatory procedure for such juvenile offenders or children.*

***208.*** *According to some Indian decisions, the post-murder remorse, penitence or repentence by the murderer is not a factor which may induce the court to pass the lesser penalty (e.g. Mominuddi Sardar [AIR 1935 Cal 591 : Emperor v. Mominuddi Sardar, 39 CWN 262 : 36 Cri LJ 1254] ). But those decisions can no longer be held to be good law in view of the current penological trends and the sentencing policy outlined in Sections 235(2) and 354(3). We have already extracted the views of A.W. Alschuler in Criminal Year-Book by Messinger and Bittner, which are in point.*



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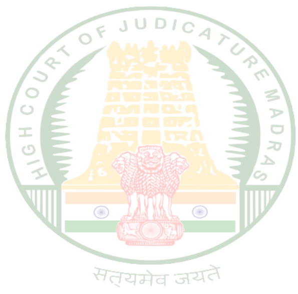

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***209.*** *There are numerous other circumstances justifying the passing of the lighter sentence; as there are countervailing circumstances of aggravation. "We cannot obviously feed into a judicial computer all such situations since they are astrological imponderables in an imperfect and undulating society." Nonetheless, it cannot be over-emphasised that the scope and concept of mitigating factors in the area of death penalty must receive a liberal and expansive construction by the courts in accord with the sentencing policy writ large in Section 354(3). Judges should never be bloodthirsty. Hanging of murderers has never been too good for them. Facts and Figures, albeit incomplete, furnished by the Union of India, show that in the past, courts have inflicted the extreme penalty with extreme infrequency — a fact which attests to the caution and compassion which they have always brought to bear on the exercise of their sentencing discretion in so grave a matter. It is, therefore, imperative to voice the concern that courts, aided by the broad illustrative guide-lines indicated by us, will discharge the onerous function with evermore scrupulous care and humane concern, directed along the highroad of legislative policy outlined in Section 354(3) viz. that for persons convicted of murder, life imprisonment is the rule and death sentence an exception. A real and abiding concern for the dignity of human life postulates resistance to taking a life through law's instrumentality. That ought not to be done save in the rarest of rare cases when the alternative option is unquestionably foreclosed."*



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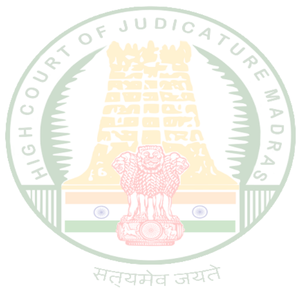
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(iii) The aforesaid extract is self explanatory and the guidelines issued therein have stood the test of time and have been followed in many of the later decisions of the Hon'ble Supreme Court. Some of the decisions, which have placed reliance on ***Bachan Singh (supra)*** are in the cases of ***Machhi Singh and Others Vs. State of Punjab*** reported in ***(1983) 3 SCC 470; Director of Settlements, A.P. And Others Vs. M.R.Apparao and Another*** reported in ***(2002) 4 SCC 638; Madan Vs. State of Uttar Pradesh*** reported in ***2023 SCC OnLine SC 1473; Mohinder Singh Vs. State of Punjab*** reported in ***(2013) 3 SCC 294.***

(iv) In a recent decision, in the case of ***Sundar @ Sundarrajan Vs. State by Inspector of Police*** reported in ***2023 SCC OnLine SC 310,*** the ratio in ***Bachan Singh's case (supra)*** was relied upon by the Hon'ble Supreme Court and the twin requirements of "aggravating circumstances" and "mitigating circumstances", which the Court dealing with death penalty requires to consider, were discussed in the following manner:-



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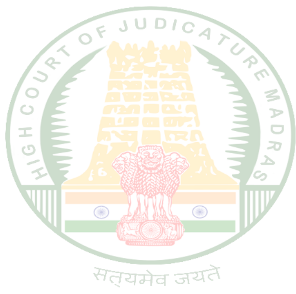
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*"**79.** The law laid down in Bachan Singh requires meeting the standard of 'rarest of rare' for award of the death penalty which requires the Courts to conclude that the convict is not fit for any kind of reformatory and rehabilitation scheme. As noted in Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra (2009) 6 SCC 498, this requires looking beyond the crime at the criminal as well:*

> *66. The rarest of rare dictum, as discussed above, hints at this difference between death punishment and the alternative punishment of life imprisonment. The relevant question here would be to determine whether life imprisonment as a punishment will be pointless and completely devoid of reason in the facts and circumstances of the case? **As discussed above, life imprisonment can be said to be completely futile, only when the sentencing aim of reformation can be said to be unachievable. Therefore, for satisfying the second exception to the rarest of rare doctrine, the court will have to provide clear evidence as to why the convict is not fit for any kind of reformatory and rehabilitation scheme. This analysis can only be done with rigour when the court focuses on the circumstances relating to the criminal, along with other circumstances.** This is not an easy conclusion to be deciphered, but Bachan Singh sets the bar very high by introduction of the rarest of rare doctrine.*
>
> ***(emphasis supplied)***



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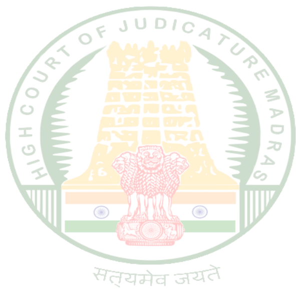
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***80.*** *A similar point was underlined by this Court in Anil v. State of Maharashtra (2014) 4 SCC 69. where the Court noted that:*

> *33. In Bachan Singh this Court has categorically stated, 'the probability that the accused would not commit criminal acts of violence as would constitute a continuing threat to the society', is a relevant circumstance, that must be given great weight in the determination of sentence. This was further expressed in Santosh Kumar Satishbhushan Bariyar.* ***Many a times, while determining the sentence, the courts take it for granted, looking into the facts of a particular case, that the accused would be a menace to the society and there is no possibility of reformation and rehabilitation, while it is the duty of the court to ascertain those factors, and the State is obliged to furnish materials for and against the possibility of reformation and rehabilitation of the accused. The facts, which the courts deal with, in a given case, cannot be the foundation for reaching such a conclusion, which, as already stated, calls for additional materials.*** *We, therefore, direct that the criminal courts, while dealing with the offences like Section 302 IPC, after conviction, may, in appropriate cases, call for a report to determine, whether the accused could be reformed or rehabilitated, which depends upon the facts and circumstances of each case.*

***(emphasis supplied)***



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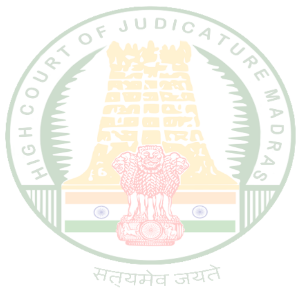

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*__82.__ In Mofil Khan, a three judge bench of this Court was also dealing with a review petition which was re-opened in view of the decision in Mohd. Arif v. Registrar, Supreme Court of India. While commuting the death sentence to life imprisonment, the Court reiterated the importance of looking at the possibility of reformation and rehabilitation. Notably, it pointed out that it was the Court's duty to look into possible mitigating circumstances even if the accused was silent. The Court held that:*

> *9. It would be profitable to refer to a judgment of this Court in Mohd. Mannan v. State of Bihar in which it was held that before imposing the extreme penalty of death sentence, the Court should satisfy itself that death sentence is imperative, as otherwise the convict would be a threat to the society, and that there is no possibility of reform or rehabilitation of the convict, after giving the convict an effective, meaningful, real opportunity of hearing on the question of sentence, by producing material.* ***The hearing of sentence should be effective and even if the accused remains silent, the Court would be obliged and duty-bound to elicit relevant factors.***
>
> *10.* ***It is well-settled law that the possibility of reformation and rehabilitation of the convict is an important factor which has to be taken into account as a mitigating circumstance before sentencing him to death. There is a bounden duty cast on the Courts to elicit***



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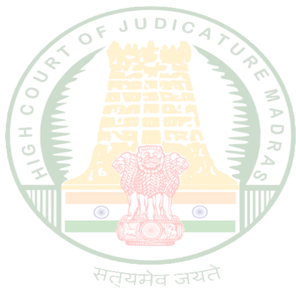
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> ***information of all the relevant factors and consider those regarding the possibility of reformation, even if the accused remains silent.*** *A scrutiny of the judgments of the trial court, the High Court and this Court would indicate that the sentence of death is imposed by taking into account the brutality of the crime. There is no reference to the possibility of reformation of the Petitioners, nor has the State procured any evidence to prove that there is no such possibility with respect to the Petitioners. We have examined the socio-economic background of the Petitioners, the absence of any criminal antecedents, affidavits filed by their family and community members with whom they continue to share emotional ties and the certificate issued by the Jail Superintendent on their conduct during their long incarceration of 14 years. Considering all of the above, it cannot be said that there is no possibility of reformation of the Petitioners, foreclosing the alternative option of a lesser sentence and making the imposition of death sentence imperative.*
>
> ***(emphasis supplied)***

(v) Since the trial Court has chosen to sentence 7 of the accused with death penalty, we are also entrusted with the responsibility as to whether such a sentence of the trial Court has adopted the well settled principles and



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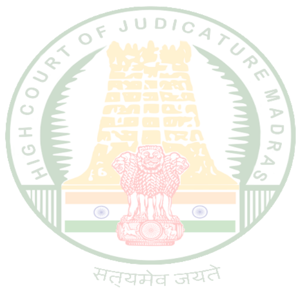
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guidelines for imposition of such a capital punishment and whether the guidelines in all the decisions of the Hon'ble Supreme Court, including the judgments referred above, have been scrupulously followed?

(vi) For such a purpose, we intend to first discuss about the various evidences available on record before the trial Court, together with the arguments and counter arguments put forth by all the counsels before us, for the purpose of coming to a conclusion as to whether the death penalty requires a confirmation by us or not.

**16. Discussion:**

(a) To prove the guilt of the accused the prosecution had examined the following witnesses.

(i) **PW1**, the brother-in-law of the deceased and the defacto complainant had spoken about the motive and the earlier disputes and the criminal cases registered against the accused on the complaint given on behalf of Dr.Subbiah.



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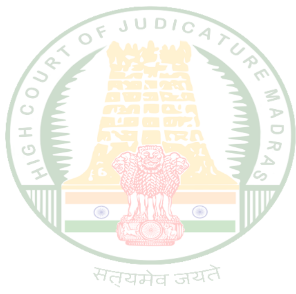
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(ii) **PW2** is an eyewitness to the occurrence and participated in the Test Identification Parade. He had also given Section 164 Cr.P.C. statement. **PW3** is another eyewitness to the occurrence and also overheard a conversation of A8 which implicated A3, A4, A5 and A6.

(iii) **PW4** is a land broker and was a witness to the second conspiracy meeting held in the last week of July 2013 in the land of Dr.S.Subbiah. **PW5** is another real estate broker who witnessed the conspiracy in the last week of July.

(iv) **PW6** is the retired Superintendent of Police who held a peace meeting on 09.06.2013 between A1, A3, A5 and the deceased DW1. **PW7** was known to A6 and A6 is said to have given an extra judicial confession to PW7. **PW8** is a real estate broker who speaks seeing A7 to A10 on 14.08.2013 at Chennai, wherein A7 is said to have told PW8 that they came for Subbiah's matter.



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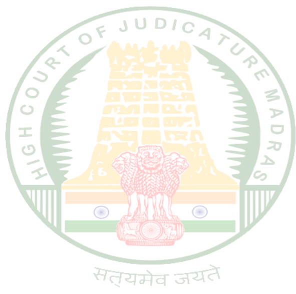
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(v) **PW9** is the employee of Dr.Subbiah, who managed his properties and speaks about the complaints given by him against the accused earlier. **PW10** is the lawyer of Dr.Subbiah, who participated in the peace meeting held in the office of PW6.

(vi) **PW11** is the Manager of the Billroth Hospital who saw the deceased after the occurrence outside the hospital and who had admitted the deceased in the hospital. **PW12** is the approver who was originally arrayed as A10.

(vii) **PW13** is the wife of the deceased and speaks about the motive and A5 threatening the deceased earlier and the presence of A4 near her house in the 2nd week of September 2013. **PW14** is the witness to the observation mahazar and seizure of bloodstained earth from the scene of the occurrence. **PW15** is the witness to the confession of A1 and A2.



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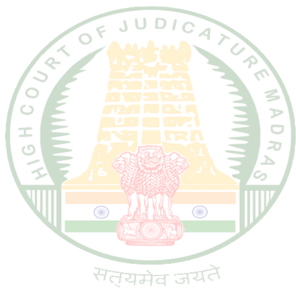

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(viii) **PW16** is the witness to the confession of A3. **PW17** is the witness to the confession of A6. **PW18** is the witness to the confession of A5. **PW19** is the witness to the confession of A7, A8, A9 and A10 and the witness to the recovery of a knife (M.O.1), a black coloured back bag (M.O.3) and a bloodstained shirt (M.O.4) of A8.

(ix) **PW20** is the witness to recovery of the marriage album (M.O.5), Marriage C.D. (M.O.6) and Nokia Cell phone (M.O.7) on the confession of A5. **PW21** is also witness to the confession of A7 to A10. **PW22** is a witness to the seizure of hard disc (M.O.9) from Shreshta Subhashree apartment.

(x) **PW23** is the witness to the seizure of material objects such as Bill Book (M.O.11), Arrival Register (M.O.12) and Departure Register (M.O.13) of Bakkiyam Lodge under Seizure Mahazar (Ex.P30). **PW24,** the Manager of Bakkiam lodge speaks about the entries made in M.O.11 to M.O.13.



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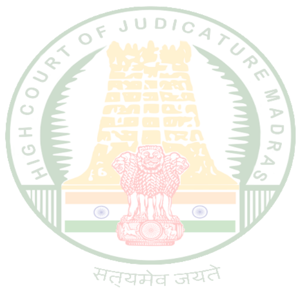
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(xi) **PW25**, President of Residents' Association of Shreshta Subhashree apartment speaks about the seizure of M.O.9-hard disc and M.O.14-hard disc pertaining to the demonstration of the accused during police custody. **PW26** is the mechanic who speaks about the repair of the motorcycle used by the accused and about A8 and A10 coming to him on 14.09.2013 at 2.00 p.m. for the said purpose.

(xii) **PW27** a room boy in Aruna Lodge speaks about the stay of A8 to A10 in the lodge on 12.09.2013 and 14.09.2013 , and is witness to the seizure mahazar [Ex.P34] by which Bill-book (M.O.15), Arrival Register (M.O.16) and Departure Register (M.O.17) were seized. **PW28** is the Manager of Aruna Lodge who speaks about the entries in M.O.15 to M.O.17.

(xiii) **PW29** is the Sales Manager at a showroom by the name Neo Suzuki, who sold an used vehicle bearing Regn.No.TN20 J 9995 on 13.09.2013 to PW30, after a customer gave it in exchange. He also speaks



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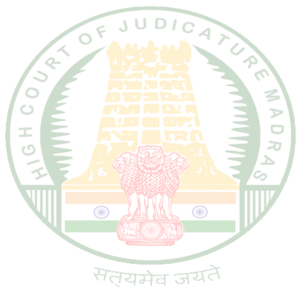
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about the recovery of Bill Book (M.O.18), Long size Note (M.O.19) under Ex.P38 and Ex.P39. **PW30** is the owner of the vehicle who sold the bike to A10 on 12.09.2013.

(xiv) **PW31** speaks about the purchase of Aruval from a shop by A8 and A10. **PW32** is the photographer who speaks about A8 and A10 coming to his shop to take a printout of the photograph of the deceased from a memory card. **PW33** had availed of a loan from A7 and speaks about the pressure given by A7 to A10 to execute a sale deed in favour of one Raja for the loan repayable by him to A7. He speaks about Ex.P40 and Ex.P47 sale deed and about the cancellation of the sale deed.

(xv) **PW34** is the Secretary of the Billroth Hospital, and speaks about A9 and A10 meeting her on 14.09.2013 at 4.00 a.m. and enquiring about the deceased. **PW35** is the witness to the seizure mahazar (Ex.P42) for seizure of billbook (M.O.21) of Udhaya Travels through whom the bike was transported to Chennai and also the witness to Seizure Mahazar-Ex.P44.



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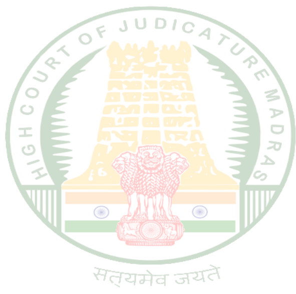
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(xvi) **PW36** is the Proprietor of Udhaya Travels who speaks about transporting of bike and marks the relevant entry in M.O.21 as Ex.P35 dated 12.09.2013.

(xvii) **PW37** speaks about the fact that DW2 gave Rs.6.5 Lakhs to A6, who in turn gave Rs.1.5 Lakhs each to A8 to A10 and kept the remainder for himself.

(xviii) **PW38** an employee in A4's company, speaks about A4's attendance record which showed his absence in the company from 08.09.2013 to 12.09.2013.

(xix) **PW39** is the brother-in-law of A8 and was witness to seizure mahazar Ex.P49 and seizure of Blue Bag (M.O.32), Nokia cell phone (M.O.22), LG cell phone (M.O.23) of A7, Money purse (M.O.33) and the other documents.



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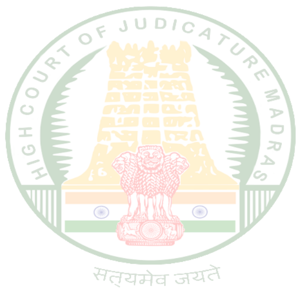
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(xx) **PW40**, is the witness to the demonstration of the occurrence by A8 to A10 at Shreshta Subhashree apartment. **PW41 to PW44** are Bank Managers, who speak about the accounts of DW2, A1, A2 and A5 respectively and marked the statement of accounts of the accused and DW2.

(xxi) **PW45** is the Sub Inspector of Cyber Crime who collected the CDR, of the accused Ex.P112 to Ex.P145.

(xxii) **PW46** is the Doctor at Billroth Hospital, who issued death certificate for the deceased [Ex.146]. **PW47**, is the Doctor at the Royapettah Government Hospital, who issued Accident Register [Ex.P147] dated 23.09.2013. **PW48** is the Postmortem Doctor who issued postmortem certificate [Ex.P148]. **PW49** is the Doctor at Billroth Hospital, who made entries in Accident Register Ex.P149 on 14.09.2013 at 5.30pm.



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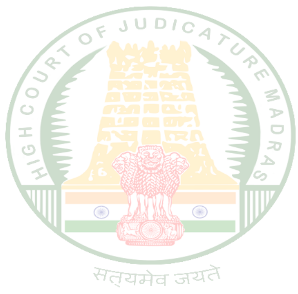
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(xxiii) **PW50** is the Sub Inspector of Police at Anjugramam Police Station, who registered Ex.P150-FIR on the complaint given by PW9 against A1, A3 and A6 for damaging the fence and board on the disputed land. **PW51** is the Magistrate who conducted Test Identification Parade and recorded the Section 164 Cr.P.C. statements of PW2, PW3 and PW9. **PW52** is the Special Sub Inspector of the District Anti-Land Grabbing Cell in Kanyakumari District and registered the FIR- Ex.P154 on the complaint given by the deceased on 21.06.2013 against A1, A2 for creating false documents.

(xxiv) **PW53** is the client of A5 and was a witness to the first conspiracy meeting that took place in the 1st week of July 2013. **PW54** is the expert working in Truth Lab, Bangalore who gave gait Analysis report Ex.P157 and also speaks about Ex.P155 backup in the pen-drive of relevant portion of M.O.9- hard disc and about Exs.D3 to D5.



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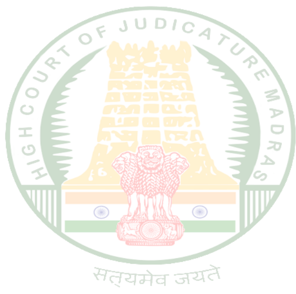

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(xxv) **PW55** is the investigating officer who conducted the investigation from 18.09.2013 to 24.10.2013. **PW56** conducted investigation from 24.10.2013 to 14.02.2014. **PW57** initially conducted the investigation from 14.09.2013 to 18.09.2013 and thereafter conducted investigation from 14.02.2014 till filing of the final report, details of which we have elaborated earlier.

(b) DW1 to DW3 were examined by the defence.

17. The discussion on the evidence adduced by the prosecution can be split into the following parts.

(A) Evidence to establish the charge of conspiracy.

(B) Evidence to establish the occurrence.

A.(i) To establish the charge of conspiracy, the prosecution relies upon the direct evidence of PW4, PW5, PW53 and PW12-the approver. Besides the above direct evidence, the prosecution relies upon the circumstance of motive which is spoken to by PW1, PW9 and PW13. The



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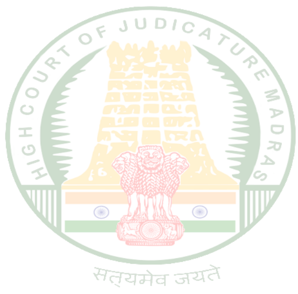
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association between the accused is sought to be established through CDRs (Ex.P.112 to Ex.145) marked through PW45. That apart, the prosecution relies upon certain money transaction between some of the accused. It is the case of the prosecution that A1 and A3 transferred Rs.1.5 lakhs and Rs.4.90 lakhs respectively to A5, who in turn transferred it to DW2 which was distributed by A6 to the assailants A8, A9 and PW12, which is sought to be proved as follows:

> (a) PW37 a taxi driver is said to have witnessed DW2 handing over cash to A6, who in turn distributed it to A8, A9 and PW12; and
>
> (b) PW41 to PW44, the Bank Managers who were in-charge of the branches where DW2, A1, A3 and A5 maintained their accounts respectively, speak about the statements of accounts, withdrawal slips and pay in slips of the accused and DW2, reflecting the transactions.



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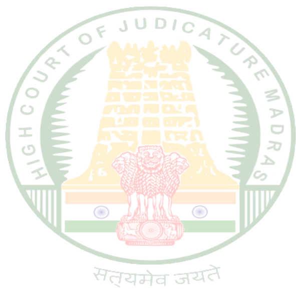

WEB COPY (ii) The other circumstances relied upon by the prosecution to establish the charge of conspiracy is sought to be established through the following witnesses

(a) PW8, a real estate broker, who met A7 to A9 and PW12 on 14.08.2013 at 2.30 p.m., when the accused first attempted to do away with Dr.Subbiah near Billroth Hospital.

(b) the presence of A8, A9 and A10 in Chennai on 14.08.2013 is spoken to by PW23 and PW24, the employees of Bakkiyam Lodge who speak about the entries in M.O.11 to M.O.13 and the seizure from their lodge, to show that the accused were staying in the said lodge from 11.08.2013 to 14.08.2013.

(c) The purchase of the two-wheeler bearing Regn.No.TN20 J 9995 is spoken to by PW29 and PW30.



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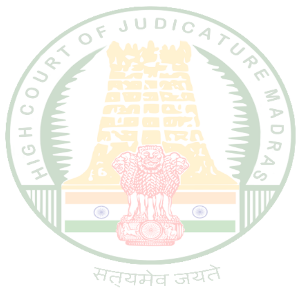
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(d) PW32, the photographer who speaks about A8 and PW12 visiting his photo studio to take a printout of the enlarged photo of the deceased Dr.Subbiah.

(e) PW33, who had taken a loan from A7 speaks about the threat and coercion made by A8, A9 and PW12 to execute a sale deed in favour of one Raja at the instances of A7. He also speaks about Ex.P40 and Ex.P41, sale deed and receipt given by Raja.

(f) A6 is said to have given an extra judicial confession to PW7 wherein he had spoken about the involvement of A5. The Association of A7 with A5 is sought to be established by showing the details of the car gifted by A7 to A5 for his wedding.



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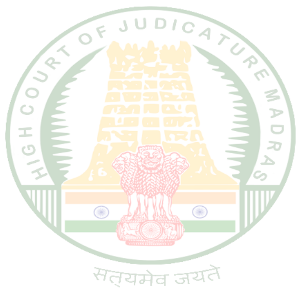

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From the above narrative, it could be seen that PW12 is the star witness relied upon by the prosecution to establish its entire case and have adduced the aforesaid evidence for the purpose of corroboration to establish the charge of conspiracy. We shall examine the evidence adduced by the prosecution in this regard in detail.

B (i) As regards the 2nd aspect viz., the evidence relating to the occurrence, the prosecution evidence can be split into two sub parts viz.,

(1) The presence of A8, A9 and PW12 in Chennai from 12.09.2013 to 14.09.2013 which is sought to be established by the following witnesses.

(a) PW27 – Room boy in Aruna Lodge who speaks about the stay of A8, A9 and PW12 in the lodge on 13.09.2013 and 14.09.2013. PW28, the Manager of Aruna Lodge had spoken about the entries in the bill book, arrival register, departure register maintained at Aruna Lodge which is marked as M.O.15 to M.O.17 respectively.



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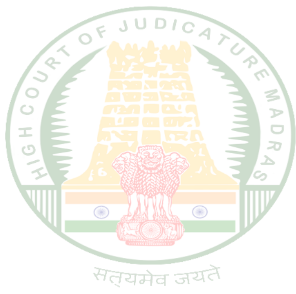
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(b) PW35, who speaks about the transport of bike which was brought by A8 and PW12 to Chennai. PW36 also speaks about the transport of bike on 12.09.2013 and also about the accused travelling in a bus from Panagudi to Chennai.

(c) PW26 the Mechanic who had repaired the motorcycle of the assailants on 14.09.2013 at about 2.00 p.m.

(d) PW34, Secretary at Billroth Hospital, who speaks about A9 and PW12 coming on 14.09.2013 at 4.00 p.m. and enquiring about the deceased.

(e) Evidence of PW12.

(2) The prosecution seeks to establish the occurrence by the following evidence.

(a) The eyewitnesses viz., PW2 and PW3.



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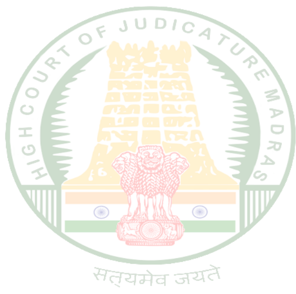
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(b)The video clipping said to have been taken from Shreshta Subhashree apartment and spoken to by PW54-Neeru stored in a pendrive Ex.P155.

(c) The gait analysis report [Ex.P157] of PW54 comparing the video recorded in hard disc M.O.9 and stored in Ex.P155 pen-drive with M.O.34 – CD of the demonstration captured on digital camera and CD-M.O.14 demonstration captured in CCTV camera at Shreshta Subhashree apartment.

(d) The evidence of PW12, the approver.

Before examining the evidence of P.W.12, we would like to address the points raised by the defence with regard to bias in the grant of pardon and with regard to the law relating to appreciation of approver's evidence.



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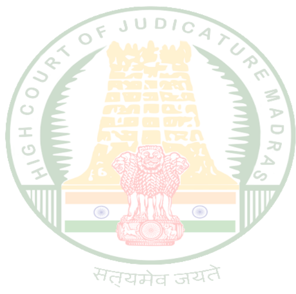
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18.(A) In order to appreciate the **submissions on bias**, it is necessary to appreciate the following facts, which are not disputed.

(i) The final report in this case was filed on 06.03.2015 arraigning PW12 as A10. After committal, the case was made over to the VII Additional Sessions Court at Chennai. The charges were framed on 30.06.2017. As on 19.09.2018, 10 witnesses were examined. At that stage the Presiding Officer of the said Court was transferred. On 20.09.2018, the II Additional Sessions Judge was given full additional charge of VII Additional Sessions Court, pursuant to the administrative order of this Court. On 03.10.2018, A10 filed an application in Crl.M.P.No.1706 of 2018 before the trial Court, praying for grant of pardon. The records indicate that on 04.10.2018, the learned Judge directed the Court Registry to number the petition and list the case on 05.10.2018 for the reply of the Public Prosecutor. The prosecution filed their counter on 05.10.2018 and submitted that the Court may favourably consider the request of the petitioner/A10 and grant pardon to him. On 08.10.2018, the petition was heard and was adjourned to 10.10.2018.



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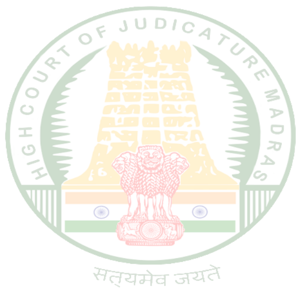

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(ii) On 10.10.2018, since A10 was not present, the case was adjourned to 11.10.2018. On 12.10.2018, after having satisfied herself that A10 was warned that he is not bound to give the statement and offered to make a statement voluntarily, the learned Judge recorded the Section 164 Cr.P.C. statement of the approver 'in camera' and further having satisfied that A10 had made a full and true disclosure of all of the circumstances within his knowledge, granted pardon and directed his inclusion in the list of witnesses.

(iii) On 23.10.2018, the prosecution filed a memo stating that they intended to examine the approver as the next witness.

(iv) On 30.10.2018, the learned Judge addressed a letter to the Registrar General of this Court through the Principal District Judge, City Civil Court, which is reproduced below.

30.10.2018
Chennai.

From

Ms.S.Sameena, B.A., L.L.B.,
II Additional Sessions Judge,
VIII Additional Sessions City Civil Court (FAC),



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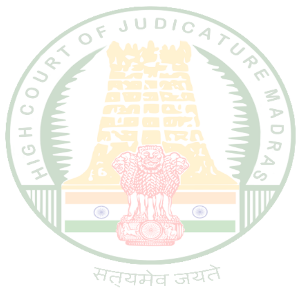
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Chennai.

To
The Honourable Registrar General,
High Court,
Madras.

Through
The Principal District Sessions Judge,
City Civil Court,
Chennai.

Honoured Sir,

Sub: Criminal cases – SC.No.348 of 2015 on the file of VII Additional Sessions Judge, VII Additional Sessions City Civil Court, Chennai – Request for transfer of case to some other Additional Sessions City Civil Court – Submitted.

I humbly submit that I am holding the post of II Additional Sessions Judge, II Additional Sessions City Civil Court, Chennai and taken Full Additional Charge of VII Additional Sessions Court from 20.09.2018 as per the Official Memorandum of the Hon'ble High Court in ROC.No.65277-A/2018-B2 dated 19.09.2018.

I humbly submit that SC No.348 of 2015 in Crime No.1352/2015, Abhiramapuram Police Station, Chennai against Ponnusamy and 9 others u/s.120(b), 109, 341, 302 r/w 34 IPC is pending on the file of VII Additional Sessions City Civil Court, Chennai.

I submit that trial has been commenced and PW1 to PW11 have been examined. A10 has turned as an approver and his statement has been recorded on 12.10.2018 and he has been tendered conditional pardon. I further submit that the Hon'ble High Court, Madras on 15.09.2017 while



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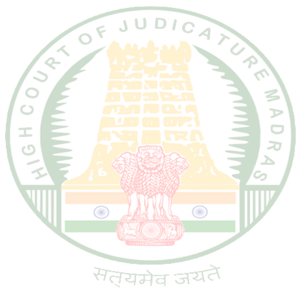
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disposing Crl.OP.3616 of 2017 was pleased to direct this court to dispose the case within time frame.

I humbly submit that the victim was one Dr.Subbiah. I further submit that the son-in-law of the victim is one Mr.Balakrishnan I.P.S., DIG of Police of Tamil Nadu. While practicing as an Advocate, I was holding his vakalath and have appeared for the said Mr.Balakrishnan, I.P.S., in Family Court, Trivandrum. I submit further that most of the accused belong to my native district, Kanyakumari. I further submit that the accused being relatives to the victim may know my appearance for the said Mr.Balakrishnan before Family Court, Trivandrum. I submit, though I could bear with such inducements as a Judicial Officer. I humbly submit that it may make inconvenience to the Judiciary in the event of any allegation that could be made by any of the party.

I humbly submit that in the above circumstances, the case in SC no.348/2015 on the file of VII Additional Sessions City Civil Court may kindly be transferred to some other Additional Sessions City Civil Court, Chennai.

Yours faithfully,
Sd/-
II Additional Sessions Judge,
VII Additional Sessions
City Civil Court (FAC),
Chennai.

(v) This letter was not marked in the trial Court. The learned counsel for the defence submitted that they found this letter while perusing the



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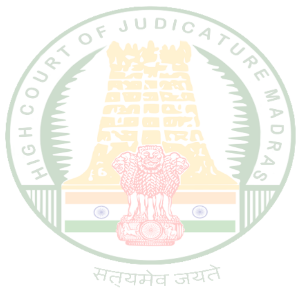
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original records of this case and prayed that this document may be taken on record.

(vi) There is no dispute with regard to the genuineness of this document. Hence, in exercise of our powers under Section 366 of the Cr.P.C., and since no formal proof of this document is required, **the said letter is marked under Section 294 of the Cr.P.C., as Court exhibit, i.e., Ex.C6.**

(vii) The facts narrated above reveal that the II Additional Sessions Judge was made incharge of the VII Additional Sessions Court as per the Memorandum issued by this Court. A10, who had until then taken a stand that the case against him was false and had cross examined the witnesses, chose to file the petition on 03.10.2018. Immediately, thereafter almost on a day-to-day basis the petition was heard and on receipt of the counter, pardon was granted to A10 on 12.10.2018. Thereafter, on 30.10.2018, the learned Judge wrote a letter which is now marked as Ex.C6.



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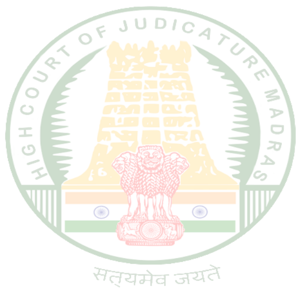
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(viii) In the said letter, the learned Judge had stated that the son-in-law of the victim is one Mr.Balakrishnan, I.P.S.; that while she was practicing as a lawyer, she had appeared for the said Balakrishnan before a Family Court at Trivandrum and that most of the accused belonged to her native District i.e., Kanyakumari; that the accused also being relatives of the victim would come to know of her appearance for the said Balakrishnan and if any allegations are made, it would cause inconvenience to the judiciary and therefore, sought for transfer.

(ix) The learned Judge chose not to examine any witnesses, after she had written the letter on 30.10.2018. She probably felt that it would be inappropriate to do so. However, what occurred to her on 30.10.2018, should have occurred to her on 03.10.2018. It is not as if that she was not aware on 03.10.2018, that the case pertained to the murder of Dr.Subbiah or that Balakrishnan, for whom she had appeared was his son-in-law. If that



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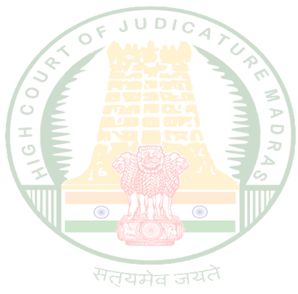
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was the case, she could have stated so in her letter addressed to the Registrar General.

(x) The learned Special Public Prosecutor submitted that there is nothing on record to show that the learned Judge was aware that the said Mr.Balakrishnan was the son-in-law of the deceased, when she granted pardon and that she would have come to know about the accused and the relationship of Mr.Balakrishnan only after seeing the Section 164 Cr.P.C. statement of the approver.

(xi) We are unable to accept this submission made by the learned Special Public Prosecutor as there is no basis to make such a submission. The learned Judge herself has not stated so in her letter.

(xii) The learned Judge ought to have recused herself from the case even before she entertained this application for tender of pardon, especially when she chose not to examine any witness thereafter.



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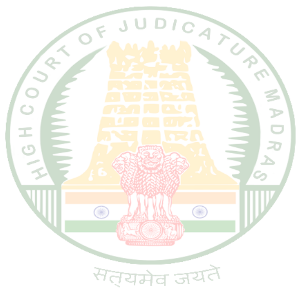
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(xiii) The fact that A10, who had till then kept quiet suddenly gained confidence and filed a petition after the concerned Judge took additional charge of the VII Additional Sessions Court, also raises suspicion. The sequence of events would suggest that it is much more than a coincidence and in any case, even if it is a coincidence, it cannot be ignored or brushed aside in the light of other circumstances, which we have pointed out above.

(xiv) It is well settled that the test of bias is not whether an action was done with bias, but whether there was a reasonable apprehension of the real likelihood of bias. This position has been reiterated in several decisions of the Hon'ble Supreme Court including in

(i) Rupa Ashok Hurra v. Ashok Hurra, (2002) 4 SCC 388;
(ii) P.K.Ghosh v. J.G.Rajput, (1995) 6 SCC 744;
(iii) State of Punjab v. Davinder Pal Singh Bhullar, (2011) 14 SCC 770; and
(iv) Ranjit Thakur v. Union of India (1987) 4 SCC 611;

(xv) It is also clear that the apprehension of bias must be judged from a reasonable and average person's point of view and not on a mere



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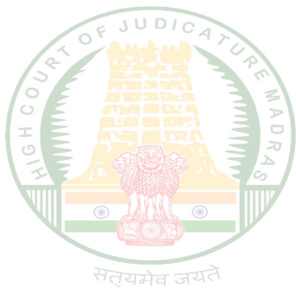
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apprehension of any whimsical person. A mere suspicion of bias is not sufficient, but the apprehension must be reasonable.

B. From the above facts, we are convinced that the proceedings of the learned Judge give rise to a reasonable apprehension of real likelihood of bias. The consequential question would be as to what would be the effect of such an action.

(i) In a case where a retired Judge who heard a disciplinary proceedings and was found as a lawyer he appeared for one of the parties, the Hon'ble Supreme Court struck down the order made in the disciplinary proceedings in ***Ramesh Chandra v. Delhi University***, reported in **(2015) 5 SCC 549.**

(ii) In several other cases, the Hon'ble Supreme Court has held that when any judgment/order/proceeding is tainted by bias, it is a nullity and stands vitiated in law. It would be useful to extract the observations in ***State***



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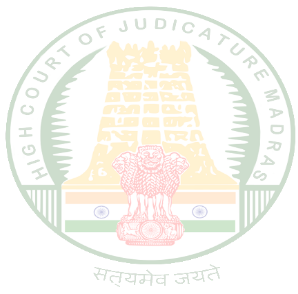

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***of Punjab v. Davinder Pal Singh Bhullar,*** reported in (2011) 14 SCC 770, which read as follows:

> "106. The order impugned has rightly been challenged to be a nullity at least on three grounds, namely, judicial bias; want of jurisdiction by virtue of application of the provisions of Section 362 Cr.P.C. coupled with the principles of constructive res judicata; and the Bench had not been assigned the roster to entertain petitions under Section 482 Cr.P.C. The entire judicial process appears to have been drowned to achieve a motivated result which we are unable to approve of.
>
> 107. It is a settled legal proposition that if initial action is not in consonance with law, all subsequent and consequential proceedings would fall through for the reason that illegality strikes at the root of the order. In such a fact-situation, the legal maxim "sublato fundamento cadit opus" meaning thereby that foundation being removed, structure/work falls, comes into play and applies on all scores in the present case."

(iii) In ***S.Parthasarathi v. State of A.P.,*** reported in **(1974) 3 SCC 459,** the Hon'ble Supreme Court held as follows:

> "15. The question then is : whether a real likelihood "of bias existed is to be determined on the probabilities to be inferred from the circumstances by court objectively, or, upon the basis of the impressions that might reasonably be left on the minds of the party aggrieved or the public at large.



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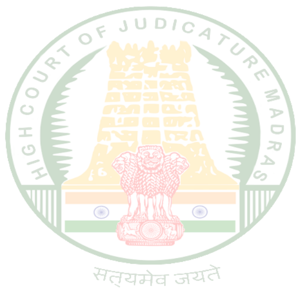
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16. The tests of "real likelihood" and "reasonable suspicion" are really inconsistent with each other. We think that the reviewing authority must make a determination on the basis of the whole evidence before it whether a reasonable man would in the circumstances infer that there is real likelihood of bias. The court must look at the impression which other people have. This follows from the principle that justice must not only be done but seen to be done. If right minded persons would think that there is real likelihood of bias on the part of an inquiring officer, be must not conduct the enquiry; nevertheless, there must be a real likelihood of bias. Surmise or conjecture would not be enough. There must exist circumstances from which reasonable men would think it probable or likely that the inquiring officer will be prejudiced against the delinquent. The court will not inquire whether he was really prejudiced. If a reasonable man would think on the basis of the existing circumstances that he is likely to be prejudiced, that is sufficient to quash the decision [see per Lord Denning, M.R. in Metropolitan Properties Co, (F.G.C.) Ltd. v. Lannon and others, etc.((1968) 3 WLR 694 at 707)]. We should not, however, be understood to deny that the court might with greater propriety apply the "reasonable suspicion" test in criminal or in proceedings analogous to criminal proceedings.

17. As there was real likelihood of bias in the sense explained above, think that the inquiry and the orders based on the inquiry were bad. The decision of this Court in the State of Uttar Pradesh v. Mhammad Nooh (AIR 1958 SC 86) makes it clear that if an inquiring officer adopts a procedure which is contrary to the rules of natural justice, the ultimate decision based on his report of inquiry is liable to be quashed. We see no reason for not applying the same principle here as we find that the inquiring officer was biased."



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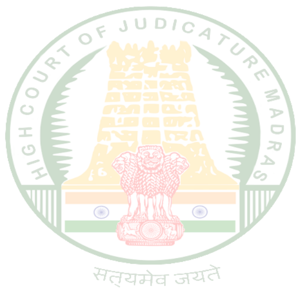
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(iv) A similar view was taken by the Hon'ble Supreme Court in ***Union of India v. B.N.Jha***, reported in **(2003) 4 SCC 531**.

(v) In a case decided by this Court in ***K.Sundara Rajan v. Deputy Inspector General of Police, Central Range, Tiruchirapalli***, reported in **(1971) SCC OnLine Mad 178**, this Court held that if the enquiry officer is found to be biased and personally interested in matter, then the order of the punishing authority that acts upon the report of the enquiry officer would also be vitiated by bias. The relevant observation reads as follows:

> 4. Before adverting to the question whether the enquiry officer was in any way prejudiced against the petitioner, it is necessary to examine the question whether how far such prejudice, even if true, would vitiate the proceedings. It is contended on behalf of the respondents that all that the enquiry officer did was to record the evidence and submit his report with his findings on the charges, that the entire matter was reconsidered by the punishing authority who came to his own independent conclusion with regard to the sustainability of the charges and that, therefore, even if there was any bias on the part of the enquiry officer that would not vitiate the proceedings. The function of the enquiry officer is to conduct the enquiry by recording the evidence that may be let in to prove the charges and also to record the



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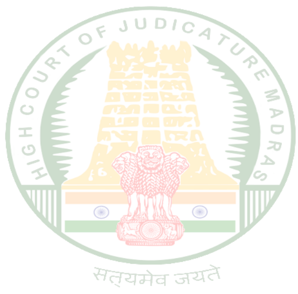
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evidence which the charged officer may let in to prove his innocence by way of rebuttal. It is his further duty to record his findings on the charges and submit the papers to the punishing authority. The question is whether, in the performance of his duty, he is expected to keep an open mind about the guilt of the charged' officer and if he had any prejudice against the charged officer, whether such prejudice would affect the ultimate result. The enquiry officer is not a mere evidence recording machine. He has to admit only relevant evidence that may be left in to prove the charges. He is also entitled to and should also decline to record evidence if such evidence is wholly extraneous to the charges. He should give a reasonable opportunity to the charged officer to peruse the records for the purpose of preparing his defence. He should give reasonable opportunity to the charged officer to cross-examine the witnesses. He should also give an opportunity to the charged officer to examine his witnesses. After all these work is over, he is not merely require to forward the entire papers to the punishing authority but he should sift the evidence to find out whether or not the charges have been made out. In substance, his function is that of a Judge dealing with a case. Such an Officer should not be personally interested in the matter."

(vi) The case of an enquiry officer cannot be equated with the present case, where a learned Judge had granted pardon. The enquiry officer not only records the evidence but also has to sift and weigh the evidence and ascertain if the charges have been validly made.



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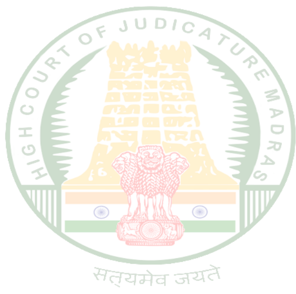
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(vii) Therefore, there cannot be any doubt that if a Judge or an enquiry officer's action is tainted with bias, then his findings would be rendered a nullity. But in none of the cases which we have just discussed and relied upon by the learned defence counsel, the question of effect of apprehension on the real likelihood of bias in a proceeding relating to the grant of pardon, was considered. Therefore, we have to ascertain the nature and scope of the proceedings under Section 307 of the Cr.P.C.

(viii) The Hon'ble Supreme Court in several cases had occasion to consider the nature and scope of the proceedings relating to the grant of pardon.

(a) In ***Lt. Commander Pascal Fernandes vs. State of Maharashtra*** reported in **(1967) SCC OnLine SC 37,** the Hon'ble Supreme Court had held as follows:

> "15. ….To determine whether the accused's testimony as an approver is likely to advance the interest of justice, the Special Judge must have material before him to show what the nature of



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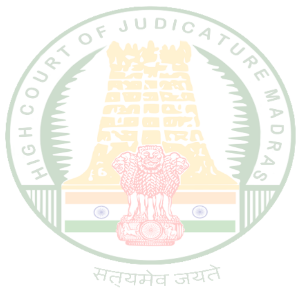
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that testimony will be. Ordinarily it is for the prosecution to ask that a particular accused, out of several may be tendered pardon. But even where the accused directly applies to the Special Judge, he must first refer the request to the prosecuting agency. It is not for the Special Judge to enter the ring as a veritable director of prosecution. The power which the Special Judge exercises is not on his own behalf but on behalf of the prosecuting agency and must, therefore, be exercised only when the prosecuting joins tendered pardon because it does not need approver's testimony. It may also not like the tender of pardon to the the crime or the worst offender. The proper course for the Special Judge is to ask for a statement from the prosecution on the request of the prisoner. If the prosecution thinks that the tender of pardon will be in the interests of a successful prosecution of the other offenders whose conviction is not easy without the approver's testimony, it will indubitably agree to the tendering of pardon. The Special Judge (or the Magistrate) must not take on himself the task of determining the propriety of tendering pardon in the circumstances of the case. The learned Special Judge did not bear these considerations in mind and took on himself something from which he should have kept aloof. All that he should have done was to have asked for the opinion of the public prosecutor on the proposal. "

(b) Similarly in ***Jasbir Singh v. Vipin Kumar Jaggi and others***, reported in **(2001) 8 SCC 289**, after referring to the judgment of the Hon'ble



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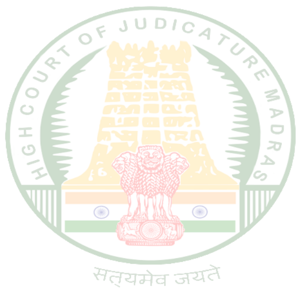

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Supreme Court in ***Lt. Commander Pascal Fernandes's case*** referred supra held as follows:

> "18. Although the power to actually grant the pardon is vested in the Court, obviously the Court can have no interest whatsoever in the outcome nor can it decide for the prosecution whether particular evidence is required or not to ensure the conviction of the accused. That is the prosecution's job. This was the view expressed in Lt. Commander Pascal Fernandes v. State of Maharashtra [(1967) SCC OnLine SC 37] where it was said :
>
> > ".......Ordinarily it is for the prosecution to ask that a particular accused, out of several, may be tendered pardon. But even where the accused directly applies to the Special Judges he must first refer the request to the prosecuting agency. It is not for the Special Judge to enter the ring as a veritable director of prosecution. The power which the Special Judge exercises is not on his own behalf but on behalf of the prosecuting agency, and must, therefore, be exercised only when the prosecution joins in the request. The State may not desire that any accused be tendered pardon because it does not need approver's testimony. It may also not like the tender of pardon to the particular accused because he may be the brain behind the crime or the worst offender. The proper course for the Special Judge is to ask for a statement from the prosecution on the request of the prisoner. If the prosecution thinks that the tender of pardon will be



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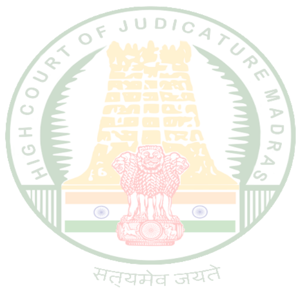
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> in the interests of a successful prosecution of the other offenders whose conviction is not easy without the approver's testimony, it will indubitably agree to the tendering of pardon. The Special Judge (or the Magistrate) must not take on himself the task of determining the propriety of tendering pardon in the circumstances of the case." (emphasis supplied)
>
> 19. Judged by this standard, the first order of the Sessions Judge refusing pardon to the respondent No. I even though it was actively convassed for by the Special Public Prosecutor, was wrong. It was not for the Sessions Judge to have considered the possible weight of the approvers evidence, even before it was given. In any case, the evidence of an approver does not differ from the evidence of any other witness except that his evidence is looked upon with great suspicion. But the suspicion may be removed and if the evidence of an approver is found to be trustworthy and acceptable then that evidence might well be decisive in securing a conviction4. The Sessions Judge could not and indeed should not have assessed the probable value of the possible evidence of the respondent No. 1 in anticipation and wholly in the abstract."

(c) So also in ***Senthamarai v S.Krishnaraj and another,*** reported in **(2002) 1 CTC 143**, a learned Single Judge of this Court has held as follows:



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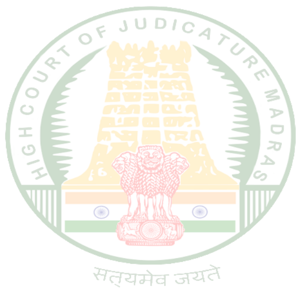
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> "12. It is settled law as laid in Faqir Singh v. Emperor, AIR 1938 PC 266, M.M. Kochar v. Stale, 1969 Crl. L.J.45 that the co-accused cannot question the act of granting pardon by the Court to one of the accused, as that is an internal matter of administration, which cannot affect the position of the accused or the approver. "

(ix) From the above decisions, it would be clear that it is for the prosecution to decide whether a particular evidence is required though the power of grant of pardon is vested in the Court. Where the prosecution thinks that the tendering of pardon may be in the interest of a successful prosecution, the Court has to indubitably agree to the tender of pardon and the Special Judge cannot take on himself the task of determining the propriety of tendering pardon.

(x) Therefore, considering the scope of pardon proceedings and the nature of enquiry that is contemplated, which has been clarified in the aforesaid decisions, ***we are of the view that the grant of pardon would not be vitiated only because of the apprehension of real likelihood of bias. But***



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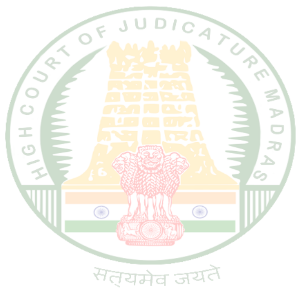
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***bias would certainly be a factor to be considered while appreciating the evidence of the approver.***

(xi) Further, the time chosen by the approver and his belated examination would definitely have a bearing on the appreciation of the evidence of PW12. In ***Narayan Chetanram Chaudhary and Another v. State of Maharashtra*** reported in **(2000) 8 SCC 457**, the Hon'ble Supreme Court held that delay in recording the statement of the approver could not be a ground to reject the testimony of the accomplice, however, the delay has to be kept in mind as a measure of caution for appreciating the evidence of the accomplice. The relevant portion reads as follows:

> *"29. Such is not the position in the instant case. Otherwise the words of the section "at any time after commitment of the case but before judgment is passed" are clearly indicative of the legal position which the Legislature intended. No time limit is provided for recording such a statement and delay by itself is no ground to reject the testimony of the accomplice. Delay may be one of the circumstances to be kept in mind as a measure of caution for appreciating the evidence of the accomplice..."*



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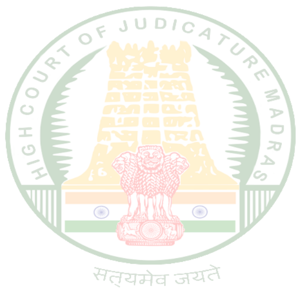
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(xii) Similarly, in view of the apprehension of bias which is real and well founded, we have to be even more cautious while appreciating the evidence of PW12 than that is usually required for the appreciation of approver's evidence. The reliability of his evidence would depend upon the nature of the corroborative evidence adduced by the prosecution.

C. The next attack on the pardon proceedings by the defence is that, **the Additional District and Sessions Judge has no power to grant a pardon,** since he/she is not the Judge to whom the commitment was made.

(i) Section 307 of the Cr.P.C., reads as follows:

> "307. Power to direct tender of pardon: At any time after commitment of a case but before judgment is passed, the Court to which the commitment is made may, with a view to obtaining at the trial the evidence of any person supposed to have been directly or indirectly concerned in, or privy to, any such offence, tender a pardon on the same condition to such person."

(ii) The provision makes it clear that after the case is committed, the Court to which the commitment is made may tender a pardon. Section 193



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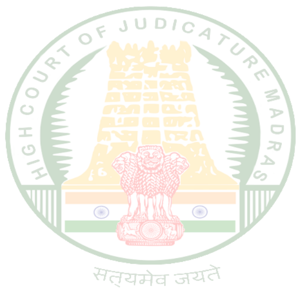
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of Cr.P.C. says that no Court of Session shall take cognizance unless the same has been committed to by a Magistrate. Section 9 of Cr.P.C. reads as follows:

> **9. Court of Session:**
> (1)The State Government shall establish a Court of Session for every sessions division.
> (2)Every Court of Session shall be presided over by a Judge, to be appointed by the High Court.
> (3)The High Court may also appoint Additional Sessions Judges and Assistant Sessions Judges to exercise jurisdiction in a Court of Session.
> (4)The Sessions Judge of one sessions division may be appointed by the High Court to be also an Additional Sessions Judge of another division, and in such case he may sit for the disposal of cases at such place or places in the other division as the High Court may direct.
> (5)Where the office of the Sessions Judge is vacant, the High Court may make arrangements for the disposal of any urgent application which is, or may be, made or pending before such Court of Session by an Additional or Assistant Sessions Judge, or, if there be no Additional or Assistant Sessions Judge, by a Chief Judicial Magistrate, in the sessions division; and every such Judge or Magistrate shall have jurisdiction to deal with any such application. The Court of Sessions shall ordinarily hold its sitting at such place or places as the High Court may, by notification, specify;
> but, if, in any particular case, the Court of Session is of opinion that it will tend to the general convenience of the parties and witnesses to hold its sittings at any other



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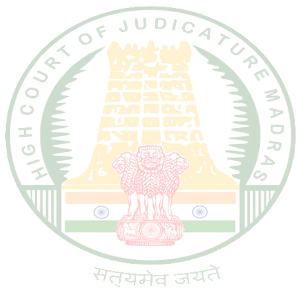
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place in the sessions division, it may, with the consent of the prosecution and the accused, sit at that place for the disposal of the case or the examination of any witness or witnesses therein."

(iii) Section 9(2) of the Cr.P.C., stipulates that the Court of Session has to be presided by a Judge appointed by the High Court.

(iv) Section 9(3) of the Cr.P.C., stipulates that the High Court may also appoint Additional Sessions Judges and Assistant Sessions Judges to exercise jurisdiction in a Court of Session.

(v) Section 194 of the Cr.P.C., provides for trial by an Additional Sessions Judge or an Assistant Sessions Judge of cases that are made over to him by the Sessions Judge.

(vi) The submission of Mr.John Sathyan, learned senior counsel appearing for A9, is that since the commitment is only made to the Court of Session only the Court of Session is empowered to grant pardon under



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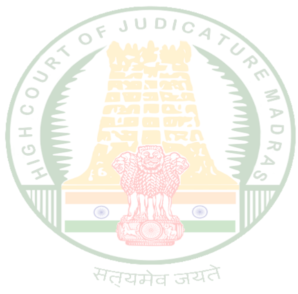
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Section 307 of the Cr.P.C., and that the Additional Sessions Judge has no power to grant pardon.

(vii) This question came up for consideration before the Calcutta High Court for the first time in ***Ijjathulla Akanda v. Emperor***, reported in **1944 ILR 280.** The Calcutta High Court held that the Assistant Sessions Judge, who is not a Court of Session, has the power to grant pardon as per Section 330 of the old Code which is equivalent to Section 307 of the present Code. The relevant observations are as follows:

> ".....An objection was taken during the argument to the learned Assistant Sessions Judge tendering a pardon to Akamuddin Pramanik under Section 338, Criminal P. C, and it was argued by Mr. N.K. Basu that the Assistant Sessions Judge was not the Court to which, the commitment was made and was therefore not the Court entitled to take action under Section 338. Mr. Basu argued that the accused were committed to the Court of Session and that the Sessions Judge alone was the Court of Session to whom the commitment was made. Section 9(3), Criminal P. C, provides:
>
>> The Provincial Government may also appoint Additional Sessions Judges and Assistant Sessions Judges to exercise jurisdiction in one or more such Courts, i.e., Courts of Session.
>
> 7. Section 17(3), Criminal P. C., provides that all Assistant Sessions Judges shall be subordinate to the Sessions Judge "in whose Court they exercise



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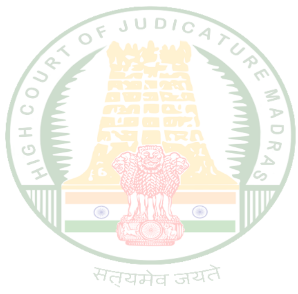
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jurisdiction." It is obvious therefore that the Assistant Sessions Judges exercise their jurisdiction in the Courts of Session; and they are, therefore, when presiding over a trial by Sessions, the Courts of Session, and therefore Courts to which the commitment is made. I am satisfied that the Assistant Sessions Judge when conducting a trial by jury is the Court which has jurisdiction under Section 338, Criminal P. C. either to tender a pardon or to order the committing Magistrate or the District Magistrate to tender a pardon to an accused person."

(viii) Similarly, while dealing with the provisions of the West Bengal Children Act, the Hon'ble Supreme Court in ***Abdul Mannan and Others v. State of West Bengal,*** reported in **(1996) 1 SCC 667**, held that a Sessions Judge would include an Additional Sessions Judge under the Code. The relevant observation reads as follows:

"It is made clear by sub-section [3] of Section 9 which provides that Additional Sessions Judges may be appointed by the High Court to exercise jurisdiction in a Court of Session. Singular includes plural. Sessions Judge would include Additional Sessions Judge under the Code. Therefore, he gets all the power and the jurisdiction of the Sessions Judge to try the offences enumerated under the Code. The Additional Sessions Judge, therefore, is competent to proceed with the trial of the juvenile offenders."



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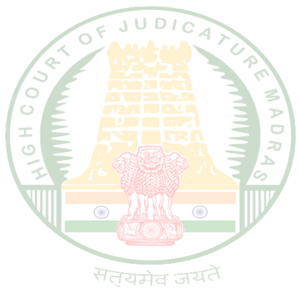
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(ix) The object of Section 307 of the Cr.P.C., is to confer power to tender pardon on the Court to which the commitment is made with a view to obtaining, the evidence of any person supposed to have been directly or indirectly concerned in, or privy to, any such offence, during trial. It deals with the power of the Court to which the case is committed as opposed to the power of the committal Magistrate to grant pardon under Section 306 of the Cr.P.C. This distinction in these two provisions is mainly with regard to the stage at which, pardon is sought for. That would not mean that a Court of Sessions, to whom the commitment is made alone has the power to grant pardon. The Additional Sessions Court and the Assistant Sessions Court, are empowered to exercise all the powers of the Court of Session with respect to cases made over to them.

(x) To restrict the power under Section 307 Cr.P.C., only to the Court of Session and not to the Additional Sessions Judge and the Assistant Sessions Judge to whom the case is made over, would be in violation of the



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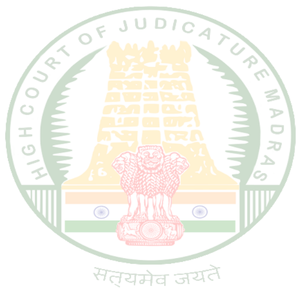
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plain language of two provisions viz., Sections 306 and 307 of the Cr.P.C., and the other provisions such as Sections 9 and 194 of the Cr.P.C.

(xi) Therefore, for the reasons stated above, we are in agreement with the Division Bench of the Calcutta High Court, referred above. That apart, as stated earlier, the Hon'ble Supreme Court had observed in ***Abdul Mannan's case*** [cited supra] that the Sessions Judge, includes the Additional Sessions Judge as well.

(xii) Further, it is well settled that while granting pardon under Section 307 of the Cr.P.C., the Sessions Judge has to grant pardon only on the same condition set out in Section 306 (i) and not the other conditions set out in sub-clauses (ii) to (v) of Section 306 of the Cr.P.C. This position has been reiterated by the Hon'ble Supreme Court in many cases. In **(2009) (6) SCC 498 *[Santosh Kumar Satishbhushan Bariyar v. State Of Maharashtra]***, the Hon'ble Supreme Court has held as follows:

> "34. Sub-section (4) of Section 306 is procedural in nature. It is necessary to be followed only by a Magistrate as he would not have any



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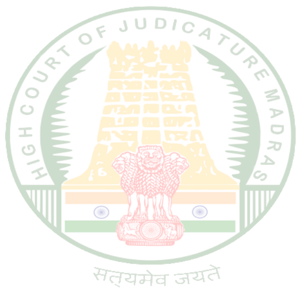
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jurisdiction to try the case himself. The learned Sessions Judge before whom the case is committed for trial must be informed as to on what basis pardon had been tendered. Section 307 does not contain any such condition. The power of the learned Sessions Judge is independent of the provisions contained in Section 306 thereof. The condition mentioned in Section 307 refers to the condition laid down in sub-section (1) of Section 306, namely that the person in whose favour the pardon has been tendered, will make a full and true disclosure of the whole of the circumstances within his knowledge. The power of a Sessions Court is not hedged with any other condition."

D. (i) As regards the other submission that the **pardon proceedings have not been marked as an exhibit,** we are of the view that pardon proceedings ought to have been exhibited, but, not doing so would not vitiate the pardon proceedings. The accused were supplied with the copies as could be seen from the record and therefore, that by itself would not be a ground to eschew the approver's evidence.

(ii) The other point raised by the defence is that the Sessions Judge ought not to have recorded the statement under Section 164 of the Cr.P.C., and in any case, it ought not to have been done so in her chamber. Section



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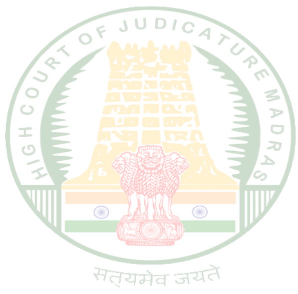


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307 of the Cr.P.C., as stated earlier does not provide for the recording of statements under Section 164 of the Cr.P.C. Therefore, in our view, the recording of Section 164 Cr.P.C., by the Sessions Court would not be of any significance, in so far as the appreciation of the approver's evidence is concerned. However, we are constrained to observe that there was no necessity for the Sessions Judge to record Section 164 Cr.P.C. statements in her chamber, as there cannot be any secrecy in any proceedings.

19. We would now like to appreciate **the approver's evidence with regard to the settled position of law and the special circumstances relating to bias** in this case relating to the grant of pardon that we have narrated above. The law relating to appreciation of evidence has been reiterated in several decisions and we do not wish to refer to all the decisions cited on either side for the sake of brevity, except for the following decisions.



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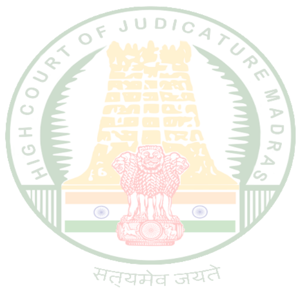

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(i) In ***Major EG Barsay v. State of Bombay*** reported in **1961 SCC Online SC 30 = AIR 1961 SC 1762**, the Hon'ble Supreme Court held that the evidence of the approver and the corroborative pieces of evidence need not be considered in two different compartments. The reliability of an approver's evidence, though not exclusively would depend upon the corroboration by unimpeachable evidence. The relevant observations are extracted below.

> "*38. ...But in most of the cases the said two aspects would be so interconnected that it would not be possible to give a separate treatment, for as often as not the reliability of an approver's evidence, though not exclusively, would mostly depend upon the corroborative support it derives from other unimpeachable pieces of evidence. We must also make it clear that we are not equating the evidence of Lawrence with that of an approver; nor did the Special Judge or the High Court put him exactly on that footing....*"

This was reiterated in ***State of Andra Pradesh v. Cheemalapati Ganeshwaran Rao and Another*** reported **in AIR 1963 SC 1850.**



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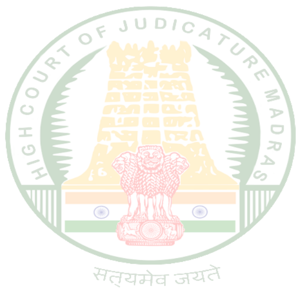
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(ii) In ***Kanbi Karsan Jadav v. State of Gujarat*** reported in **1962 Supp (2) SCR 726,** the Hon'ble Supreme Court held that the corroboration need not be only direct evidence and that the nature of corroboration would depend on the facts and circumstances of each case. It has also been held that in ***State of Tamil Nadu vs. Suresh and Another*** reported in **(1998) 2 SCC 372** and ***Sitaram Sao @ Mungeri v. State of Jharkhand*** reported in **(2007) 12 SCC 630** if the approver's evidence is credible and cogent, the Court can record a conviction even on the uncorroborated testimony of an accomplice.

(iii) In ***K. Hasim v. State of Tamil Nadu*** reported in **(2005) 1 SCC 237** it has been held that, if corroboration is required for every detail of the crime spoken to by the accomplice, his evidence would not be essential to the case, and therefore it is not necessary that every detail spoken to by the approver has to be corroborated.



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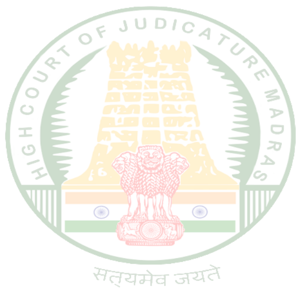
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(iv) In ***A.Devendran v. State of Tamil Nadu*** reported in **(1997) 11 SCC 720,** the Hon'ble Supreme Court after analysing the various decisions on this aspect had held as follows:

> ".....There cannot be any dispute with the proposition that ordinarily an approver's statement has to be corroborated in material particulars. Certain clinching features of involvement disclosed directly to an accused by an approver must be tested qua each accused from independent credible evidence and on being satisfied the evidence of an approver can be accepted. What is the extent of corroboration that is required before the acceptance of the evidence of the approver would depend upon the facts and circumstances of the case. The corroboration required, however, must be in material particular connecting each of the accused with the offence. In other words the evidence of the approver implicating several accused persons in commission of the offence could not only be corroborated generally but also qua each accused. But that does not mean that there should be independent corroboration of every particular circumstance from an independent source. All that is required is that there must be some additional evidence rendering it probable that the story of the compliance is true. Corroboration also could be both by direct or circumstantial evidence."



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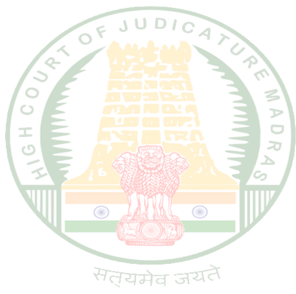
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The above observations of the Hon'ble Supreme Court have been made by not only taking into consideration the earlier judgments of the Hon'ble Supreme Court, but also the provisions of the Indian Evidence Act viz., Section 133 and illustration (b) to Section 114 of the Indian Evidence Act, which reads as follows:

> "(b) that an accomplice is unworthy of credit, unless he is corroborated in material particulars;
> as to *illustration* (b) -- A, a person of the highest character is tried for causing a man's death by an act of negligence in arranging certain machinery. B, a person of equally good character, who also took part in the arrangement, describes precisely what was done, and admits and explains the common carelessness of A and himself;"

(v) We may also note yet another provision in Indian Evidence Act, which relates to the admissibility of questions tending to corroborate the evidence of relevant fact. Section 156 of Indian Evidence Act, reads as follows:

> **156. Questions tending to corroborate evidence of relevant fact admissible:**- When a witness whom it is intended to corroborate gives evidence of any relevant fact,



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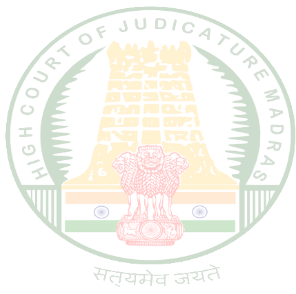
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> he may be questioned as to any other circumstances which he observed at or near to the time or place at which such relevant fact occurred, if the Court is of opinion that such circumstances, if proved, would corroborate the testimony of the witness as to the relevant fact which he testifies.
>
> **Illustration**
>
> A, an accomplice, gives an account of a robbery in which he took part. He describes various incidents unconnected with the robbery which occurred on his way to and from the place where it was committed.
>
> Independent evidence of these facts may be given in order to corroborate his evidence as to the robbery itself.

The illustration to the provision suggests that in a case of robbery, if an accomplice describes various incidents, unconnected with robbery which occurred on his way to and from the place where it was committed, independent evidence of those facts may be given to corroborate his evidence as to the robbery itself.

(vi) Therefore, the nature of corroboration that could be required for an approver's evidence would depend on the facts and circumstances of each case. The corroboration must be of such a nature as to render the story of



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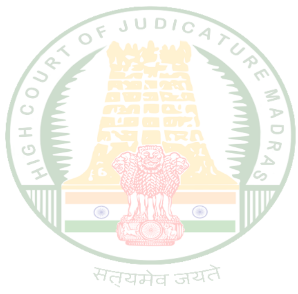
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the accomplice believable. The corroboration has to be with regard to the version of the approver, not only relating to the offence, but also to the role played by each of the accused. It is no doubt true that there need not be corroboration on all aspects spoken to by the approver. If such evidence is available, the recording of the evidence of the approver would be nugatory. However, the corroboration must be of such a nature, which would not only make the version of the approver relating to the crime, but also the role played by each of the accused in the crime, reliable. For instance, in a case of conspiracy, there must be evidence to corroborate the existence of conspiracy. The approver may speak of the involvement of accused in the conspiracy. The nature of the corroboration has to be such that it would make the Court believe that the version of the approver *qua* each of the accused is also true.

(vii) Before, we analyse the corroborative evidence available on record, we shall analyse the approver's evidence independently.



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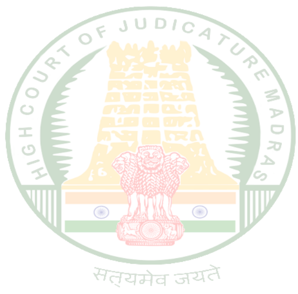
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(a) The approver has made several admissions in the cross examination, suggesting that his version as regards certain material aspects is an improvement, which is not found in his confession to the police.

(b) The learned Special Public Prosecutor sought to make an innovative submission that the confession to the police which is inadmissible, cannot be used even for the purpose of contradiction, as that statement cannot be treated as a true statement. The learned Special Public Prosecutor in his written submissions, gave an illustration which reads as follows:

> "For an illustration, an accused makes a statement to a police that on the date of occurrence, he along with the other accused were in U.S. But in his evidence as approver, he had claimed that he along with the other accused very much present in SOC in India. The travel records confirms that his statement that he was in India is true. In such state of affairs, the positive evidence of the approver on oath that, he was in India during occurrence along with others cannot be permitted to be dislodged in the light of his former false statement."



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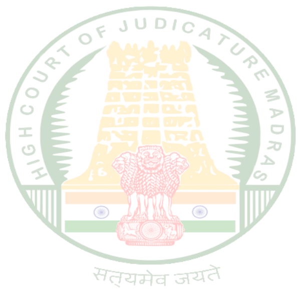

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(c) The question as to whether the confession to police has to be treated as a statement recorded under Section 162 of the Cr.P.C., is no longer *res integra.* In ***Aghnoo Nagesia v. State of Bihar,*** reported in **AIR 1966 SC 119,** the Hon'ble Supreme Court has held as follows:

> "9. Section 25 of the Evidence Act is one of the provisions of law dealing with confessions made by an accused. The law relating to confessions is to be found generally in ss. 24 to 30 of the Evidence Act and ss. 162 and 164 of the Code of Criminal Procedure, 1898. Sections 17 to 31 of the Evidence Act are to he found under the heading "Admissions". Confession is a species of admission, and is dealt with in ss. 24 to 30. A confession or an admission is evidence against the maker of it, unless its admissibility is excluded by some provision of law. Section 24 excludes confessions caused by certain inducements, threats and promises. Section 25 provides : "No confession made to a police officer, shall be proved as against a person accused of an offence." The terms of s. 25 are imperative. A confession made to a police officer under any circumstances is not admissible in evidence against the accused. It covers a confession made when he was free and not in police custody, as also a confession made before any investigation has begun. The expression "accused of any offence" covers a person accused of an offence at the trial whether or not he was accused of the offence when he made the confession. Section 26 prohibits proof against any person of a confession made by him in the custody of a police officer, unless it is made in the immediate presence of a Magistrate. The partial ban imposed by S. 26 relates to a confession made to a person other than a police officer. Section 26



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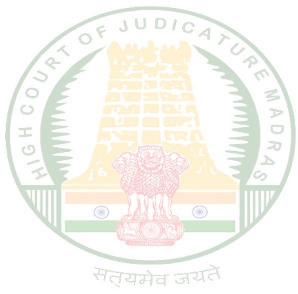
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does not qualify the absolute ban imposed by s. 25 on a confession made to a police officer. Section 27 is in the form of a proviso, and partially lifts the ban imposed by ss. 24, 25 and 26. It provides that when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved. Section 162 of the Code of Criminal Procedure forbids the use of any statement made by any person to a police officer in the course of an investigation for any purpose at any enquiry or trial in respect of the offence Order investigation, save as mentioned in the proviso and in cases falling under sub-s (2), and it specifically provides that nothing in it shall be deemed to affect the provisions of S. 27 of the Evidence Act. **The words of s. 162 are wide enough to include a confession made to a police officer in the course of an investigation**. A statement or confession made in the course of an investigation may be recorded by a Magistrate under s. 164 of the Code of Criminal Procedure subject to the safeguards imposed by the section. Thus, except as provided by s. 27 of the Evidence Act, a confession by an accused to a police office- is absolutely protected under s. 25 of the Evidence Act, and if it is made in the course of an investigation, it is also protected by s. 162 of the Code of Criminal Procedure, and a confession to any other person made by him while in the custody of a police officer is protected by S. 26, unless it is made in the immediate presence of a Magistrate. These provisions seem to proceed upon the view that confessions made by an accused to a police officer or made by him while he is in the custody of a police officer are not to be trusted, and should not be used in evidence against him. They are based upon grounds of public policy, and the fullest effect should be given to them. (Emphasis supplied)



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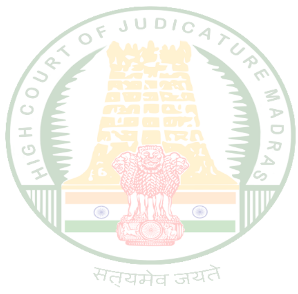
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**Therefore, the submission of the learned Special Public Prosecutor that the confession cannot be used for contradiction, is rejected. Section 162 Cr.P.C., would take within its fold the confession made to the police officer during the investigation.**

(viii) The learned Special Public Prosecutor relied upon the judgments in ***Mina Adhikary V. State and Another*** reported in **1988 SCC Online Cal 151** and ***Shyamal Ghosh v. State of Bengal*** reported in **(2012) 7 SCC 646** in support of his submission, that even assuming that the confession given to the police by the approver can be treated as a statement under Section 161 Cr.P.C., merely because he had made certain statements contrary to the substantive evidence in Court, it cannot be said that the substantive evidence is false. There cannot be any doubt about such a proposition. However, the question is whether the omissions and contradictions discredit a witness and make the substantive evidence unreliable. This, again, would depend on facts and circumstance of each case. In a given case, the omissions and contradictions would be of such a nature which would not discredit the



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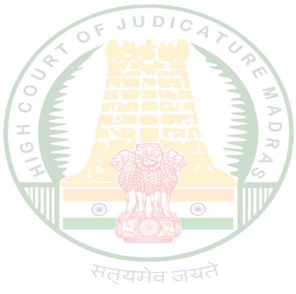
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witness. Therefore, the nature of omissions and contradictions and whether they discredit the witness are factual aspects and there cannot be any precedent in such matters.

20. (a) As stated earlier in the **approver's evidence, there are omissions and contradictions,** on the following aspects.

(i) In the chief examination, the PW12 had stated that he was privy to the conspiracy and had stated about the various conversations said to have taken place on the disputed land in Anjugramam village. However, in the cross examination, when confronted with the portion of the confession in which he had stated that Murugan told him about the conversation, he said that he did not remember. The relevant portion of that evidence is as follows:

> "அதன் பின்னர் ஒருநாள் முருகன் என்னிடம் வந்து பாசிலும், வில்லியம்சும் டாக்டர் ஜேம்சிடம் சென்னையில் உள்ள டாக்டர் ஒருவர் பாசில் குடும்பத்தாரிடம் அஞ்சுகிராமத்தில் உள்ள சுமார் ரூ40 கோடி மதிப்புள்ள சொத்து சம்பந்தமாக பிரச்சினை செய்துவருவதாகவும் அவரை போட்டுத் தள்ளவேண்டும் அதற்கு நல்ல ஆட்களை ஏற்பாடு செய்யவேண்டும் என கூறியதற்கு டாக்டர் ஜேம்ஸ்



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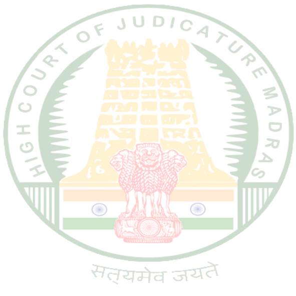

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ஒன்றும் கவலைப்படவேண்டாம் என்னிடம் நம்பிக்கையான நபர்கள் உள்ளனர் என தன்னைக் காட்டி அவர்களிடம் கூறியதாக முருகன் என்னிடம் கூறினார் என்று சொல்லியுள்ளேனா என்றால் ஞாபகம் இல்லை.

(ii) Similarly, when questioned as regards the meeting of A3, A5 and A7 with A8 and their discussing about getting the property worth Rs.40 Crores, if Dr.Subbiah is done to death; their showing the photograph to A8 and about A7 promising them that he would execute the job with the aid of A8, A9 and PW12; the approver-PW12 had stated in the confession that he came to know of the meetings only through PW8; PW12 had stated that out of fear he told so. The relevant portion reads as follows:

அதேபோல் அந்த ஒப்புதல் வாக்குமூலத்தில் அதன் பின்னர் இது சம்பந்தமாக டாக்டர் ஜேம்ஸ், வில்லியம்ஸ் மற்றும் பாசில் ஆகியோர் அடிக்கடி சந்தித்து பேசும்போது முருகன் உடனிருந்ததாகவும் பாசில் தனது செல்போனில் இருந்த ஒரு போட்டோவை காட்டி இவர்தான் சென்னையில் உள்ள நான் கூறிய டாக்டர் சுப்பையா என்றும் இவரால்தான் எங்கள் குடும்பத்திற்கு பல பிரச்சினைகள் ஏற்படுவதாகவும், இவரை கொலை செய்தால்தான் ரூ.40 கோடி மதிப்புள்ள சொத்து முழுவதும் எங்களுக்கு கிடைக்கும் அப்போதுதான் நாங்கள் நிம்மதியாக இருக்க முடியும் என அந்த



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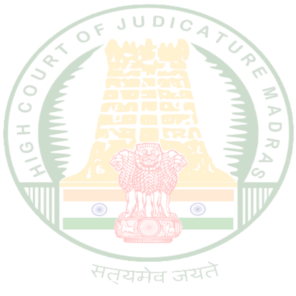
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போட்டோவை காட்டி அவரை போட்டு தள்ளவேண்டும் அதற்கு நல்ல ஆட்களை ஏற்பாடு செய்யவேண்டும் என கூறியதற்கு டாக்டர் ஜேம்ஸ் ஒன்றும் கவலைப்படவேண்டாம் என்னிடம் நம்பிக்கையான நபர்கள் உள்ளனர் என முருகனை காட்டி அவர்களிடம் கூறியதாக முருகன் என்னிடம் கூறினார். பின்னர் முருகன் வந்து அந்த தகவலை சொல்ல அதற்கு நானும் சரி பார்த்துக்கொள்ளலாம் என முருகனிடம் சொன்னேன். அதன் பின்னர் இது சம்பந்தமாக டாக்டர் ஜேம்ஸ், வில்லியம்ஸ் மற்றும் பேசில் ஆகியோர் அடிக்கடி சந்தித்து பேசியதாக முருகன் என்னிடம் கூறியிருந்தார் என்று சொல்லியுள்ளேனா என்றால் பயத்தில் அவ்வாறு சொல்லியிருக்கலாம். அதேபோல் அந்த ஒப்புதல் வாக்குமூலத்தில் டாக்டர் சுப்பபைய்யாவை களை எடுத்துவிட்டால் அவரது இரண்டு மகள்களோ, அவரது மனைவியோ இந்த பிரச்சினையில் பெரிய அளவுக்கு செயல்படமாட்டார்கள் என முடிவெடுத்து டாக்டர் சுப்பைய்யாவை கொலை செய்ய வில்லியம்சும், பேசிலும் டாக்டர் ஜேம்சும் திட்டம் தீட்டி பேசிக்கொண்டிருந்ததாகவும் அப்போது முருகன் அவர்களுடன் இருந்ததாகவும், பேசிலும் வில்லியம்சும் இந்த காரியத்தை யாரை வைத்து செய்யலாம் என்று டாக்டர் ஜேம்சிடம் கேட்க அவர் என்னிடம் இருக்கும் நம்பிக்கைக்கு பாத்திரமான முருகன், செல்வபிரகாஷ் மற்றும் ஐயப்பன் ஆகியோர்களை வைத்து முடித்துவிடலாம் என சொன்னதாகவும், பேசில் இம்மாதிரியான வேலையை இவர்கள் செய்வார்களா என தெரியவில்லை கூலிப்படையினரை வைத்து டாக்டர் சுப்பையாவின் கதையை முடிக்கலாம் என்று சொல்ல அதற்கு வில்லியம்ஸ் கூலிப்படையினரை வைத்து கொலை செய்தால் எந்த



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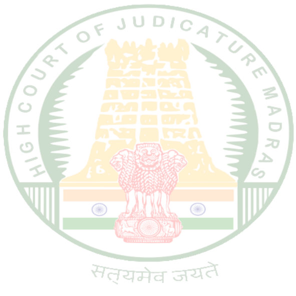
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சமயத்திலும் நம்மை காட்டிக் கொடுத்துவிடுவார்கள். இதை காரணமாக வைத்து நம்மையே மிரட்டுவார்கள். எனவே என்னிடம் வேலை செய்யும் முருகன், செல்வபிரகாஷ், ஐயப்பன் ஆகியோர்களை வைத்து டாக்டர் சுப்பையாவின் கதையை முடித்தால் நாம் சொல்வதுபோன்று அவர்கள் நடந்துகொள்வார்கள் என்று டாக்டர் ஜேம்ஸ் சொல்ல அவர்களுக்கு தேவையானவைகளை நாம் செய்துகொடுத்துவிடலாம் என்று வில்லியம்ஸ் சொன்னதாகவும் பேசிலும் அதற்கு சம்மதம் செரிவித்ததாகவும் அப்போது டாக்டர் முருகனிடம் பேசிலின் சொத்தைப் பற்றிய விவரத்தையும் டாக்டர் சுப்பையாவை கொன்றுவிட்டால் பேசிலும், வில்லியம்சும் சொத்தில் பாதியை எடுத்துக்கொண்டு மீதி பாதியை டாக்டர் ஜேம்சிற்கு கொடுப்பதாக சொல்லியிருப்பதாகவும் அதில் எனக்கும் முருகன் செல்வபிரகாசுக்கும் ஆளுக்கு ரூ.50 இலட்சம் தருவதாகவும் முருகனை தனியாக கவனித்துக்கொள்வதாகவும் டாக்டர் ஜேம்ஸ் சொல்ல அதற்கு சம்மதித்து என்னிடம் செல்வபிரகாஷ் இருவரிடமும் பேசி சம்மதம் பெற்று சொல்வதாக சொன்னதாகவும் பின்னர் என்னை சந்தித்து விவரத்தை கூறியபோது நானும் ஒப்புக்கொண்டேன் என்ற சொல்லியுள்ளேனா என்றால் போலீசார் அடிப்பார்கள் என்று பயந்து நான் அவ்வாறு முருகன் சொன்னதாக சொல்லியுள்ளேன்.”

(iii) In the chief examination, PW12 had stated that in the 1st week of July 2013, he along with the other assailants went to the house of A5; that



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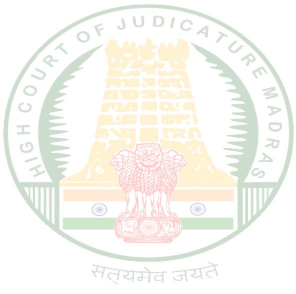
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they entered into a conspiracy with A7; that A7 had asked A3 to bring his parents and get their confirmation; that A1 and A2 thereafter came and agreed to join the said conspiracy and also offered to pay half the value of the property i.e. Rs.16 Crores to A5 and others; that at that time, a client of A5 was also in the house; that A5 wrote the car number of Dr.Subbiah in a paper and showed the photograph of Dr. Subbiah in his mobile phone to others; that he removed the memory card and asked them to take a printout; and that he also gave the visiting card of Dr.Subbiah, containing the address and other details. When confronted with the statement made by him in the confession that conspiracy meeting was in August 2013 and he came to know of the details of the conversation from Murugan, he would say that he came to know from A1 to A5. The relevant portion reads as follows:

> "அதேபோல் அந்த வாக்குமூலத்தில் 2013ம் ஆண்டு ஆகஸ்ட் மாதம் முதல் வாரத்தில் வில்லியம்ஸ் வீட்டின் மொட்டை மாடியில் வைத்து வில்லியம்ஸ், பேசில் இருவரும் முரகனிடமும் டாக்டரிடமும் எப்போது சுப்பைய்யாவை களை எடுக்கபோகிறீர்கள் என்று கேட்டு நீங்கள் களை எடுத்தால் அதற்கு கைமாறாக சொத்தில் பாதி பங்கை கொடுத்துவிடுவோம் என்று சொன்னதாகவும்,



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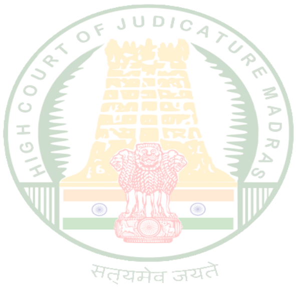

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அப்போது டாக்டர் ஜேம்ஸ் நீங்கள் சொன்னால் போதாது பேசிலின் அப்பா அம்மா சொல்லட்டும் என்று சொல்ல எனது தம்பி பேசிலிடம் ஏற்கனவே பேசிவிட்டேன் அவனும் இதற்கு ஒத்துக்கொண்டான் என்று பேசில் சொன்தாகவும் சிறிது நேரத்தில் பேசிலின் அப்பா பொன்னுசாமியும் அம்மா மேரிபுஷ்பம் அவர்களும் வந்து எங்களுக்கு வேண்டியது சுப்பையாவை களை எடுக்கவேண்டியதுதான். கிடைக்கும் சொத்தில் பாதியை உங்களுக்கு கொடுக்க தயாராக இருக்கிறோம். எவ்வளவு சீக்கிரம் முடியுமோ அவ்வளவு சீக்கிரம் முடித்துக்கொடுங்கள் என்று சொன்னதாகவும், டாக்டர் ஜேம்சும், முருகனும் ஒத்துக்கொண்டதாகவும், இந்த மாதமே இதற்கு ஒரு முடிவு செய்கிறோம் என்று டாக்டர் ஜேம்ஸ் சொல்லியுள்ளதார். அப்போது பேசிலும் அவரது செல்போனில் இருந்த டாக்டர் சுப்பைய்யாவின் போட்டோவை காட்டி அந்த போட்டோவை முருகனும் டாக்டர் ஜேம்சும் பார்த்ததாகவும் பிறகு பேசில் செல்போனில் இருந்த மெமரி கார்டை கழட்டி கொடுத்து ஒரு படம் எடுத்துக்கொண்டு திருப்பிக் கொடுத்துவிடுமாறு முருகனிடம் கொடுத்ததாகவும் வில்லியம்ஸ் டாக்டர் சுப்பையா பயன்படுத்திவரும் கார் நெம்பரை TN07 BE 2493 Ford Fiesta என்று ஒரு பேப்பரில் எழுதி முருகனிடம் கொடுத்ததாகவும் டாக்டர் சுப்பைய்யா சென்னை ராஜீவ் காந்தி அரசு மருத்துவமனையில் நியூரோ டாக்டராக வேலை



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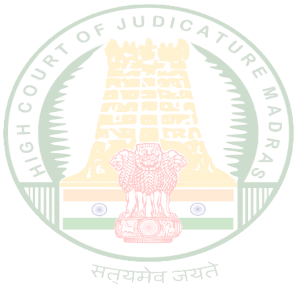
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செய்துகொண்டு அபிராமபுரத்தில் உள்ள பில்ரோத் மருத்துவமனையில் வேலை செய்வதாக பேசிலும், வில்லியம்சும் சொன்னதாகவும், பின்னர் முரகனும், டாக்டர் ஜேம்சும் மெமரி கார்டை வாங்கிவிட்டு வந்துவிட்டதாகவும், மெமரி கார்ட்டை முருகன் எடுத்துக்கொண்டுபோய் அஞ்சுகிராமத்தில் உள்ள ராணி ஸ்டுடியோவில் கொடுத்த டாக்டர் சுப்பையாவின் உருவம் நன்றாக தெரியும்படி போட்டோ எடுத்துவந்து டாக்டர் ஜேம்சினிடம் காட்டியதாகவும் ராணி ஸ்டுடியோவில் போட்டோ எடுத்ததற்காக பில் வாங்கவில்லை என்றும் கம்ப்யூட்டரில் இருந்து அழித்துவிடுமாறு ஸ ்டுடியோவில் சொல்லியதாகவும் என்னிடம் தெரிவித்தான் என்று சொல்லியுள்ளேனா என்றால் அவ்வாறு அவர்கள் என்னிடம் சொன்னதாக எனக்கு தெரிவித்ததாக சொல்வது சரியல்ல. முருகன் என்னிடம் சொல்லவில்லை, வில்லியம்ஸ், பேசில், போரிஸ், பொன்னுசாமி, மேரிபுஷ்பம் ஆகியோர் என்னிடம் சொன்னார்கள்.”

(iv) PW56, who recorded the confession given to him by PW12, has confirmed that PW12, stated in his confession that he came to know of all the alleged discussions between A3 and A7 through A8. Similarly, as regards the conspiracy, he had stated that it had happened during the first



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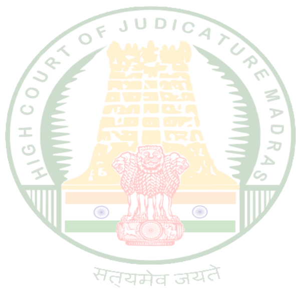
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week of August 2013 and he came to know of it only through Murugan (A8). Therefore, the improvement made by PW12 in his deposition is not only confirmed in the cross examination of PW12, but also by PW56.

(v) As regards the presence of a client (PW53) in the house of A5, PW12 would admit that he had not stated about the presence of the client in the confession and further states that he would have forgotten to say so due to fear.

(vi) As regards the conspiracy meeting said to have taken place in the last week of July 2013 on the disputed land, the PW12 had stated in the chief examination about the presence of A5, A4, A3, A1, A2 and A6 along with two other land brokers. However, in the cross examination, he admits that he had not stated in the police confession about the presence of A6-Yesurajan and two other land brokers as he was nervous.



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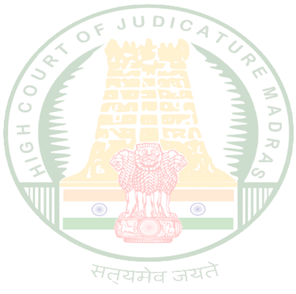
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(vii) PW56 had admitted that PW12 had not referred to A6 earlier in the confession statements. The relevant portion reads as follows:

> "அப்ரூவர் ஐயப்பன் என்னிடம் கொடுத்ததாக சொல்லும் ஒப்புதல் வாக்குமூலத்திலும் மறு ஒப்புதல் வாக்குமூலத்திலும், "வில்லியம், பேசில், வில்லியமின் அடியாள் ஏசுராஜன் ஆகியோருடன் அன்றைக்கு எங்கள் மூவருக்கும் பழக்கம் ஏற்பட்டது" என்று குறிப்பிட்டு சொல்லியுள்ளாரா என்றால், குறிப்பிட்டு சொல்லவில்லை."

(viii) PW56 further would state that PW12 did not state about the presence of A6 in the conspiracy meeting said to have taken place in the last week of July 2013.

(xi) Similarly, as regards the payment of money by DW2 to Yesurajan-A6 and Yesurajan handing over Rs.1.5 Lakhs to each of the assailants and keeping Rs.2 Lakhs for himself which is stated in his depositions, PW12 in the cross examination would state that he did not tell about those facts in the confession due to fear. PW56 also confirms this fact in his evidence and the relevant portion reads as follows:



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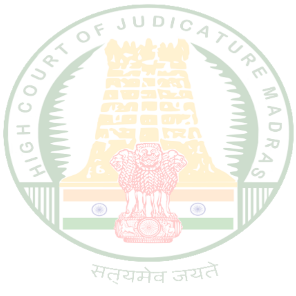
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"""2013 செப்டம்பர் மாதத்தில் ஒருநாள் ஏசுராஜன் என்னையும், முருகன் மற்றும் செல்வபிரகாசையும் திருப்பூருக்கு அழைத்துச் சென்றால் என்றும், அங்கு வீரமணி என்பவரிடம் ரூ.6½ இலட்சம் பணம் வாங்கினார் என்றும் அதில் எங்கள் மூவருக்கும் ரூ.1½ இலட்சம் தந்து மீதி ரூ.2 இலட்சத்தை ஏசராஜனே வைத்துக்கொண்டார்" என்று அப்ரூவர் ஐயப்பன் என்னிடம் கொடுத்ததாக சொல்லும் ஒப்புதல் வாக்குமூலம் மற்றும் மறு ஒப்புதல் வாக்குமூலத்தில் குறிப்பிட்டு சொல்லியுள்ளாரா என்றால், இல்லை."

(x) In the chief examination, PW12 had stated that on 14.08.2013, when they first came to Chennai along with A7 and attempted to murder the deceased, they met a person by name, Shivaji-PW8, who was known to A7. However, in the cross examination he would admit that he had not stated in the police confession about the meeting of PW8, due to fear.

(xi) In the chief examination, he had stated that before he along with A8 and A9 came to Chennai, A4 told them not to attack the deceased at his house, because, the deceased had a huge pet dog. However, in the cross



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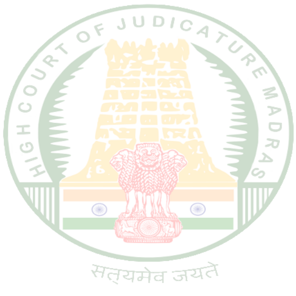
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examination, he would state that he had not stated so in the confession. The relevant portion reads as follows:

> “போரிஸ் தான் டாக்டர் சுப்பையா வீடு மற்றும் அவர் செல்லும் இடங்களை நோட்டமிட்டதாவும் டாக்டர் சுப்பையாவின் வீட்டில் பெரிய நாய் ஒன்று இருப்பதாகவும் எனவே அங்கு வைத்து டாக்டர் சுப்பையாவை கொலை செய்யவேண்டாம் என்று எங்களிடம் சொன்னதாக நான் சொல்வது எந்த மாதம், தேதி மற்றும் இடம் என்றால் வள்ளியூரில் 12.09.2013ம் தேதியன்று போரிஸ் அவ்வாறு எங்களிடம் சொன்னார். சாட்சி தற்போது தேதி 12ஆ என்பது சரியாக ஞாபகமில்லை என்று சொல்கிறார். போலீசார் விசாரணையிலோ அல்லது என் பிரமாண வாக்குமூலத்திலோ, முதல் விசாரணையிலோ அவ்வாறு வள்ளியூரில் வைத்து போரிஸ் சொன்னார் என்று குறிப்பட்டு சொல்லியுள்ளேனா என்றால் சொல்ல மறந்திருக்கலாம். இவ்வழக்கு சம்பவத்திற்கு முன்பு டாக்டர் சுப்பையாவை கொலை செய்ய முயற்சித்ததாக நான் தற்போது சொல்லும் சங்கதியை போரிஸ் என்பவருக்கு எப்போதாவது சொல்லியுள்ளேனா என்றால், நான் சொல்லவில்லை. அவ்வாறு ஏற்கனவே சுப்பையாவை கொலை செய்ய முயற்சித்த விவரம் போரிசுக்கு தெரியுமென்று நான் எங்காவது இதற்கு முன்பு சொல்லியுள்ளேனோ என்றால், சொல்ல மறந்து விட்டேன்.”



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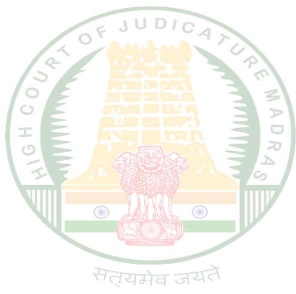
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(xii) In the chief examination, PW12 had stated that on 14.08.2013, when they were unable to execute their plan, A5 and A3 had called them and asked them why they couldn't kill the deceased. In the cross examination, PW2 would admit that he had not stated so in the earlier police confession.

(xiii) Similarly, in the chief examination, PW12 had stated that in July 2013, A7 took A8, A9 and PW12 to Vadasery Sub Registrar's office to sell the land purchased in the name of one Raja and there he met A5, A3 and A6. However, in the cross examination, he would admit that he had not mentioned the name of A6 in the police confession. He would state that he did not say so due to fear.

(xiv) In the chief examination, PW12 had stated that the land belonging to Selvam [PW33] was sold to one Raja (not examined), by



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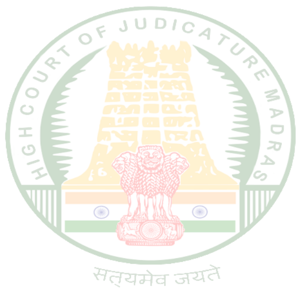
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threatening him and the said land was sold by A3 and A5 to one Damodaran and Krishnan (both not examined) and the sale price was given to A7. This, statement of PW12 also refers to the relationship between the accused/A8, A9 and PW12 with A7 and that of A3, A5 and A7. However, in the cross examination, he admitted that he had not stated the above facts in his police confession.

(xv) In the chief examination, PW12 had stated that A6 would always be with A5. In the cross examination he admits that he had not stated so in the police confession due to fear.

(xvi) In the chief examination, PW12 had stated that on 14.08.2013, A7 came to Chennai and A8 and A9 and PW12 went to Billroth Hospital, along with A7, where A7 gave them the plan as to how the deceased should be murdered. However, in the chief examination, he would state that he had not stated so in the police confession because A7 had told them not to tell any facts relating to him and therefore, he did not say so.



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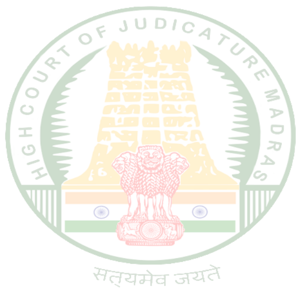
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(b) The above contradictions and improvements would show that PW12 had stated vital facts for the first time, to suit the prosecution case. One major improvement in our view is that in the police confession, his version was that he had no direct knowledge of the conspiracy. However, in his deposition, he claimed direct knowledge of the conspiracy and also gave details of the conversations between the conspirators. This in our view is an improvement on a very material aspect.

(c) The other major improvement is that PW12 would state about his visit to DW2's house and receipt of cash, which is not stated in his police confession. Even as regards the involvement of A6 and on other aspects as well, which were narrated above, there are improvements, which makes the version of the approver subject to even deeper scrutiny.

(d) PW12 had stated that the reason for becoming an approver is remorse. We are unable to accept this since PW12 had throughout



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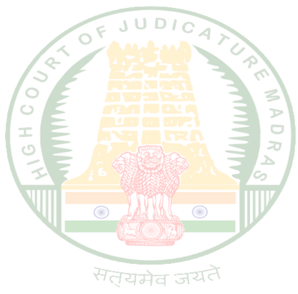
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questioned the prosecution case and had taken a stand that the case against him is false. This is also confirmed by the fact that PW12 had filed an application before the XXIII Metropolitan Magistrate, Saidapet, complaining that the police officers attached to E4-Abiramapuram Police Station were harassing him and praying for action against them. As we have stated earlier, the delay in filing the application and the time chosen by him though may not be the grounds to eschew his evidence, but are factors to be kept in mind while appreciating his evidence. Therefore, this Court in the peculiar facts of this case while appreciating PW12's evidence has to look for corroboration on all the material aspects and the corroboration has to be through unimpeachable evidence.

21. The prosecution relies on direct **evidence to establish conspiracy** through witnesses PW53, PW4 and PW5 besides the evidence of PW12. That apart, prosecution seeks to establish the conspiracy through other circumstances viz., motive, association of the accused with one another and facts such as taking of picture of Dr. Subbiah, buying of bike, money trail



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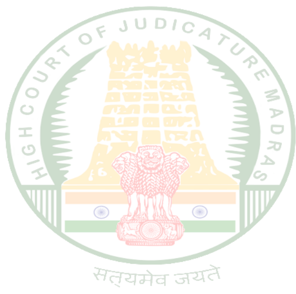

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from A3 and A1 to A5 and to the assailants, etc. We now deal with the evidence of the witnesses, who are said to have overheard the conspiracy amongst the accused.

(i) The first conspiracy meeting is said to have taken place in the 1st week of July 2013. PW53 a client of A5 is said to have overheard the conspiracy while waiting outside his office. In his deposition he would narrate the minute details of the conversation between the accused and about A7 asking A3 to get the consent of his parents viz., A1 and A2, after which A1 and A2 came there and had agreed to the conspiracy. PW53 did not disclose this information to anyone till 10.02.2014, when his statement under Section 161 of the Cr.P.C., was first recorded by the investigating officer. The investigating officer's explanation as to how he discovered PW53 as a witness also belies common sense. PW56, the investigating officer would state that when he went to A5's house, during the course of investigation, he happened to see PW53 and when he questioned him, PW53 made the statement.



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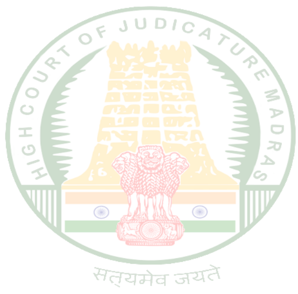
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(ii) PW53 has stated that he did not disclose his knowledge of the conspiracy to anyone since his wife told him not to do so. What made PW53 to ignore his wife's advice when he disclosed it to PW56, the investigating officer is not clear. Further, PW53 had told about the alleged money transactions in his second statement on 10.02.2014, which is admitted by PW57. That apart, admittedly, PW53 was a total stranger to the other accused except A5, who had allegedly participated in the conspiracy meeting. No Test Identification Parade was conducted to identify the other accused. Further, PW53 was also unable to identify A3 in Court. Though PW53 admitted that he had weak eyesight, the fact that he had not seen the other accused earlier, his identification of the other accused in Court for the first time after seven years, is highly suspicious, to say the least. PW53, is a chance witness and in such circumstances, it ought to have been established that he was in fact a client of A5, especially when it is an admitted fact that he was residing nearly 75 kms away from A5's house. There is inherent improbability in the versions of PW53 and no prudent person would accept his version as true. Neither PW53's version as to how he told the police nor



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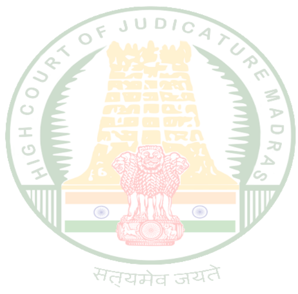

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PW56's explanation as to how he discovered PW53, is plausible. Further his statement reached the Court on 16.08.2015. PW53 for the first time in his deposition before the Court has stated that the conspiracy took place in the 1st week of July which was not stated even in his belated statement before the police. It is clear from the reading of PW53's evidence that the prosecution has introduced PW53 as an afterthought. Above all, the prosecution case that the accused conspired to commit the offence of murder in the presence of a stranger who could hear even the minute details of the conversation, is a desperate attempt to introduce witness to suit their case. The version that the accused conspired in such a manner that a stranger could hear the conversation is opposed to common sense and logic. For all the above reasons, PW53, in our view is unreliable.

(iii) Similarly, PW4 and PW5, who were land brokers and said to be witnesses to the second conspiracy meeting that took place in the last week of July 2013 also in our view have been introduced by the prosecution as an afterthought. PW4, who is said to have heard the conversation was



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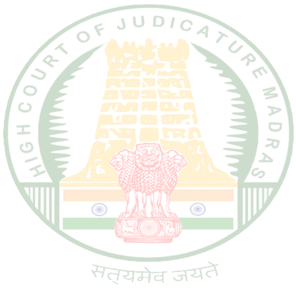
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examined by the police on 10.02.2014. He was unable to explain the reason for the delay. He has not even discussed this with his family members. His statement was also despatched to the learned Magistrate on 06.05.2015 along with the final report. Even in PW4's case, there is no plausible explanation by the investigating officer as to how he discovered the fact that PW4 was a witness to the conspiracy. PW56 would state that he received secret information and therefore went in search of PW4. PW4 would state that he went to Kannimadam, where his statement was recorded on the invitation of one Subramani Nadar, who was not examined by the prosecution.

(iv) That apart, PW4 claimed that A5 had called him to the disputed land to sell it through him, also appears to be improbable. On his own admission, PW4 was only earning Rs.10,000/- to Rs.20,000/- per month, and was living 50 kms away from the village and to suggest that his services were sought for selling such a high value property is unbelievable.



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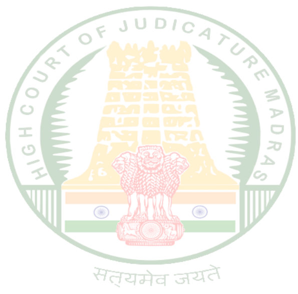

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(v) Likewise the same would apply to PW5, whose evidence is even worse. He was examined only on 12.12.2014 and has no explanation for not disclosing his knowledge of conspiracy to anyone for more than one year and three months. His statement was also sent to Court only on 06.05.2015 along with the final report. Before recording PW5's statement, the investigating officer had recorded the second statement of PW4, which discloses the presence of PW5 in the conspiracy meeting. PW4, who was originally examined on 10.02.2014 did not choose to disclose the presence of PW5 his friend, even though it was a belated statement. However it is not known as to how PW57, the investigating officer had suddenly discovered that PW4 had additional facts to disclose and examined him on 11.12.2014. It is the prosecution case that PW57 himself went to PW4 to record the second statement on 11.12.2014, in which statement he had spoken about the presence of PW5.

(vi) Here again the prosecution's version that the accused discussed the conspiracy in the presence of PW4 and PW5 who are strangers is



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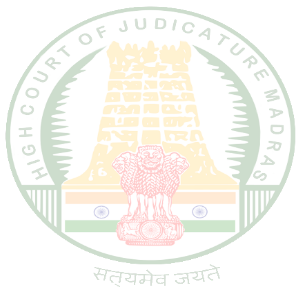
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inherently improbable. Further, It is well settled that a chance witness has to justify his presence and when he does not do so, to the satisfaction of the Court, his testimony be rendered unreliable. Besides the inherent improbability in the versions of PW4 and PW5, their belated examination, the non explanation or illogical explanation for their belated examination by the investigating officer renders their evidence worthless. In our view the conduct of the investigation in introducing such witnesses has to be condemned. It defies common sense and logic, to say the least. Believing such a witness would be an insult to the criminal justice system.

(vii) Therefore, in our view the witnesses PW4, PW5 and PW53 meant to corroborate the version of PW12 have to be disregarded and no reliance can be placed on their evidence.

22. The other circumstances relied upon by the prosecution to show that there was a conspiracy and to connect the appellants with the crime are as follows:



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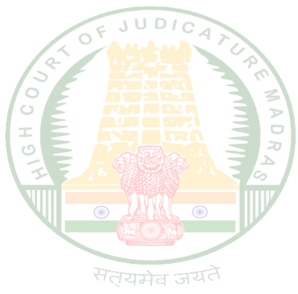
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(A) A3, handing over a memory card containing the picture of the deceased to A8, A9 and PW12, to take a printout. As discussed above, P.W.12 has stated in his police confession that A8 told him about these facts. However, in the chief examination, PW12 has stated that he was present when A5 showed A8, the picture and told him to take a printout by handing over the memory card. PW32 is a photographer, who took the printout from the memory card. He was examined by the prosecution on 10.02.2014 and his statement reached the Court on 13.02.2014. He admits that his studio is situated on the same road as that of Anjugramam Police Station. To a question as to whether he could produce any copy of the photograph from his computer, he replied in the negative. No Test Identification Parade was conducted to identify the accused, who came to his shop to take a printout. He could not produce any bill copies to confirm that a printout of the photograph was taken in his studio. He identifies the accused, for the first time on 01.04.2019, when he was examined in the Court. We are of the view that this circumstance cannot be believed as PW32's evidence that he remembered all the customers, though there was no evidence in his



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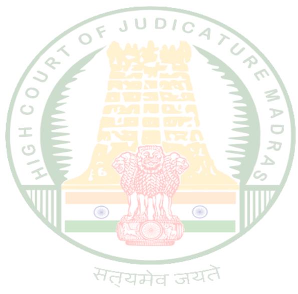
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computer of taking a printout or a bill copy, is highly artificial and no prudent person would believe his testimony.

(B) The other circumstance is A5 showing the visiting card of Dr.Subbiah to A8 and A10 and giving the details of his workplace including the car number of Dr.Subbiah, during the first week of July 2013. PW6 speaks about A5, taking the visiting card of Dr.Subbiah. If A5 had attended the peace meeting, there is nothing unusual about his taking the visiting card of Dr.Subbiah and the seizure of the visiting card from A5 would not be of any consequence. However, PW12's statement about the card being shown to him by A5 in the chief examination is an improvement, which he had not stated in the confession given before the Police.

C. (i) PW3, is an eyewitness to the occurrence and is said to have overheard a conversation between A8 to A10, just before the occurrence. PW3's deposition, in this regard, belies common sense and suffers from artificiality. PW3's deposition on this aspect reads as follows:



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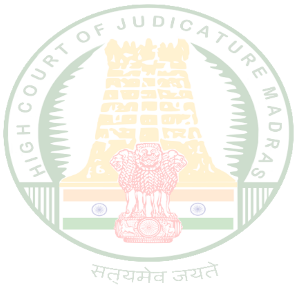

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*"அப்போது 8வது எதிரி முருகன் எதிரி ஐயப்பனை பார்த்தேன் ஏலே ஐயப்பா இன்று நாம் டாக்டரை களைஎடுக்கனும் போன தடவை மாறி சொதப்பிடகூடாது. அப்படி முடித்து விட்டால் வக்கீல் வில்லியம்சம், நம்ம டாக்டர் ஜேம்ஸ்சும் போரிஸ், பாசில் ஆகியோரிடமிருந்து ரூ50 லட்சம் வாங்கி கொடுப்பார்கள் நாம் சிங்கபூர் போய் செட்டில் ஆகி விடலாம் என்று பேசி கொண்டு இருந்தார்கள்."*

(ii) Firstly, the assailants who were prepared to execute a murderous attack would not be discussing this aspect, in a public place especially with such minute details referring to the names of the victim and the names of the accused A3 to A5 besides mentioning the actual amount promised by them. Above all, they would not be discussing it loudly in a public place, so that it would be overheard by a third party. PW3 also did not inform the Police immediately, and his statement was recorded five months later. Therefore, we are of the view that this circumstance relied upon by the prosecution is also of no avail to them and only confirms that the statements have been extracted from the witnesses to suit their case.

**D. Money Trail**



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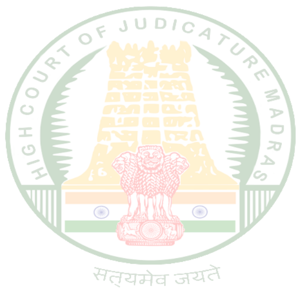
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(i) The other circumstance relied upon by the prosecution is the money trail from A1 and A3 to A5, who in turn transferred it to DW2, who handed over the money to A6, his brother-in-law and the assailants. It is the prosecution case that A1 had transferred Rs.,1,50,000/- and A3 had transferred Rs.5,40,000/- to A5, which is proved by the statements of accounts [Exs.P72, 73, 74, 91 and 92] of accused 1, 3 and 5, spoken to by PW41 and PW44, the Bank Managers and that A5 had in turn transferred Rs.6,50,000/- on various dates from 27.06.2013 to 02.09.2013 to DW2.

(ii) The money transactions are not disputed by the defence. It is the prosecution case that these money transactions between the accused and the transfer of money from A5 to DW2 were meant for distribution to the assailants. Though DW2 was examined during the investigation, the prosecution chose not to examine him as a witness. If DW2 was used by A5 to distribute the money for the assailants, he ought to have been made an accused. If the prosecution felt that DW2 was not privy to the conspiracy, they ought to have examined him to prove the circumstances, under which



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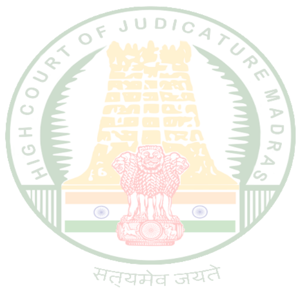

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the money was sent to him and why he had handed over the same to A6, his brother-in-law. On the contrary, the defence chose to examine him as DW2.

(iii) DW2 in his deposition would state that A5 had been sending money for missionary work and to help youngsters since 2012 and in fact, A5 had sent money even in 2014. This was also admitted by the prosecution as could be seen from the exhibits marked especially the statement of accounts of DW2, which was marked as Ex.P50.

(iv) The prosecution has relied upon the evidence of PW37, who is a Taxi Driver and had allegedly witnessed the distribution of money when he came to meet DW2. PW37 is a chance witness and has not explained the reasons for his presence at the house of DW2. He merely says that he went to meet DW2 for a purpose. He was examined for the first time on 24.02.2015, and his statement reached the learned Magistrate on 06.05.2015. Here again, there is no proper explanation by the prosecution as to how the



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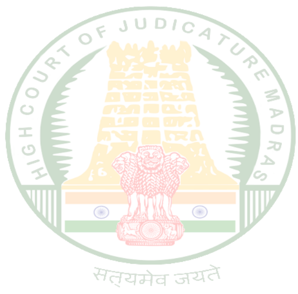
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Investigating Officer had discovered PW37 as a witness to the money transactions between DW2, A6 and the assailants. PW37 is a stranger to the assailants. No Test Identification Parade was conducted to identify the accused. He would also state that in his presence, DW2 handed over Rs.6.5 lakhs to A6 and A6 had distributed Rs.1.5 lakhs each to A8, A9 and PW12 and retained Rs.2,00,000/- for himself. It is not known as to how PW37 remembered the exact amount of money given by DW2 and distributed to the assailants. DW2 would not be handing over such a huge amount in the presence of PW37. Even assuming that DW2 had handed over cash to A6, he would not be distributing it, in the presence of a stranger. If the prosecution wanted to establish this fact, D.W.2 would have been the best person. However, introducing a third person belatedly to suit their case again exposes the desperate efforts taken to create evidence to suit their case. PW37's evidence again belies common sense.

(v) D.W.2's evidence is to the effect that he had never distributed the money to A6, A8, A9 and P.W.12; that he had received this money for



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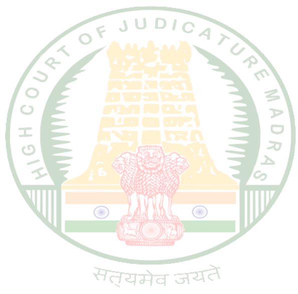
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missionary work for the Church and that A5 had sent this money to help two youngsters by the name Maheswaran and Babu to set up a company; that this money was handed over to Maheswaran; and that Maheswaran had in turn returned it to A5.

(vi) D.W.2 was cross examined by the Public Prosecutor, wherein DW2 admitted that he did not know where Maheswaran and Babu were working at the relevant time. The reading of the cross examination of D.W.2 would suggest that he knew that the said Maheswaran and Babu were working along with Williams and that all three were close friends. Merely because he had stated that he did not know where Babu was working at the relevant point in time, his evidence cannot be disregarded. Further the Investigating Officer would admit that he had examined both Maheswaran and Babu during the investigation and had not sent the statements along with the Final Report.



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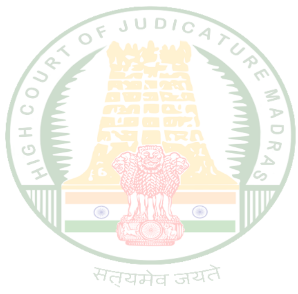

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(vii) The learned Special Public Prosecutor brought to our notice certain contradictions in the answers given by the accused in Section 313 Cr.P.C., questioning with regard to the money transfer to A5 and thereafter to DW2. A1 had stated that he had transferred Rs.1.5 Lakhs to A5 as a loan, which was repaid by A5 by cheque in favour of A3 and by cash. A3 and A5 also confirm the said version.

(viii) The learned Special Public Prosecutor submitted that the repayment in cash has not been substantiated and there was no necessity to issue a cheque in favour of A3 and therefore, the explanation is improbable. Similarly, A3 had sent a total sum of Rs.5.4 Lakhs to A5. A3 had stated that this was given by his aunt one Mapel Latha Bai, sister of A2 for the purchase of property and he in turn added some money and sent it to A5 for making an investment in CNG Textiles Company. A5 confirmed this fact. However, DW2 to whom A5 had transferred the total sum of Rs.6.5 Lakhs had stated that the sum was used to rehabilitate youngsters, drug addicts, etc. and that it was sent to one Maheswaran and Babu for them to set up a



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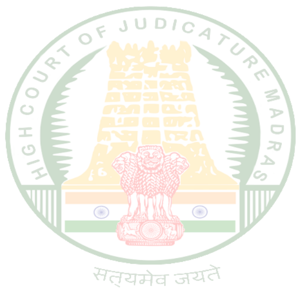
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company. DW2 also had stated that since Maheswaran did not have a bank account, the money was routed through him and that this money was returned by Maheswaran to A5; The learned Special Public Prosecutor pointed out Ex.P98 to prove that the said Maheswaran had a bank Account with Indian Bank.

(ix) It is the contention of the learned Special Public Prosecutor that in view of the different explanations which are not consistent with each other, it has to be presumed that the explanation offered is false and the effect of the false explanation is that it would offer an additional link in the chain of circumstances pointing out to the quilt of the accused.

(x) As stated earlier, the prosecution case is definite that money was given by DW2 to A6 and the assailants which was witnessed by PW37. We have held that PW37 is a totally unreliable witness. When the fact of the distribution of money has not been established by the prosecution, merely because there are inconsistent explanations, which in our view would not



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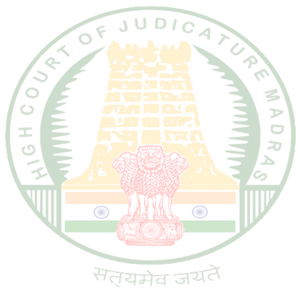
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lead to the only conclusion that the money was meant for assailants and therefore, would not be an additional link in the chain of circumstances.

(xi) The non examination of Maheswaran and Babu, during the trial and not sending their statements to the Court, though their statements were recorded under Section 161 of the Cr.P.C., also raises doubt with regard to the prosecution case.

(xii) Further, as rightly pointed out by the learned defence counsel DW2's evidence is more reliable than PW37. The defence witnesses are entitled to equal treatment and the evidence of the witness is not judged by whether he supports the prosecution or the defence. The defence is entitled to produce their witnesses and if those witnesses are reliable, there is no reason why they should be disregarded. The Hon'ble Supreme Court in ***State of Haryana Vs. Ram Singh*** reported ***(2002) 2 SCC 426*** held as follows:

> **"19. ……** Incidentally, be it noted that the evidence tendered by defence witnesses cannot always be termed to be a tainted one — the defence



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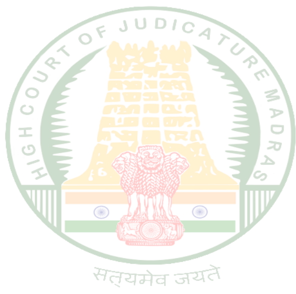
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> witnesses are entitled to equal treatment and equal respect as that of the prosecution. The issue of credibility and the trustworthiness ought also to be attributed to the defence witnesses on a par with that of the prosecution. Rejection of the defence case on the basis of the evidence tendered by the defence witness has been effected rather casually by the High Court. Suggestion was there to the prosecution witnesses, in particular PW 10 Dholu Ram that his father Manphool was missing for about 2/3 days prior to the day of the occurrence itself — what more is expected of the defence case: a doubt or a certainty — jurisprudentially a doubt would be enough: when such a suggestion has been made the prosecution has to bring on record the availability of the deceased during those 2/3 days with some independent evidence. Rejection of the defence case only by reason thereof is far too strict and rigid a requirement for the defence to meet — it is the prosecutor's duty to prove beyond all reasonable doubts and not the defence to prove its innocence — this itself is a circumstance, which cannot but be termed to be suspicious in nature.

A similar view was taken with regard to appreciation of defence witnesses in (i) ***State of Haryana Vs.Ram Singh*** reported in ***(2002) 2 SCC 426 (ii) Dudh Nath Pandey Vs. State of U.P.,*** reported in ***(1981) 2 SCC 166 and (iii) State of U.P. vs. Babu Ram*** reported in ***(2000) 4 SCC 515.***

(xiii) Thus to sum up, we are of the view that the prosecution which sought to prove the distribution of money to the assailants through a direct



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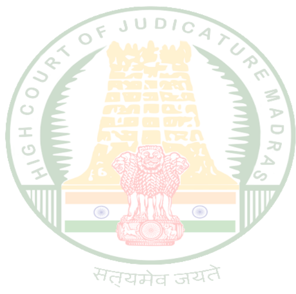
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witness-PW37 has failed to do so. That apart after examining DW2, Maheshwaran and Babu during the investigation, there is no reason why they were not examined during the trial. PW12 himself had not stated anything about the alleged money distribution in the presence of PW37 by DW2 in his police confession. Considering the above facts and the fact that there were money transactions between A5 and DW2 between 2012 and 2014, we cannot assume that the money transactions were pursuant to the conspiracy and were meant for distribution to the assailants.

E. The other circumstance is the Call Records produced through P.W.45 which according to the prosecution show that the accused and the family members of A1 to A4 were in touch with A6 and A7 and some of them were in touch with the assailants directly, is of no avail to the prosecution. Admittedly, P.W.45, the Sub Inspector of Police, Cyber Crime Branch received the details from the Telecom Companies. Strangely, none of the officers who sent this informations were examined by the prosecution. The alleged information received by P.W.45, during the course of the



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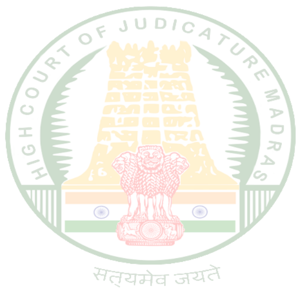
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investigation by e-mail is sought to be proved by the prosecution with the 65-B certificate of P.W.45. The 65-B certificate of P.W.45 would not be of any relevance for the simple reason that the fundamental rules of evidence as to how a document has to be proved has been ignored by the prosecution. P.W.45 who represents the Police Department collected the documents on behalf of the Investigating Officer. Incidentally, in this case, he obtains it in electronic form. The document was generated from the Telecom Companies. The e-mail sent by those Telecom Companies was also not marked by the prosecution. The documents which were generated by the Telecom companies cannot be proved by the police officer who collects it during the course of the investigation. Those documents which are maintained in the computers of the respective Telecom companies ought to be proved either by the Nodal Officer or such Officer, who maintained these documents. This is a fundamental aspect which requires no further elaboration. Further, on P.W.45's own admission, these CDRs were both in Excel and PDF formats. It is common knowledge that the documents in Excel format can be manipulated or edited. This is yet another instance of shoddy investigation



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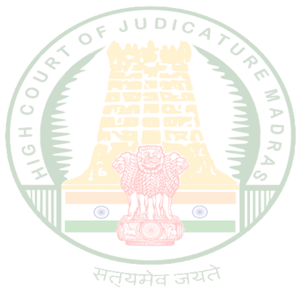
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and introduction of documents by ignoring the basic procedure. Therefore, we are of the view that the documents pertaining to the CDRs marked as Exs.112 to 145, through P.W.45 is not worth the paper it is printed on.

F (i) The next circumstance relied upon is the Extra Judicial Confession, which is said to have been given by A6 to P.W.7. The prosecution had not established that P.W.7 was a close confidante of A6. P.W.7 himself admits that he had hardly spoken to A6 and would have spoken to him, twice or thrice before he met A6 on the day when the alleged confession was made to him. Therefore, the prosecution case that A6 confessed to P.W.7 by stating that A5 had promised to give Rs.10,00,000/- but did not keep up his promise is unbelievable. In any case, it is not the prosecution case that A6 was offered the said amount of Rs.10,00,000/- by A5. Further, the Extra Judicial Confession is a weak piece of evidence, even as against the maker namely A6 and it has to be corroborated. There is no corroboration for the alleged Extra Judicial Confession which itself is highly doubtful. That apart, it is also a settled principle of law that as against the co



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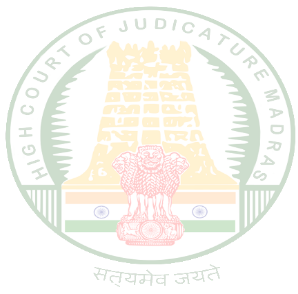
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accused, this Extra Judicial Confession can be used only to lend assurance to other evidence on record and this position of law is fairly settled.

(ii) The Law relating to the appreciation of Extra Judicial Confession given to strangers has been settled by the Honourable Supreme Court in several cases. It will be useful to refer to the following observation of the Honourable Supreme Court in ***Sahadevan Vs. State of Tamil Nadu*** reported in ***2012 SCC 6 SCC 403.***

> **16.** Upon a proper analysis of the abovereferred judgments of this Court, it will be appropriate to state the principles which would make an extra-judicial confession an admissible piece of evidence capable of forming the basis of conviction of an accused. These precepts would guide the judicial mind while dealing with the veracity of cases where the prosecution heavily relies upon an extra-judicial confession alleged to have been made by the accused:
>
> (i) The extra-judicial confession is a weak evidence by itself. It has to be examined by the court with greater care and caution.
>
> (ii) It should be made voluntarily and should be truthful.
>
> (iii) It should inspire confidence.
>
> (iv) An extra-judicial confession attains greater credibility and evidentiary value if it is supported by a chain of cogent circumstances and is further corroborated by other prosecution evidence.



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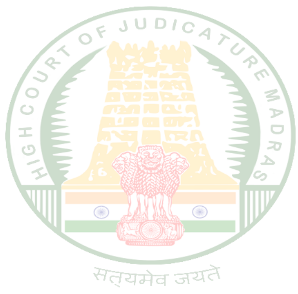
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(v) For an extra-judicial confession to be the basis of conviction, it should not suffer from any material discrepancies and inherent improbabilities.

(vi) Such statement essentially has to be proved like any other fact and in accordance with law.

(iii) Therefore, in our view, PW7 who is not a close associate of A6 is not a trustworthy person and in any case his evidence does not inspire confidence at all. Therefore, his evidence is of no use to the prosecution.

(iv) In any case, as against the co-accused, the alleged extra judicial confession of A6 has no value whatsoever, and can only lend assurance to the evidence already adduced by the prosecution. There is no such evidence as discussed above and therefore, even assuming that this extra judicial confession can be relied upon, it would have no relevance against the co-accused. In this regard, we may refer to the observation of the Hon'ble Supreme Court in ***Panchu Vs. State of Haryana*** reported in (***2011) 10 SCC 165.***



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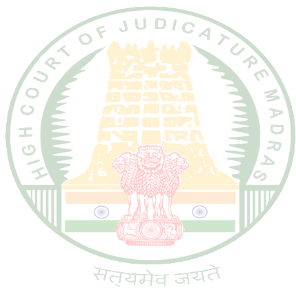
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> ***28.***_This Court in Haricharan case [AIR 1964 SC 1184 : (1964) 2 Cri LJ 344] clarified that though confession may be regarded as evidence in generic sense because of the provisions of Section 30 of the Evidence Act, the fact remains that it is not evidence as defined in Section 3 of the Evidence Act. Therefore, in dealing with a case against an accused, the court cannot start with the confession of a co-accused; it must begin with other evidence adduced by the prosecution and after it has formed its opinion with regard to the quality and effect of the said evidence, then it is permissible to turn to the confession in order to receive assurance to the conclusion of guilt which the judicial mind is about to reach on the said other evidence._

G. The next circumstance relates to the fact of A7 attending A5's wedding; his giving his car to A5 for his use in the wedding; and selling another car at half the price to A5, to show the association between A5 and A7. The above facts are sought to be established firstly by a photo album. The said photo album was disbelieved by the Trial Court and rightly so as the photographer was not examined and no 65B certificate was produced. That apart, it is the prosecution case that the car belonged to A7 and they marked Ex.P166, to show that TN 72 AX 5106 was in the name of G.Maheshwari. Firstly, the said document was said to have been



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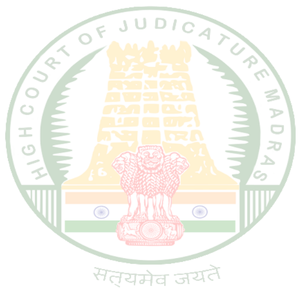
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downloaded from the RTO website. No person from the RTO was examined by the prosecution. The registration details have thus not been proved. The relationship of G.Maheshwari, with A7 was also not established. The sale of car is also not established. Ex.P167 relied upon by the prosecution is again the printout of the website and such document would not have any relevance unless it is marked and proved in accordance with the Indian Evidence Act. Therefore, the case of the prosecution that a car was given to A5 by A7 at his wedding cannot be taken as a circumstance to establish the conspiracy.

H. (i) The other circumstance, sought to be established by the prosecution is motive. The fact that there was a dispute between A1's family and the deceased and that there were several litigations between the parties including criminal complaints, is not disputed by the defence. Further, P.W.50 and P.W.52, the Sub Inspectors of Police attached to the Anjugramam Police Station and Anti Land Grabbing Cell, have stated the complaint filed by the deceased against A1 to A6 in Crime No.467 of 2013,



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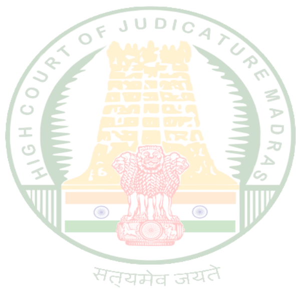
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on the file of Anjugramam Police Station and against A1 and A2 in Crime No.57 of 2013 on the file of Anti Land Grabbing Cell. P.W.1, P.W.9, P.W.10, and P.W.13 had also spoken about the same. The fact that there was a compromise talk between the parties in the office of P.W.6 is spoken to by P.W.1, P.W.6 and P.W.10. This fact is also not disputed by the defence. In the compromise talk, A1, A3 and A5 are said to have participated, as seen from P.W.6's evidence.

(ii) Both P.W.1 and P.W.13, the brother-in-law and wife of the deceased respectively, have stated that the deceased informed them that there is a life threat to him, which was given by A5. P.W.1 would further add that the deceased had told him about the threats given by A6 along with A5. However, we find that there is no complaint filed by the deceased in this regard. That there was a bitter dispute is admitted. Whether this dispute and the criminal complaints had led the accused to enter into a conspiracy, is a question to be considered. Except for the deposition of P.W.1 and P.W.13 that A5 had made life threats, which is not supported by any complaint, we



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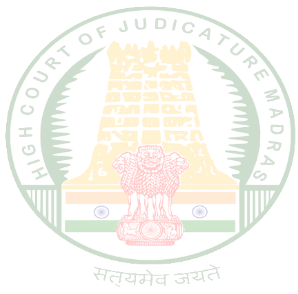
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are of the view that the same by itself would be of no significance if the other evidence on record does not inspire confidence. We have held that the prosecution has not proved the conspiracy meetings said to have been held in the first and last weeks of July 2013.

23. (i) When once the tendency of the investigation to plant witnesses, whose versions are artificial is revealed, the fabric of the prosecution case would collapse. We are constrained to say that the Investigating Officers involved in this case, have not collected evidence but created evidence to suit their case.

(ii) The manner in which the witnesses have been examined belatedly, the illogical explanation given by the witnesses and the Investigating Officers as to how the witnesses were discovered, the delay in despatch of the statements to the learned Magistrate and the improvements made by P.W.12 endorses our view.



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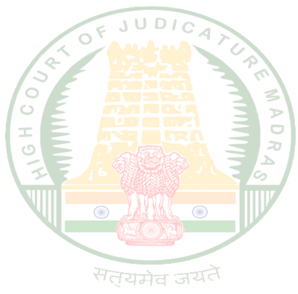
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(iii) Both the prosecution and the defence have cited judgments in support of their respective submissions as regards the delay in the examination of witnesses.

(iv) In the cases cited by the prosecution, the delay in the examination of witnesses was not considered by the Court as a reason for rejecting the testimony of the witnesses, since the explanation offered by the investigating officer to justify the delay in the examination was plausible and reasonable. In the following cases, the Hon'ble Supreme Court found the delay was sufficiently explained and therefore, the version of the prosecution witness cannot be suspected.

(a) In ***Ganeshlal v. State of Maharashtra,*** reported in **(1992) 3 SCC 106**, the Hon'ble Supreme Court held as follows:

> "10.It is true that there was a delay of nearly 2½ months in recording his statement but it goes explained as the investigation did not proceed in the desired lines initially and only after PW.16 took over the investigation, he recorded the statement of PW.6. The dispensary used to open by 10.00 a.m. and his presence is natural. He has no



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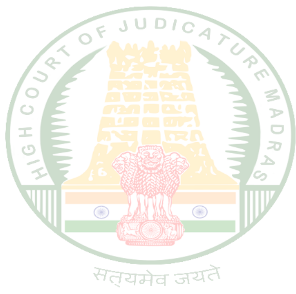
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> axe to grind against the appellant or any of the members of his family. He is also an independent witness. It is true that he was a Compounder working with Doctor Chitlange, brother-in-law of PW-5. There nothing on record nor even suggested that the family members of PW.5 were inimically disposed towards the accused. It was suggested to PW.5 which was admitted that appellant's mother visited PW.5 when she sustained an injury which would show that both families were on cordial terms. So PW.6 being a natural witness his evidence cannot be doubted due to delay."

(b) In ***Vijaybhai Bhanabhai Patel v. Navnitbhai Nathubhai Patel and others***, reported in **(2004) 10 SCC 583**, the Hon'ble Supreme Court held as follows:

> "4.The learned Counsel for the appellant submitted that PW 7 and PW 4 who claimed to be eyewitnesses cannot be believed for various reasons. It was submitted that the incident happened on 13.11.1985 but these two witnesses were questioned by the Investigation Officer only on 15.11.1985. No proper explanation was given by the Investigation Officer. There is evidence to show that the Investigation Officer had visited the house of the deceased on the very next day. It seems that there was an attempt by



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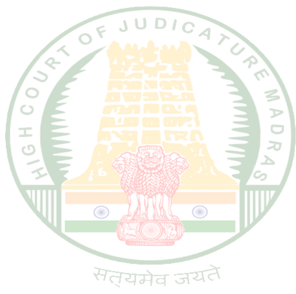
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the prosecution to show that PW 7 the widow of the deceased was unconscious during this period and therefore, she could not be questioned by the Police. But they could have questioned PW 4, the son of the deceased at least on the very next day. The delay in questioning these witnesses by the Investigation Officer is a serious mistake on the part of the prosecution. We do not think that the High Court erred in disbelieving these witnesses. ."

(c) In ***State of U.P. v. Satish,*** reported in **(2005) 3 SCC 114**, the Hon'ble Supreme Court held as follows:

"18. As regards delayed examination of certain witnesses, this Court in several decisions has held that unless the Investigating officer is categorically asked as to why there was delay in examination for the witnesses the defence cannot gain any advantage therefrom. It cannot be laid down as a rule of universal application that it there is any delay in examination of a particular witness the prosecution version become suspect. It would depend upon several factors. If the explanation offered for the delayed examination is plausible and acceptable and the court accepts the same as plausible, there is no reason to interfere with the conclusion [See Ranbir and Ors. v. State of Punjab, AIR (1973) SC 1409]"



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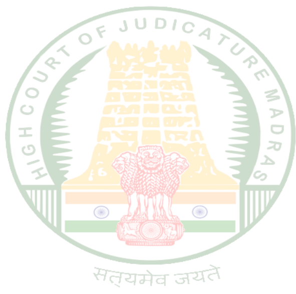

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(d) In ***Santhosh Kumar Singh v. State through CBI,*** reported in **(2010) 9 SCC 747**, the Hon'ble Supreme Court held as follows:

> "50. The only argument against PW-2 is that his statement under Section 161 of the Code of Criminal Procedure had been recorded after three days. We find nothing adverse in this matter as there was utter confusion in the investigation at the initial stage. Moreover, PW-2 was a next neighbour and a perfectly respectable witness with no bias against the appellant. "

(e) In ***Himanshu Mohan Rai v. State of Uttar Pradesh and Another,*** reported in **(2017) 4 SCC 161**, the Hon'ble Supreme Court held as follows:

> "14. Chandra Shekhar Rai (P.W. 2) was interrogated after about 25 to 30 days and was questioned 8 days after the incident. He is criticized as a planted witness. In this regard it may be noted that the investigation was first carried out by S.H.O. D.P. Shukla (P.W. 6), who was the investigating officer from the time of the incident to 00:10 hours on the next day. Remarkably, this investigating officer changed the registration of the offence of murder under Section 302 to Section 304 of the IPC. Since Section 304 became a lesser offence, the investigation was



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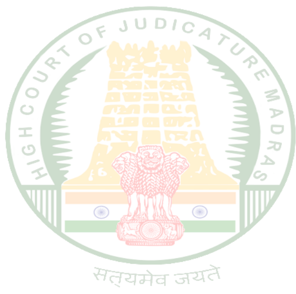
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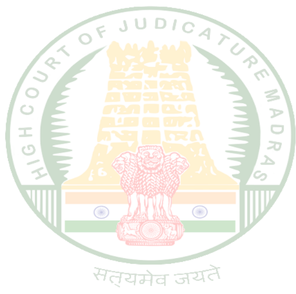
transferred to a sub-inspector by the name of Sriniwas Pande (P.W. 5) who was the investigating officer from 00:10 hours on 02.01.2005 to 18:00 hours on 09.01.2005. On receiving a complaint by the accused that the investigation was not being done properly, the police transferred the investigation back to an inspector of the Police; one R.K. Singh (P.W.7) who took over on 09.01.2005 and investigated the matter till the charge-sheet was filed on 19.01.2005. This is possibly why P.W. 2 was not interrogated for a long time. It appears that the new investigating officer took time to follow up on the leads, interrogate P.W. 2 and record his statement.

15. In these circumstances, we do not consider the delay to cause such suspicion as to warrant the complete rejection of the testimony of P.W. 2. The testimony of P.W. 2 completely corroborates the version of P.W. 1 in all material details of the incident. We are not inclined to reject this testimony on the ground that his statement was recorded after 30 days particularly since there was a change of investigating officers. ”

(v) Similarly, in the cases cited by the defence, the Hon'ble Supreme Court held that the delay in the examination destroys the credibility of the witness.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(a) In ***State of Orissa v. Brahmnanda Nanda,*** reported in **(1976) 4 SCC 288**, the Hon'ble Supreme Court held as follows:

> "2. The entire prosecution case against the respondent rests on the oral evidence of Chanchala (PW. 6) who claimed to be an eye-witness to the murder of Hrudananda, one of the six persons alleged to have been killed by the respondent. The learned Additional Sessions Judge believed her evidence, but the High Court found it difficult to accept her testimony. The High Court has given cogent reasons for rejecting her evidence and we find out selves completely in agreement with those reasons. We have carefully gone through the evidence of this witness, but we do not think we can place any reliance on it for the purpose of founding the conviction of the respondent. The evidence suffers from serious infirmities which have been discussed in detail by the High Court. It is not necessary to reiterate them, but it will be sufficient if we refer only to one infirmity which, in our opinion, is of the most serious character. Though according to this witness, she saw the murderous assault on Hrudananda by the respondent and she also saw the respondent coming out of the adjoining house of Nityananda where the rest of the murders were committed, she did not mention the name of the respondent as the assailant for a day and a half. The murders were committed in the night of 13th June, 1969 and yet she did not come out with the name of the respondent until the



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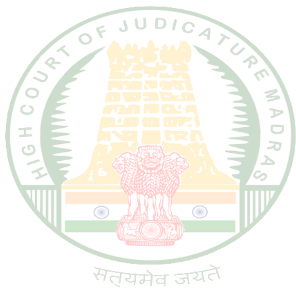
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morning of 15th June, 1969. It is not possible to accept the explanation sought to be given on behalf of the prosecution that she did not disclose the name of the respondent as the assailant earlier than 15th June, 1969 on account of fear of the respondent. There could be no question of any fear from the respondent because in the first place, the respondent was not known to be a gangster or a confirmed criminal about whom people would be afraid, secondly, the police had already arrived at the scene and they were stationed in the Club House which was just opposite to the house of the witness and thirdly, A.S.I. Madan Das was her nephew and he had come to the village in connection with the case and had also visited her house on 14th June, 1969. It is indeed difficult to believe that this witness should not have disclosed the name of the respondent to the police or even to A.S.I. Madan Das and should have waited till the rooming of 15th June, 1969 for giving out the name of the respondent. This is a very serious infirmity which destroys the credibility of the evidence of witness. The High Court has also given various other reasons for rejecting her testimony and most of these reasons are, in our opinion, valid and cogent. If the evidence of this witness is rejected as untrustworthy, nothing survives of the prosecution case."



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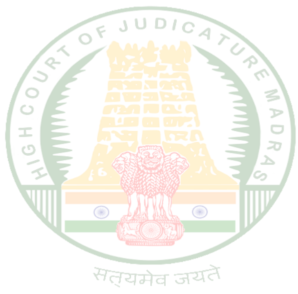

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(b) In ***Mangamma Avva v State of AP,*** reported in **(1995) Supp (2) SCC 43**, the Hon'ble Supreme Court held as follows:

> "17. What surprises us most is the silence of PWI in narrating this incident to others at the earliest possible time. To begin with she had the opportunity of disclosing about the incident, if not for anything else, but to unload herself to the devotees who had come on that Tuesday to the Asharam and had seen one of the most ardent of them lying murdered. That apart when questioned by PW-7 she could have unloaded her information before he left for the Police Station or to have, accompanied him. Significantly, in the first information report, Ex.P.3 the presence of PW-1 in the Asharam, finds mention. She had the opportunity to speak out then. Thirdly when the Police arrived in the evening, she could have volunteered her statement to the Police much before the Inquest, even if it was postponed to the following morning. That by itself is a suspicious circumstance as to why Inquest stood postponed, specially in the background of what was stated in Ex.P.3. Positive suspicion and assertion of the murder having taken place on account of factionalism was mentioned in Ex.P.3, not even remotely suggesting the inmates of the Asharam to be responsible for it. PW. 1 making a statement the following day, at the time of Inquest, shows that by that time the investigation had been successful in framing her to be witness of the crime; the hours of the night intervening



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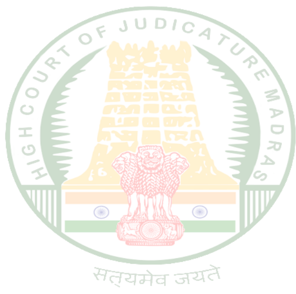
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being sufficient for the purpose. Further the version given by her appears to be highly improbable and artificial. According to the prosecution because of a deep-rooted sexual jealousy A-1 hatched a plan in a coldblooded manner to kill the deceased and with the help of A-2 and A-3 executed it in a diabolical manner by strangulating the deceased. P.W. 1 was after all a maid servant and in such a situation it is highly unthinkable that A-1 to A-3 would have allowed her to sleep near the scene of occurrence almost next to them and thus enable her to witness the same. On the other hand, they could have easily sent her away when she asked their permission to go to her village in connection with her sister's marriage. The fact that she came forward with this artificial version about the occurrence at a belated stage itself shows that she was fixed up as a witness later during the investigation. Thus in our view, it is unsafe to rest conviction of the appellants on such a witness as PWI, and on such a piece of evidence as letter Ex.P.5. The other evidence of the investigation relating to A-3 and the deceased being seen moving together and effecting redemptions of pawned ornaments, leaving apart the contents and their merit, becomes insignificant in the view we have taken on the eye witness account. The accused persons are thus entitled to acquittal."



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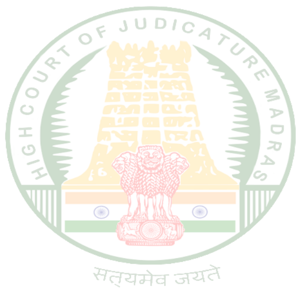
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(c) In ***Paramjit Singh v. State of Punjab,*** reported in **(1997) SCC (Cri) 156**, the Hon'ble Supreme Court held as follows:

> "7. Coming to the vital vital circumstance, namely, Sukhdev Singh was last seen alive in the company of the appellants and in order to prove this fact, prosecution strongly relied upon the evidence of Mohinder Singh (PW 4) and Madan Lal, PC (PW 5). Both the witnesses undoubtedly stated on oath that on 22nd March, 1991, when they were on patrolling duty alongwith Sukhdev Singh, the appellants came and asked Sukhdev Singh to come alongwith them to find out a room on rent and also share a drink. Saying so, Sukhdev Singh left the patrolling duty and went alongwith the appellants. We have gone through the evidence of both these witnesses very carefully and we do not feel it safe to accept the same as credible one. The main reason for discarding their evidence is that their statements under Section 161 of Cr. P.C. came to be recorded on 8th August, 1991 after about four and a half months. No explanation whatsoever was given by the Investigating Officer Gurmeet Singh (PW 11) as to why their statements could not be recorded earlier. Both these witnesses were members of the patrolling duty and even after knowing that on 22nd March, 1991, Sukhdev Singh left alongwith the appellants and was admitted in the hospital in an injured condition, they did not come forward to tell about this fact. It is in these circumstances, we do not



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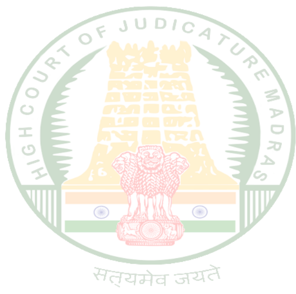
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> feel it safe to accept their evidence on this vital circumstance, namely, Sukhdev Singh was last seen alive in the company of the appellants.”

(d) In ***Kantilal alias K.L.Gordhandas Soni v. State of Gujarat,*** reported in **(2002) 10 SCC 39**, the Hon'ble Supreme Court held as follows:

> “8. The third circumstance noted hereinabove, in our opinion, has not been established by the prosecution. This is based on the evidence of PW 21, the neighbour Natwarlal Shankarlal. There is no doubt that this witness resides very close to the house of the deceased and it is also possible that on 8.4.1994 around 8 or 8.30 p.m. he might have been present in his house but we have serious doubt whether this witness had actually seen the appellant in the house of the deceased. It is an admitted fact that at that point of time there was no light in the house of the deceased. In such circumstances, this witness has not given any reason how he could identify the appellant in spite of the fact that there was no light. That apart, the most doubtful part of PW 21's evidence is that he did not speak about this factum of his having seen the appellant in the house of the deceased on 8.4.1994 night to anybody for nearly 39 days till after he decided to speak to the investigating agency. No explanation whatsoever has been brought on record to explain this extraordinary conduct of



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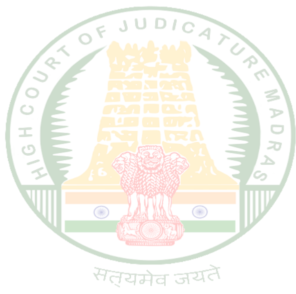
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this witness. This witness was known to the deceased and he was staying in the close proximity of the house of the deceased; after the incident on 8th of April, 1994 police were regularly visiting the house of the deceased; all the relatives of the deceased had come to Modasa including her son and definitely if this witness is speaking the truth he would have known the importance of the fact noticed by him on 8th of April, 1994. Still he did not speak about this to anybody till 17th of May, 1994 by which time the appellant was arrested. To us, the evidence of this witness seems to be artificial. Of course, merely because the evidence of a witness is recorded by the police under Section 161 Cr.P.C. belatedly, by itself, does not make the evidence unacceptable provided there is some logical or acceptable explanation for the same. In the instant case, there is no such explanation. Therefore, contrary to the findings of the Courts below, we are unable to accept the evidence of this witness. Hence this circumstance cannot be relied upon."

(e) In ***State of Orissa vs. Brahmnanda Nanda*** reported in ***(1976) 4 SCC 288,*** the Hon'ble Supreme Court held as follows:

*"2..........**The murders were committed in the night of June 13, 1969 and yet she did not come out with the name of the respondent until***



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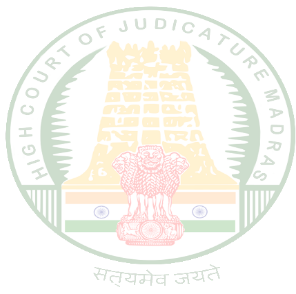

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***the morning of June 15, 1969. It is not possible to accept the explanation sought to be given on behalf of the prosecution that she did not disclose the name of the respondent as the assailant earlier than June 15, 1969 on account of fear of the respondent.*** *There could be no question of any fear from the respondent because in the first place, the respondent was not known to be a gangster or a confirmed criminal about whom people would be afraid, secondly, the police had already arrived at the scene and they were stationed in the clubhouse which was just opposite to the house of the witness and thirdly, A.S.I. Madan Das was her nephew and he had come to the village in connection with the case and had also visited her house on June 14, 1969. It is indeed difficult to believe that this witness should not have disclosed the name of the respondent to the police or even to ASI Madan Das and should have waited till the morning of June 15, 1969 for giving out the name of the respondent....."* *[emphasis supplied]*

(f) In ***Rajeevan v. State of Kerala,*** reported in **(2003) 3 SCC 355**, the Hon'ble Supreme Court held as follows:

> "12. Another doubtful factor is the delayed lodging of FIR. The learned counsel for the appellants highlights this factor. Here it is worthwhile to refer Thulika Kali v. State of Tamilnadu [(1972) 3 SCC 393], wherein the delayed filing of FIR and its consequences are discussed. At Para 12 this Court says -
>
> "...First Information Report in a criminal case is an extremely vital and valuable piece of evidence



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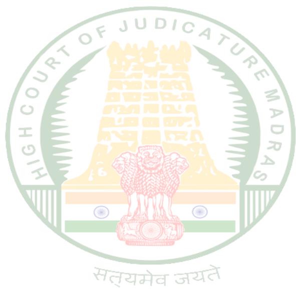
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> for the purpose corroborating the oral evidence adduced at the trial. The importance of the report can hardly be overestimated from the standpoint of the accused. The object of insisting upon prompt lodging of the report to the police in respect of commission of an offence is to obtain early information regarding the circumstances in which the crime was committed the names of the actual culprits and the part played by them as well as the names of eye-witness present at the scene of occurrence. *Delay in lodging the first information report quite often results in embellishment which is a creature of after- thought. On account of delay, the report not only gets benefit of the advantage of spontaneity danger creeps in of the introduction of colored version, exaggerated account or concocted story as a result of deliberation and consultation.* It is, therefore, essential that the delay in lodging the first information report should be satisfactorily explained." (Emphasis supplied)

13....

14. As feared by the learned counsel for the appellants, the possibility of subsequent implication of the appellants as a result of afterthought, may be due to political bitterness, cannot be ruled out. This fact is further buttressed by the delayed placing of FIR before the Magistrate, non-satisfactory explanation given by the



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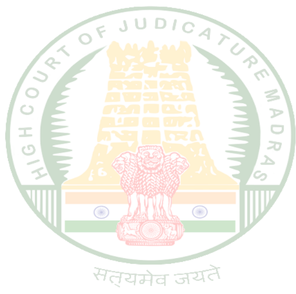
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Police Officer regarding the blank sheets in the Ex. P30 counter foil of the FIR and also by the closely written bottom part of Ex.P1 statement by PW 1. All these factual circumstances read with the aforementioned decisions of this Court lead to the conclusion that it is not safe to rely upon the FIR in the instant case. The delay of 12 hours in filing FIR in the instant case irrespective of the fact the Police Station is situated only at a distance of 100 meters from the spot of incident is another factor sufficient to doubt the genuineness of FIR. Moreover, the Prosecution did not satisfactorily explain the delayed lodging of FIR with the Magistrate.

15. This Court in Marudanal Augusti v. State of Kerala,[(1980) 4 SCC 425], while deciding a case which involves a question of delayed dispatch of the FIR to the Magistrate, cautioned that such delay would throw serious doubt on prosecution case, whereas in Arjun Marik v. State of Bihar, [1994 Supp. 2 SCC 372], it was reminded by this Court that:

> "...the forwarding of the occurrence report is indispensable and absolute and it has to be to forwarded with earliest despatch which intention is implicit with the use of the word 'forthwith' occurring in Section 157 CrPC, which means promptly and without any undue delay. The purpose and object is very obvious which is spelt out from the combined reading of Sections 157



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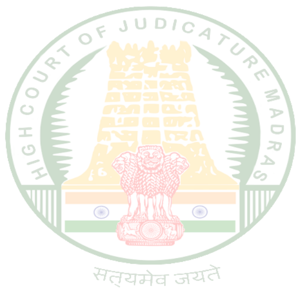
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and 159 CrPC. It has the dual purpose, firstly to avoid the possibility of improvement in the prosecution story and introduction of any distorted version by deliberations and consultation and secondly to enable the Magistrate concerned to have a watch on the progress of the investigation..."”

(g) In ***Thulika Kali v. State of Tamilnadu,*** reported in **(1972) 3 SCC 393,** the Hon'ble Supreme Court held as follows:

“12. It is in the evidence of Valanjiaraju that the house of Muthuswami is at a distance of three furlongs from the village of Valanjiaraju. Police station Valavanthi is also at a distance of three furlongs from the house of Muthuswami. Assuming that Muthuswami PW was not found at his house till 10.30 p.m. on March 12, 1970 by Valanjiaraju, it is, not clear as to why no report was lodged by Valanjiaraju at the police station. It is, in our opinion, most difficult to believe that even though the accused had been seen at 2 p.m. committing the murder of Madhandi deceased and a large number of villagers had been told about it soon thereafter, no report about the occurrence could be lodged till the following day. The police station was less than two miles from the village of Valanjiaraju and Kopia and their failure to make a report to the police



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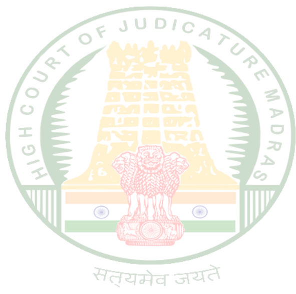
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till the following day would tend to show that none of them had witnessed the occurrence. It seems likely, as has been stated on behalf of the accused, that the villagers came, to know of the death of Madhandi deceased on the evening of March 12, 1970. They did not then know about the actual assailant of the deceased, and on the following day, their suspicion fell on the accused and accordingly they involved him in this case. First information report in a criminal case is an extremely vital and valuable piece of evidence for the purpose of corroborating the oral evidence adduced at the trial. The importance of the above report can hardly be overestimated from the standpoint of the accused: The object of insisting upon prompt lodging of the report to the police in respect of commission of an offence is to obtain early information regarding the circumstances in which the crime was committed, the names of the actual culprits and the part played by them as well as names of eye witnesses present at the scene of occurrence. Delay in lodging the first in- formation report quite often results in embellishment which is a creature of afterthought. On account of delay, the report not only gets bereft of the advantage of spontaneity, danger creeps in of the introduction of coloured version, exaggerated account or concocted story As a result of deliberation and consultation. It is, therefore, essential that the delay in the lodging of the first information report should be satisfactorily explained. In the present case, Kopia,



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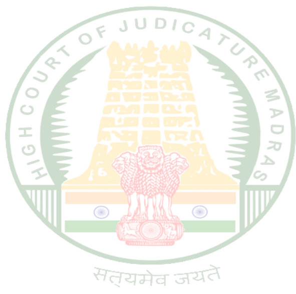
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daughter-in-law of Madhandi deceased, according to the prosecution case, was present when the accused made murderous assault on the deceased. Valanjiaraju, stepson of the deceased, is also alleged to have arrived near the scene of occurrence on being told by Kopia. Neither of them, nor any other villager, who is stated to have been told about the occurrence by Valanjiaraju and Kopia, made any report at the police station for more than 20 hours after the occurrence, even though the police station is only two miles from the place of occurrence. The said circumstance, in our opinion, would raise considerable doubt regarding the veracity of the evidence of those two witnesses and point to an infirmity in that evidence as would render it unsafe to base the conviction of the accused-appellant upon it."

(vi) From the above judgments, it would be clear that the delay in the examination of witnesses may not be a reason to reject the testimony of the witness, provided the investigating officer and the witness offered plausible explanation for the delay. In any case, where there is a delay in the examination of witness, the Courts also have to be cautious in appreciating the evidence, even if some explanation is offered.



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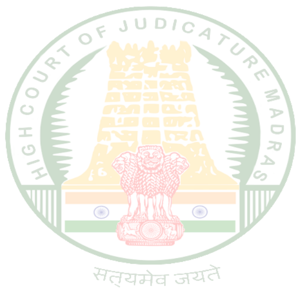
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(vii) As to whether the delay in the examination would affect the credibility of the witnesses would depend on the facts and circumstances of each case. Factually, in the instant case, we find that the delay has not been explained properly and the explanation sought to be given by either the witnesses or the investigating officer as discussed earlier, belies common sense.

(viii) The despatch of the statements to the Magistrate belatedly, though the investigation claims prompt examination of the witnesses, would also render the testimony of the witnesses doubtful. In this regard, it would be useful to refer to the observations ***In Re: Karunakaran and Another Vs. Unknown,*** reported in **1974 SCC OnLine Mad 287**, wherein the Hon'ble Supreme Court held that when there is a delay in despatching the documents, a doubt would arise as to whether the documents came into existence at the time and date mentioned therein. The relevant observation is extracted below.



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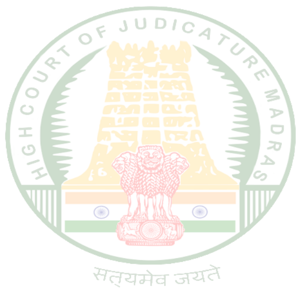
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"28... We are therefore of the opinion that it is imperative that the following documents should be despatched immediately, without any delay by the investigating officers to the Sub-Magistrate. The Station House Officer should record the time of the actual despatch of the various documents in the various registers, particularly, the statement recorded under Section 154 of the Code of Criminal Procedure. On receipt of the said documents, the Magistrate should initial the same, noting therein the time and date of the receipt of those documents. This would provide the only judicial safeguard against subsequent fabrication of such documents in grave crimes Therefore, as the Manual of Instructions for the Guidance of Magistrates in the Madras State does not contain any instructions to the Magistrates in this regard, we suggest that the same may be brought up-to-date by incorporating in it the circulars which had been issued from time to time for the guidance of the Magistrates. The following are documents of special importance which, in our opinion, should be despatched by the investigating officers without any delay to the Magistrates, and they should bear the initials of the Magistrate with reference to both the time and date of their receipt.

1. The original report or complaint under Section 154 of the Code of Criminal Procedure.

2. The printed form of the first information report prepared on the basis of the said report or complaint.



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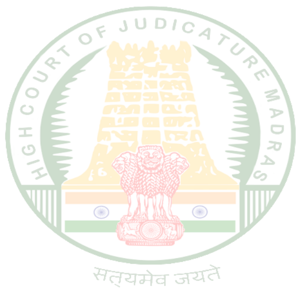
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> 3. Inquest reports and statements of witnesses recorded during the inquest.
>
> 4 Memo, sent by the Station House Officers to doctors for treating the injured victims who die in the hospital subsequently and the history of the case-treatment.
>
> 5. Memo, sent by the doctor to the police when a person with injuries is brought to the hospital, or the death memo, sent by the doctor to the police on the death of the person admitted into the hospital with injuries.
>
> 6. Observation mahazars for the recovery of material objects, search lists and the statements given by the accused admissible under Section 27 of the Evidence Act, etc. prepared in the course of the investigation.
>
> 7. The statements of witnesses recorded under Section 161 (3) of the Code of Criminal Procedure.
>
> 8. Form No. 91 accompanied by material objects."

(ix) The delay in the examination and despatch of statements of witnesses, whose evidence is vital for the prosecution, is by itself sufficient to suspect the veracity of the versions. This has been reiterated in several cases and it is not necessary to extract all the Judgements and Law on the subjects, but to refer to the following observations of the Honourable



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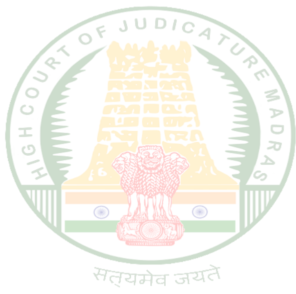

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Supreme Court in ***Abuthagir Vs. State*** reported in ***2005 SCC Online Mad 976***.

> *"**30.** It is expected from the prosecution that the papers connecting the crime starting from F.I.R. should reach the Judicial Magistrate concerned without any delay as far as practicable. If any delay occasioned unavoidably, that alone should not cast cloud provided that delay is explained. As pointed out by the learned senior counsel, a Division Bench of this Court in Karunakaran Jabamani Nadar In re (1974 LW (Cri) 190) held that the statements of witnesses recorded under Section 161(3) of Cr.P.C. having special importance they should be despatched by the Investigating Officer without any delay to the Magistrate and they should bear the initials of the Magistrate with reference to both the date and time of the receipt. Though Criminal Procedure Code does not prescribe any such guideline, it is declared by this Court, that the documents, which are coming within the meaning of special importance should reach the judicial authority in time, thereby preventing its challenge at later point of time as if concocted one utilizing the delay etc. to suit the convenience of the prosecution. If the important documents had reached the judicial hand, then it could be safely said that the averments contained in the documents came into existence at appropriate time, not utilising the delay, thereby it should be given its due weight and credence. This kind of safeguard, was not made available to the statements of P.Ws. 5 & 6, thereby creating a dark cloud upon their statements even compelling us to say that the*



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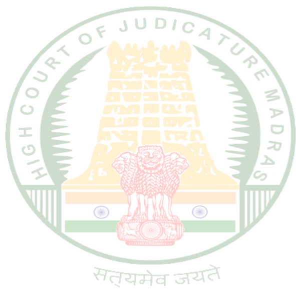
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*statements might have been recorded at later point of time, fixing the accused even after identification."*

24. In the light of the above discussion, we shall now refer to the individual roles played by each of the accused from the evidence adduced by the prosecution to prove the same and as to whether from the individual overt acts, any other offence could be inferred.

**(i) The overt act attributed to A1:**

(a). He participated in the first conspiracy meeting in July 2013 - sought to be proved by P.W.12 and P.W.53. P.W.12's version on this aspect, cannot be believed, as it comes as an afterthought, as held earlier.

(b) Likewise, A1's participation in second conspiracy meeting is sought to be established by the evidence of P.W.4 and P.W.5 whose evidence has to be disregarded.

(c). Transfer of Rs.1,50,000/- to A3 cannot be taken as a circumstance as P.W.37, who speaks about the alleged distribution of money, is unreliable. The alleged phone calls made to the other accused, namely A6



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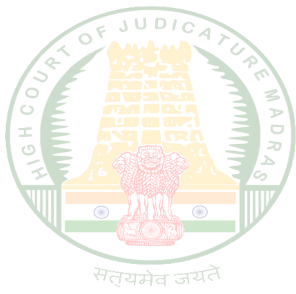
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and A7, cannot be believed as the prosecution has not established the call records in accordance with law. P.W.45, the Inspector of Police attached to the cyber-wing is not competent to speak and mark those documents. Therefore, in our view, the prosecution has failed to establish the charge of conspiracy as against A1.

(d) Motive alone, in our view, would be insufficient to hold that 'A1' is part of the conspiracy, even assuming that the prosecution has established the motive.

**(ii) The overt act attributed to A2:**

Similarly, as regards the role of A2, who is said to have participated in the first two conspiracies, has not been established by the prosecution. There is no other evidence connecting her with the conspiracy. Thus, the prosecution has failed to establish a conspiracy against her.

**(iii) The overt act attributed to A3:**



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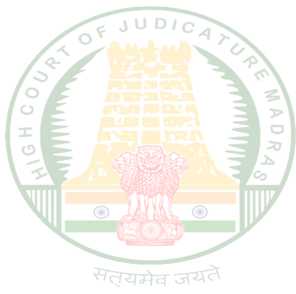
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The *overt acts* attributed to A3 besides attending the conspiracy meetings are that:

a) prior to July 2013, during a discussion, A3 is said to have told A4 to A7 that the deceased could be eliminated with the aid of henchmen, for which, A7 is said to have replied that the deceased could be eliminated with the aid of A8, A9 and PW12. However, this aspect was not referred to by PW12 in his confession, which is elicited in the cross examination of PW12. In the earliest statement, he would state that he came to know about the incident through A8, which is contrary to the deposition where he claims personal knowledge of the same. In any case, this aspect is not corroborated by any other evidence.

(b) A3's participation in the conspiracy meetings wherein A5 agreed to engage A7 and others provided Dr.Subbiah gave 50% share. This is spoken to by PW53, whose evidence cannot be believed, as discussed earlier. There is no other evidence on this aspect.



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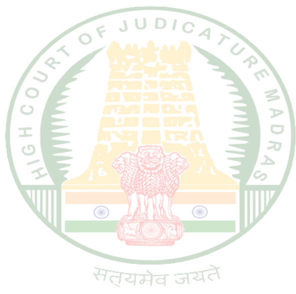
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(c) Participation in the first conspiracy meeting also has not been established by the prosecution. The fact that he showed the pictures of the deceased, sought to be proved by PW4 and PW5, also has not been established in view of our discussion rejecting the evidence of PW4 and PW5.

(d) The transfer of the sum of Rs.5,50,000/- to A5: This aspect has been established by the prosecution. However, this circumstance cannot be said to be incriminating in the light of the evidence of DW2 and the artificiality in the evidence of PW37, a chance witness and totally unreliable.

e) The phone calls made by A3 to the other accused which also have not been established by the prosecution as the Call Detail Records have not been properly exhibited and proved. As discussed earlier, PW45's evidence does not prove the CDRs.

**(iv) The overt act attributed to A4:**



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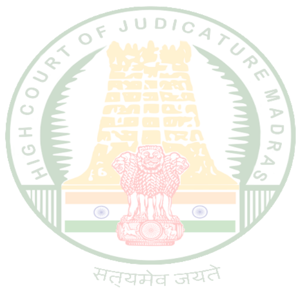

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A4 is said to have participated in the first two meetings in July and called A3 over phone during the second meeting in the last week of July 2013. In this regard, P.W.12's evidence is unreliable as we have discussed above. Further P.W.13 who says that she saw A4 during the second week of 2013 and enquired about her husband and came to know that it was A4 who enquired about the d eceased, when the occurrence was telecast on Television and A4's picture was shown. However, we find that P.W.13 had admitted in the cross examination that she had not told the Police about seeing A4 immediately and she told them only on 02.10.2013. It is also admitted that this statement of P.W.13 dated 02.10.2013, reached the Court only on 06.05.2015 which makes her version highly doubtful. Therefore, A4's involvement in the conspiracy also cannot be accepted.

**(v) The overt act attributed to A5:**

(a) As regards A5, the *overt acts* listed by the prosecution are that, A5 participated in the conspiracy meetings in the 1st and 2nd weeks of July 2013;



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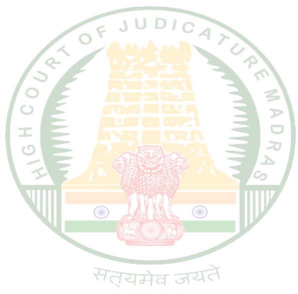
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and that he had received a sum of Rs.1,50,000/- from A1 and sum of Rs.5,40,000/- from A3, who in turn transferred Rs.6,50,000/- totally to DW2 in various instalments.

(b) In our view as discussed earlier, none of the circumstances have been proved by the prosecution including the CDRs. In all these aspects as regards the role played by A3 and A5, we are left with only the evidence of PW12. PW12's evidence with regard to two conspiracy meetings is unreliable, since, it is an improvement from his original statement given before the police. That apart, the corroborative evidence sought to be relied upon by the prosecution is of no value. Therefore, besides, PW12 being unreliable, there is no corroboration. Hence, we are of the view that the conspiracy has not been established by the prosecution against these accused.

**(vi) The overt act attributed to A6:**



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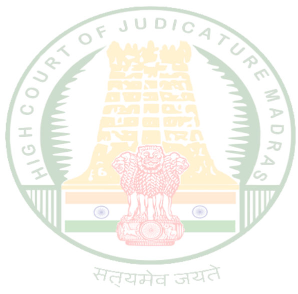
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(a) As regards A6, he is also said to have participated in the conspiracy meetings prior to July 2013 conducted to discuss the elimination of the deceased.

(b) A6 is said to be an accused in the criminal complaint which was lodged when the deceased was alive and subsequently registered as an FIR in Ex.P150. This circumstance alone in our view could not lead to an inference of conspiracy.

(c) The fact that DW2 handed over cash to A6 who in turn handed over Rs.1,50,000/- to A8 to A10 is sought to be established through the evidence of PW37, which cannot be believed, as discussed earlier.

(d) In addition, A6 is said to have given an extra judicial confession to PW7, who admittedly was never close to A6. PW7 has deposed in his evidence that he had spoken to A6 twice or thrice earlier, before he met him at Koyambedu bus stand. Further, there was no reason for A6 to confess to



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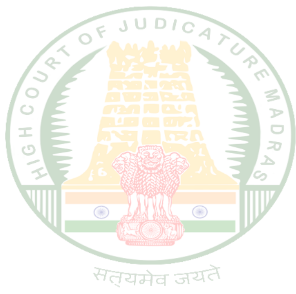
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PW7 and state about A5's promise to give him Rs.10,00,000/- for killing the deceased. Further, as discussed earlier, this aspect has not been corroborated by any other evidence.

(e) PW57 had admitted that in the alteration report [Ex.P161], he had not mentioned the name of A6-Yesurajan. He had further admitted that in none of the confession statements of A7 to A9, there is any reference to A6. Thus, we are of the view that the prosecution has also failed to establish A6's involvement in the conspiracy.

**(vii) The overt act attributed to A7:**

(a) As against A7, besides his attending the conspiracy meetings, the phone calls, which have not been established, he is said to have had close acquaintances with A8, A9 and A10 (PW12). His acquaintance with A8 to A10 is sought to be established firstly through the evidence of PW8, who had seen A7 along with the assailants near R.A.Puram on 14.08.2013.



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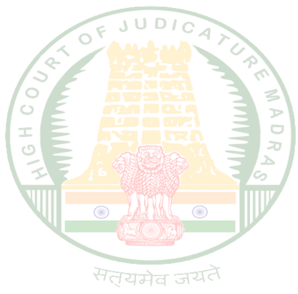
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(b) It is PW8's version that on 14.08.2013, he happened to meet A7 along with A8, A9 and PW12 near a sweet stall in R.A.Puram and when he asked A7 as to why he was standing there, A7 is said to have smiled and said to him that it was because of 'Subbiah's matter'. He also learnt from TV news and from newspapers that the assailants were the people whom he met along with A7. He did not disclose this aspect to anyone. His evidence is that he knew the accused and out of fear he did not disclose it to anybody. On 12.12.2014, he was called by PW5 to Anjugramam and thereafter both went to Kannimadam and at that time he told the police as to what happened. To a specific query, he stated that he did not tell the police the reason for the delay in giving the statement. He would further state in the cross examination that when he went to Kannimadam on 12.12.2014 along with PW5 he never expected the police to be there.

(c) Firstly, if A7 had come along with the assailants and failed in the attempt to cause the death of the deceased he would not be stating the reasons for his presence to outsiders to the conspiracy. Besides the evidence



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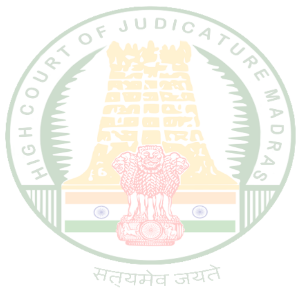
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being inherently improbable, no value can be attached to his evidence in the absence of a plausible explanation, either by him or the investigating officer for the delay in the examination. In our view this witness has also been introduced by the prosecution to create a circumstance against the accused.

(d) The association of A7 with the alleged assailants is sought to be established by yet another circumstance, which is spoken to by PW33. PW33 had stated that he had borrowed a certain sum of money from A7 and since he could not repay the amount, A7 threatened and forced him through A8, A9 and PW12 to execute a sale deed in favour of one Raja. The xerox copy of the sale deed was marked as Ex.P40 by the prosecution. PW33 does not state that A8 signed as a witness in the sale deed. We cannot infer from the xerox copy of the sale deed alone that A8 signed as a witness and hence this document in our view does not advance the prosecution case to show the association of A8, A9 and PW12 with A7. Further, it is the admitted case that PW33 was not known to A8, A9 and PW12 earlier. No Test Identification Parade was conducted to identify the accused.



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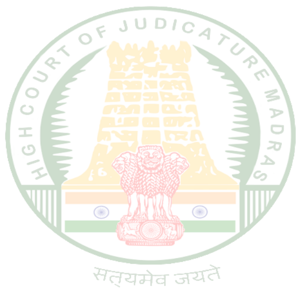
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(e) Another document is marked as Ex.P41 which is a cash receipt and this is also a xerox copy which indicates that the said Raja to whom PW33 had allegedly sold the property, had received Rs.38,50,000/- from one Damodaran and Krishnan for having sold the said property. A7 is said to have signed as a witness. However, PW33 does not speak about this aspect. In any case, PW33 has nothing to do with the said receipt. Neither Raja nor Damodaran / Krishnan who had allegedly paid money to Raja were examined by the prosecution. PW33 was examined on 10.02.2014. Further, PW12 the approver, admitted that he has not spoken about these transactions in his first confession. Even assuming that A7 was associated with A8, A9 and PW12, the circumstance in isolation would be of no avail to the prosecution.



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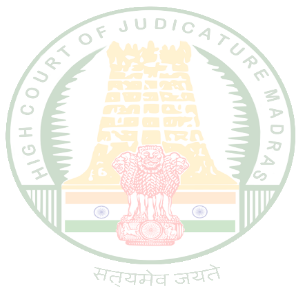
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**(viii) The overt act attributed to A8 and A9:**

A8 and A9, according to the prosecution, besides being part of the conspiracy, are the assailants. The conspiracy has not been established either by direct evidence or by any of the circumstances for the reasons stated above. Nevertheless, if participation of A8 and A9 with PW12 in the occurrence is established, then, A8 and A9 would be liable to be punished for the offence of murder. The prosecution has relied upon the following witnesses and circumstances to establish the involvement of A8, A9 and A10 (PW12).

(a) The eyewitnesses PW2 and PW3, besides the evidence of the approver (PW12).

(b) The evidence of PW54-Neeru of Truth Labs, PW25-Leela Natarajan, President of Shreshta Subhashree Apartments, Investigating officers and Ex.P155-Pendrive containing the CCTV footage of the occurrence.

(c) Ex.P157-report of PW54, who compared the gait appearances of the individuals found in Ex.P155-Pen drive and in the demonstration video,



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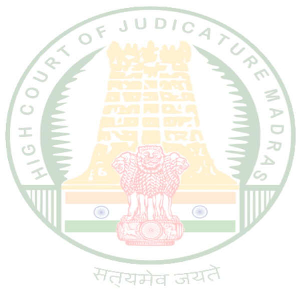
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which was captured in the police camera and stored in M.O.34-CD and captured from the camera in PW25's Apartment and stored in M.O.14-CD.

(d) arrival of A8, A9 and A10 (PW12), to Chennai on 12.09.2013, spoken to by PW36, the purchase of bike, spoken to by PW29, transportation of the bike spoken to by PW35 and PW36 and the repair of the bike spoken to by PW26 on the day of occurrence.

(e) Stay of A8, A9 and A10 (PW12) at Aruna Lodge from 13.09.2013 to 14.09.2013 spoken to by PW27-Room Boy and PW28-Manager.

(f) A8 and PW12 meeting PW34, the Secretary of the deceased, one hour prior to the occurrence at the hospital.

25. Before we discuss the evidence of the eyewitnesses, we may refer to the electronic evidence let in by the prosecution:

**(a) Ex.P155:**

(i) PW54, was working as the Deputy Director (Digital Forensics) in a private lab called the 'Truth Lab'. M.O.9 is the hard disc that was seized from the Shreshta Subhashree apartments, where PW25 was the Association



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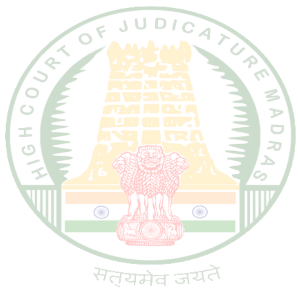
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President. M.O.9 was sent for forensic examination to the Government Forensic Science Laboratory for analysis. However, the hard disc was returned as the forensic science lab found that the files could not be opened without the DVR. The relevant document of the forensic science lab was marked as Court Document i.e, Ex.C5.

(ii) The forensic science department returned the hard disc on 23.10.2013 to the Court. Thereafter, on 10.03.2014, the investigating officer addressed a letter to the learned XXIII Metropolitan Magistrate, Saidapet, stating that the accused had acted and demonstrated as to how they committed the murder, which was recorded by a digital video camera and a CCTV camera at the scene of the occurrence and that the incident that was captured in the CCTV camera stored in a hard disc may be sent to Truth Labs, with a request to find out if the accused involved in the murder and in the demonstration video, are the same.



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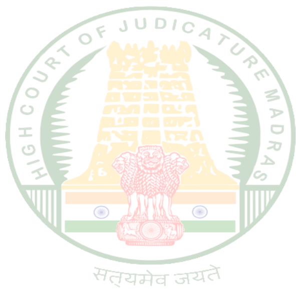

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(iii) The learned XXIII Metropolitan Magistrate, Saidapet, acceded to the request and forwarded the hard disc-M.O.9 and two CDs viz., M.O.34 and M.O.14 along with two photographs of the accused, with the following query.

> "Whether the accused involved in the murder (i.e.) video motion recorded by the CCTV camera in hard-disc S.No.9VP8CCVV and the persons shown in model video recording are same?"

These communications have been marked as Ex.C1 series.

(iv) PW54 had compared these two videos and given a report stating that the gait pattern of the individuals found in M.O.9-hard-disc is similar to the gait pattern of individuals found in the demonstration video. This report was marked as Ex.P157 and the said report is dated 28.05.2014.

(v) In the report PW54 had stated that she had taken a backup from the hard disc-M.O.9 in an USB pen drive using the menus and options provided in the 'embedded software provided in the hard disc'. However,



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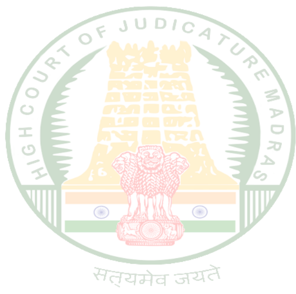

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PW54 had not sent the said backup copy along with the report in May 2014. During the course of trial, the prosecution filed an application before the trial Court, praying for a direction to PW54 to produce the backup pen drive, with sufficient copies. This application was allowed on 05.08.2019 and after the order was communicated to PW54, she had handed over the backup pen drive marked as Ex.P155 with 10 copies to the investigating officer with a 65-B certificate, marked as Ex.P156. The details that we have just narrated above, are found in Ex.P156.

(vi) Ex.P155 does not contain the entire footage. It only contains the portions where the accused are said to be seen. This portion corresponds to the time chart prepared by the investigating officer and sent along with the requisition made to the Court for sending the hard disc and other documents for gait analysis. In our view in the absence of complete footage, Ex.P155, which is truncated, cannot be used by the prosecution, as a document to prove the involvement of the accused.



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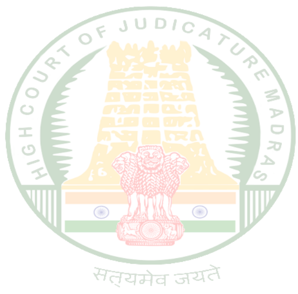
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(vii) That apart, Ex.P155 was not shown to the eyewitnesses viz., PW2 and PW3 to identify the accused in the said recording. The explanation offered by the prosecution for not showing the video in Ex.P155 to the eyewitnesses or PW12 for identifying the accused is that Ex.P155 was collected after the deposition of PW2, PW3 and PW12. This explanation, in our view is unacceptable as the prosecution could have always recalled the witnesses to identify the assailants in Ex.P155.

(viii) Further, when the defence made an application seeking cloned copies of M.O.9, PW54 could not make cloned copies, since according to her, there was a mechanical failure in the hard disc.

(ix) It may be relevant to point out here that PW57 had stated in the cross examination that after the occurrence and before collecting the hard disc from Shreshta Subhashree apartments, he copied the footage on a pen drive through a Constable by name Parthiban, who was not examined by the prosecution. This pen drive was neither sent to the Court nor marked by the



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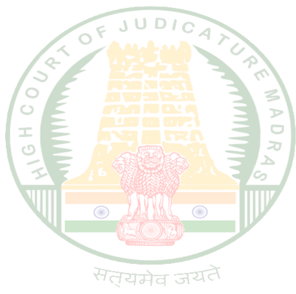
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prosecution. However, strangely, when the forensic science lab could not retrieve the video due to the absence of DVR, it is not known as to how, PW54 alone could take a backup copy, that too a truncated version and store it in Ex.P155. The fact that cloned copies also could not be made, raises doubt as to whether PW54 had taken the backup copy from the hard disc, especially in the light of PW57's evidence that he was in possession of a pen drive taken earlier, immediately after the occurrence.

(x) Another aspect that we may note is that PW25, does not speak about any investigating officer making a request for DVR. Having collected the hard disc from PW25, the DVR ought to have been obtained from her and given to the forensic science laboratory for them to retrieve the images from the hard disc. PW25 as stated above has not spoken about any request made to her for DVR. Strangely, PW56, the investigating officer had stated that he asked for the DVR from the Watchman of Shreshta Subhashree apartments and he had told him that the DVR was scrapped. The said Watchman was not examined by the prosecution.



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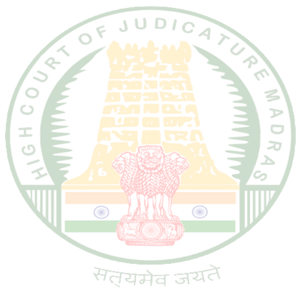
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(xi) For all the above reasons, we are of the view that it is impossible to hold from Ex.P155 that A8, A9 and PW12 were involved in the assault. The prosecution was aware that Ex.P155 even otherwise, cannot be used to prove the involvement of A8, A9 and PW12 as it is not clear enough for such identification and that is probably the reason why they chose to compare the gait pattern with the demonstration video.

**(b) Ex.P157:**

(i) Though arguments were made on either side, as to the value that could be attached to the opinion of PW54, who had stated in her report [Ex.P157] that the gait pattern of the individuals found in two videos is the same, we would like to address the issue of the legal validity of the demonstration video. Reference was made to the provisions of Identification of Prisoners Act and Section 54-A of the Cr.P.C.



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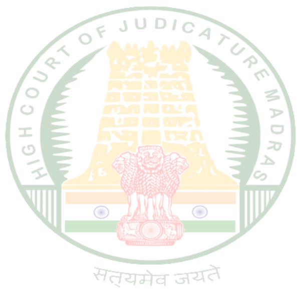
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(ii) It is the submission of the learned defence counsel that the accused ought not to have been asked to reenact the occurrence without the permission of the Magistrate. The learned Special Public Prosecutor submitted that Section 4 of the Identification of Prisoners Act empowers the police to take measurements, even without the orders of the Magistrate.

(iii) We have our own doubt as to whether the police can ask the accused to reenact the occurrence with or without the orders of the Magistrate. We would examine this question as well. However, even assuming that the police have the power to do so, in a case like this where the demonstration and the comparison of gait patterns would offer evidence, the investigating officer ought to have obtained the orders of the Magistrate. In this regard, we rely upon the following observations of the ***Hon'ble Supreme Court in Prakash v. State of Karnataka,*** reported in **(2014) 12 SCC 133.**

> "28. Assuming Prakash's fingerprint was in fact obtained by D'Souza, it was clearly not given voluntarily, but perhaps unwittingly and in what seems to be a deceitful manner. To avoid any suspicion regarding the



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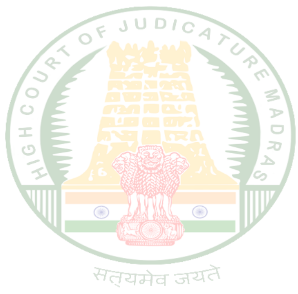
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genuineness of the fingerprint so taken or resort to any subterfuge, the appropriate course of action for the Investigating Officer was to approach the Magistrate for necessary orders in accordance with section 5 of the Identification of Prisoners Act, 1920. In Mohd. Aman v. State of Rajasthan [(1997) 10 SCC 44] this Court referred to the possibility of the police fabricating evidence and to avoid an allegation of such a nature, it would be eminently desirable that fingerprints were taken under the orders of a Magistrate. We may add that this would equally apply to the creating evidence against a suspect. This is what this Court had to say:

> "8.....Even though the specimen fingerprints of Mohd. Aman had to be taken on a number of occasions at the behest of the Bureau, they were never taken before or under the order of a Magistrate in accordance with Section 5 of the Identification of Prisoners Act. It is true that under Section 4 thereof police is competent to take fingerprints of the accused but to dispel any suspicion as to its bona fides or to eliminate the possibility of fabrication of evidence it was eminently desirable that they were taken before or under the order of a Magistrate."

29. The Karnataka High Court has taken the view[State v. B.C.Manjunatha, ILR 2013 Kar 3156] that it is not incumbent upon a police officer to take the assistance of a Magistrate to obtain the fingerprints of an accused and that the provisions of the Identification of Prisoners Act are not mandatory in this regard. However, the issue is not one of the provisions being mandatory or not – the issue is whether the manner of taking fingerprints is suspicious or not. In this case, we do not know if Prakash's fingerprint was taken on 7th November, 1990 as alleged by him or later as contended by the Investigating Officer, or the circumstances in which it was



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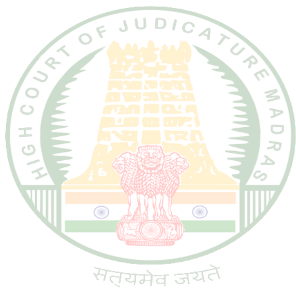

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taken or even the manner in which it was taken. It is to obviate any such suspicion that this Court has held it to be eminently desirable that fingerprints are taken before or under the order of a Magistrate. As far as this case is concerned, the entire exercise of Prakash's fingerprint identification is shrouded in mystery and we cannot give any credence to it."

(iv) However, the most relevant question is whether the investigating officer has a right to ask the accused to reenact the occurrence and as to whether the evidence relating to reenactment, would be admissible in law.

(v) In ***State of Bombay vs. Karthi Kalu Oghad and Others,*** reported in **AIR 1961 SC 1808**, a eleven-Judge Bench of the Hon'ble Supreme Court held that when an accused person is compelled to give his specimen handwriting, signature, impressions of his fingers, palms, or foot to the investigating officer on the orders of the Court for comparison, it would not amount to testimonial compulsion violating Article 20 (3) of the Constitution of India.



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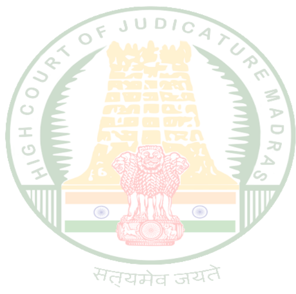
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(vi) In that case, the Hon'ble Supreme Court made a distinction between statements that reveal personal knowledge of relevant facts and evidence that assists the investigating officer or the Court to prove a fact. Therefore, in that case, it was held that asking for impressions of fingers, palms, or feet and specimen handwriting, would not be included within the expression 'to be a witness'.

(vii) In a case where the Hon'ble Supreme Court was considering whether an accused can be directed to give his voice sample, the Hon'ble Supreme Court held that the giving of voice sample would not fall under the expression "to be a witness" as it does not convey information about his personal knowledge which could incriminate him. The relevant observations of the Hon'ble Supreme Court in ***Ritesh Sinha v. State of Uttar Pradesh and Another,*** reported in **(2013) 2 SCC 357**, read as follows:

> "27. Applying the test laid down by this court in Kathi Kalu Oghad which is relied upon in Selvi, I have no hesitation in coming to a conclusion that if an accused person is directed to give his voice sample during the course of investigation of an offence, there is no violation of his right under Article 20(3) of the Constitution. Voice sample is like finger print impression,



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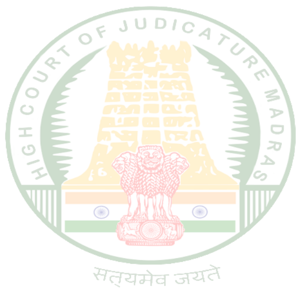
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signature or specimen handwriting of an accused. Like giving of a finger print impression or specimen writing by the accused for the purposes of investigation, giving of a voice sample for the purpose of investigation cannot be included in the expression "to be a witness". By giving voice sample the accused does not convey information based upon his personal knowledge which can incriminate him. A voice sample by itself is fully innocuous. By comparing it with tape recorded conversation, the investigator may draw his conclusion but, voice sample by itself is not a testimony at all. When an accused is asked to give voice sample, he is not giving any testimony of the nature of a personal testimony. When compared with the recorded conversation with the help of mechanical process, it may throw light on the points in controversy. It cannot be said, by any stretch of imagination that by giving voice sample, the accused conveyed any information based upon his personal knowledge and became a witness against himself. The accused by giving the voice sample merely gives 'identification data' to the investigating agency. He is not subjected to any testimonial compulsion. Thus, taking voice sample of an accused by the police during investigation is not hit by Article 20(3) of the Constitution."

(viii) The learned Special Public Prosecutor relied upon the judgment of the Hon'ble Supreme Court in ***Ritesh Sinha v. State of UP*** [AIR 2019 SC 3592], in support of his submission that though there is no specific statutory provision relating to the power of the police or Magistrate to direct the



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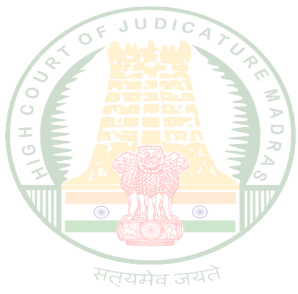
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accused to demonstrate the occurrence, the police or the Magistrate would be empowered to do so. In the said case, the Hon'ble Supreme Court held that in the absence of explicit provision, the Magistrate had the power to order a person to give voice sample for the purpose of investigation. But in our view, obtaining voice sample is different from asking the accused to reeanact the occurrence. Asking the accused to reenact the occurrence would amount to personal testimony. By reenacting the occurrence, the accused conveys information based on his personal knowledge and thereby becomes a witness against himself. It is not merely an identification data. For instance, if the accused is simply asked to walk, which would enable comparison of his gait appearance, he does not convey any information based on personal knowledge and it would be in the realm of 'identification data'. However, reenacting the occurrence certainly leads to revelation of facts within personal knowledge. Therefore, we are of the view that asking the accused to reenact the occurrence would amount to becoming a witness against himself, thereby offending Article 20(3) of the Constitution of India. That apart, the reenacting of the occurrence would amount to giving a



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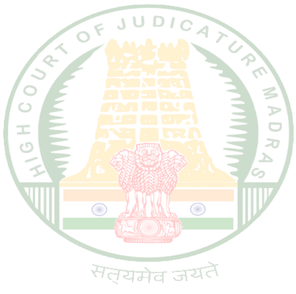

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confession to the police or a confession while in police custody. Therefore, it has no evidentiary value and it cannot be used for comparison with the video containing the recording of the actual occurrence, if any.

(ix) Most importantly, on facts we find that PW12 admits that the police officers had shown him the video even before they were asked to reenact the occurrence. The relevant portion reads as follows:

> "அன்றைக்கு பார்த்தபிறகு அதன் பின்னிட்டு அவ்வாறு டாக்டர் சுப்பையா வெட்டப்படும் காட்சியை டி.வி.யில் எப்போதாவது பார்த்தேனா என்றால் டி.வி.யில் பார்க்கவில்லை போலீசார் என்னிடம் வாக்குமூலம் பெற்றபிறகு காண்பித்தார்கள் என்ன தேதியென்றால் 29.01.2014 தேதியன்று இரவு காண்பித்தார்கள். அந்த வீடியோ பதிவை நான் எதில் பார்த்தேன் என்றால் போலிசாரின் லேப்டாப்பில் காண்பித்தார்கள். அதுகுறித்து என்னிடம் போலீசார் வாக்குமூலம் ஏதேனும் பெற்றார்களா என்றால் இல்லை. அதன் பின்னிட்டு போலீசார் சம்பவம் எவ்வாறு நடைபெற்றது என்பதை நடித்துக் காண்பிக்கச் சொன்னார்களா என்றால் ஆமாம்."

(x) Therefore, in our view, besides the other infirmities in the comparison of gait patterns, which we have listed below, we find that the demonstration video is of no value, as it is hit by Sections 25 and 26 of the



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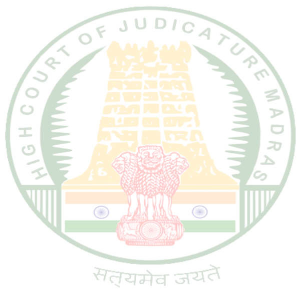
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Indian Evidence Act. It is no doubt true that the prosecution can obtain voice samples, specimen handwriting, etc., including asking the accused to stand or walk for comparison, as that by itself would not incriminate the accused. But, since reenacting the occurrence tends to incriminate the accused, it is hit by Sections 25 and 26 of the Indian Evidence Act, apart from infringement of Article 20(3) of the Constitution of India.

(xi) For the above reasons, we are of the view that the demonstration video is inadmissible. Therefore, the comparison said to have been made by PW54 consequentially would have no value and has to be discarded.

26. (i) That apart, there are other infirmities as well, which may not be relevant in the light of the observations made above. For the sake of narration, we would like to record them.

(a) PW54, has not compared the gait pattern of the entire body and has restricted only to the foot pattern.



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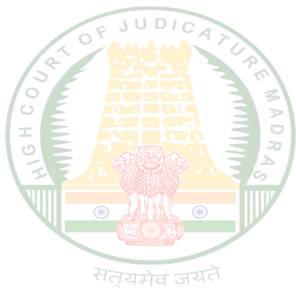
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(b) There is a doubt with regard to the storage of the backup copy on a pen drive which is incomplete and truncated.

(c) Science with regard to gait analysis is not absolute and there cannot be an assumption that the gait pattern is unique for a person.

(d) Above all, we find that in the absence of proof that the DVR was really scrapped, as we have discussed above, the action of the investigating officer in sending the hard disc - M.O.9 to a private lab even with the approval of the Magistrate, also raises suspicion. This suspicion is not without basis. The Hon'ble Supreme Court had on more than one occasion, commented adversely upon the investigating officer in seeking the assistance of private labs for investigation purposes and more particularly, in the case of 'Truth Labs'. It would be useful to refer to the observations of the Hon'ble Supreme Court at paragraph Nos.12 and 42 of the judgment in ***Mariam Fasihuddin and Another v. State by Adugodi Police Station and Another***, reported in **2024 SCC OnLine SC 58**, which are extracted hereunder.

> "12. In addition to the State FSL Report, the supplementary charge sheet also mentioned a report



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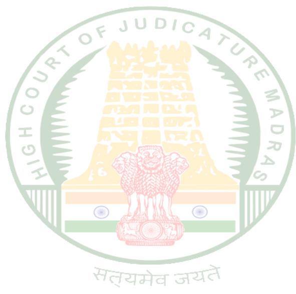
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> dated 15.07.2013 purportedly obtained by Respondent No.2 from a private agency, known as, 'Truth Lab'. This report opined that the signatures on the passport application did not signify a close resemblance with the specimens of Respondent No. 2's signatures.
>
> 42. We also fail to understand the reliability of the material based on which the investigating agency or the Trial Magistrate could form a prima facie opinion concerning the allegation of forgery of signatures of Respondent No. 2. As observed earlier, the State FSL report does not substantiate these allegations. In our opinion, a paid report obtained from a private laboratory seems to be a frail, unreliable, unsafe, untrustworthy and imprudent form of evidence, unless supported by some other corroborative proof. It is painful to mention that Respondent No. 2 has not produced any other substantive proof, nor has the investigating agency obtained any such material in compliance with the Trial Magistrate's order for further investigation. The basis on which the Trial Magistrate formed a prima facie opinion, in the absence of such supporting evidence is, therefore, beyond our comprehension."

Similar observations were made by the Hon'ble Supreme Court in ***Canara Bank v. United India Insurance Co. Ltd., and Others,*** *reported in* **2020 (3)**



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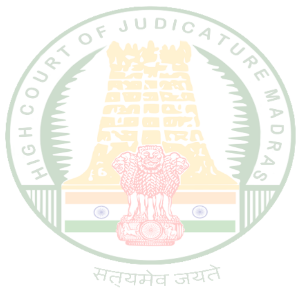
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**SCC 455** and by this Court in **Crl.R.C. (MD) No.35 of 2016** ***[K.Venkateshwaran v. S.Baskaran and 3 others decided on 17.02.2021].*** Both cases relate to obtaining an opinion from this particular lab and the Hon'ble Supreme Court and this Court has deprecated the said practice.

(ii) That apart, it is seen that no camera was shown in the Rough Sketch (Ex.P163) and Observation Mahazar (Ex.P3) in Shreshta Subhashree apartments. But a camera was shown in the other apartment nearby viz., CEEBROS Apartments. Even assuming that the investigating officer had inadvertently missed out the mentioning of cameras in Shreshta Subhashree apartments, the prosecution has not proved as to why the footage from the other Apartment was not collected. The explanation that the footage was not available is *mere ipsi dixit* of the investigating officer and no person/witness from the said CEEBROS Apartment was examined by the prosecution.

(iii) Considering the fact that the cloned copies could not be produced, because of alleged mechanical failure; the fact that the investigating officer



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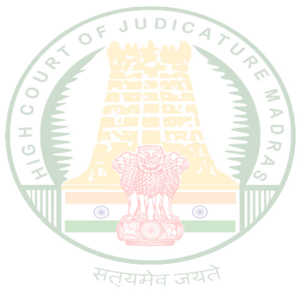
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had copied the footage on a pen drive and had not produced it before the Court; the version of PW54 that a truncated backup of the footage was taken being doubtful; besides the act of the investigating officer in referring it to a private lab and the 'not so good' reputation of the said private lab; that the prosecution did not establish that the DVR which was called for by the Government Lab was scrapped and for the other reasons mentioned above, we are of the view that no reliance can be placed either on Ex.P155-pen drive or Ex.P157-report of PW54.

**<u>Evidence of PW2 and PW3 (Eyewitnesses):</u>**

27. (i) Coming to the evidence of the eyewitnesses, viz., PW2 and PW3, we have to once again express our surprise with regard to the way in which the investigating officers have conducted themselves in such a sensitive case.

(ii) According to the prosecution, PW2 was first examined on 16.09.2013. His statement reached the Court along with the final report on



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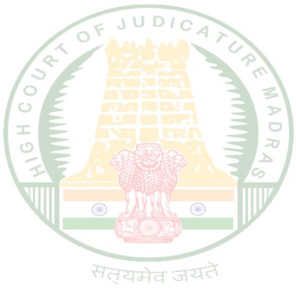
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06.05.2015. PW57 recorded the second statement of PW2 on 06.02.2014, which reached the Court on 13.02.2014.

(iii) Likewise, though PW3's first statement was recorded on 25.01.2014 and the second statement was recorded on 06.02.2014, both the statements were sent to the Magistrate only on 13.02.2014.

(iv) PW2 had stated in his first statement on 16.09.2013 that he came to know from TV News that the deceased had died. However, the deceased died on 23.09.2013. When asked about this, in the cross examination, he gave an evasive reply, which reads as follows:

> "முதல் முறையாக போலீஸ்சாரிடம் நான் டாக்டர் சுப்பையா இறந்து போய் விட்டதாக சொன்னது சரியான தகவல் இல்லை என்றால் அது பற்றி என்னால் சொல்லமுடியாது."

(v) Section 164 Cr.P.C., statement of PW2 was also recorded by the Magistrate. In the said Cr.P.C., statement, he had stated that he went to the



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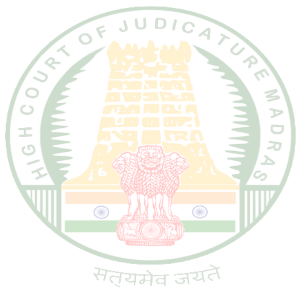
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police station ten to fifteen days after the occurrence, which is elicited in the cross examination.

(vi) Be that as it may. We find that, the fact that the first statement of PW2 was not despatched to the Court immediately, would have a bearing in this case. The second statement dated 06.02.2014 was however sent to the Court on 13.02.2014. The explanation offered by the prosecution for not sending his earlier statement is that since, a lawyer was involved in the occurrence and an incident happened immediately after the occurrence, which led to suspension of a Sub Inspector of Police, it had caused fear and panic in the minds of the investigating officers and therefore, by oversight the statement of PW2 was not despatched to Court. That apart according to the prosecution there were frequent transfers of the investigating officers which led to this error.



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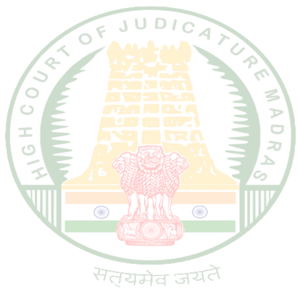
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(vii) However as submitted by the defence counsels the statements of some of the witnesses and documents were sent to the Court immediately. The details are as follows:

| ***S.No.*** | ***Name of Witness*** | ***Role in the Crime Scene*** | ***Date of recording Sec.161 Cr.P.C. Statement*** | ***Sent to Court*** |
|---|---|---|---|---|
| 1 | Venkatesalu Eye Witness | Watchman at Sreshta Subashri Apartment | 14/09/2013 | 23/09/2013 |
| 2 | Chakravarthi Eye Witness | Watchman to the house owned by Mr.Ramalingam | 14/09/2013 | 23/09/2013 |
| 3 | Raja Eye Witness | Auto Driver (Auto Stand) | 14/09/2013 | 23/09/2013 |
| 4 | Ramalingam (called 108 Ambulance) | Resident (Watchman Chakravarthi informed him about the incident) | 14/09/2013 | 23/09/2013 |
| 5 | Ramu | Iron Shop (Witness to Observation Mahazar – Blood Stained Soil, Sketch) | 14/09/2013 | 23/09/2013 |
| 6 | Vinayagam | Fruit Shop (Witness to Observation Mahazar – Blood Stained Soil, Sketch) | 14/09/2013 | 23/09/2013 |
| 7 | Ex.P163 | Rough Sketch | 14/09/2013 | 23/09/2013 |
| 8 | Ex.P3 | Observation Mahazar | 14/09/2013 | 23/09/2013 |
| 9 | Ex.P159 | Inquest Report | 23/09/2013 | 23/09/2013 |



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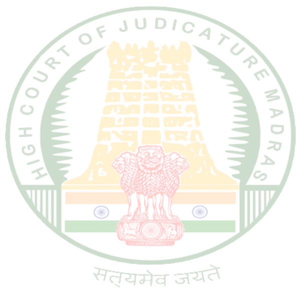

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We perused the original record and confirmed that the facts stated by the defence counsel in the above tabular column are correct.

(viii) Thus, the explanation offered by the prosecution is not acceptable. This in our view raises substantial doubt with regard to the veracity of PW2's evidence. Further, amongst the statements that were sent immediately to Court, are the statements of three eyewitnesses recorded on 14.09.2013 itself viz., Venkatesalu, Chakravarthy and Raja and none of them have been examined by the prosecution. Ramalingam another important witness who is said to have called PW2 to his house to pick up his old Air Conditioner, was also examined on 14.09.2013.

(ix) It is no doubt true that the prosecution has the choice to dispense with the examination of some witnesses, if the witnesses are unreliable. However, in this case, eyewitnesses who were examined on the same day and whose statements were despatched to the Court immediately were dispensed with and witnesses examined later and statements despatched with



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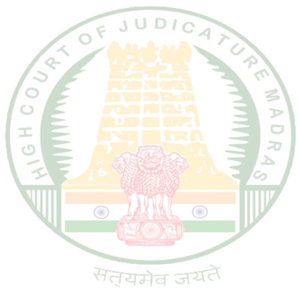
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enormous delay have been preferred by the prosecution, for the reasons best known to them. Similarly, PW3's statement was recorded only on 25.01.2014 and reached the Court on 13.02.2014. It is pertinent to point out here that the accused A7 to A9 were arrested on 29.01.2014 and the statement of this witness was dispatched to Court two weeks after that.

(x) Considering the fact that the investigating officers had the tendency to create the evidence as noted above, we have no hesitation in holding that PW2 and PW3, whose statement under Section 161 of the Cr.P.C., were either recorded belatedly or sent belatedly to the Court and neither the witnesses nor the investigating officers have given acceptable explanation for the same, their testimony becomes unreliable. We could have discarded the evidence of these two witnesses for this reason alone. However, we propose to examine the deposition of these two witnesses, to ascertain if their evidence is otherwise trustworthy and believable.

28. First let us deal with the evidence of PW3.



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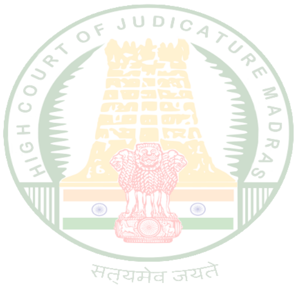
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(i) **PW3** is a chance witness and the explanation offered by him for his presence is that he came to the HDFC Bank to update his KYC [Know Your Customer] details in the bank. It is his version that while going to the bank, he met one Gopinath, who was his friend and while they were chatting, they saw all the accused with the backpack, discussing about the involvement of A5 and the promise given by the other accused to pay them each Rs.10 lakhs. The relevant portion of his evidence in this regard reads as follows:

> "அப்போது 8வது எதிரி முருகன் எதிரி ஐயப்பனை பார்த்தேன் ஏலே ஐயப்பா இன்று நாம் டாக்டரை களைஎடுக்கணும் போன தடவை மாறி சொதப்பிடகூடாது அப்படி முடித்து விட்டால் வக்கீல் வில்லியம்சும், நம்ம டாக்டர் ஜேம்ஸ்ம் போரில், பாசில் ஆகியோரிடமிருந்து ரூ.50 லட்சம் வாங்கி கொடுப்பார்கள். நாம் சிங்கப்பூர் போய் செட்டில் ஆகி விடலாம் என்று பேசி கொண்டு இருந்தார்கள்."

(ii) We have discussed this portion of PW3's evidence in the earlier part of the judgment, wherein, we found that artificiality is writ large in this version. The conspirators would not be discussing the minute details, relating to the likely reward and the names of the conspirators in a public



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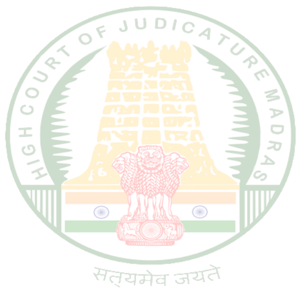
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place. PW3, therefore appears to be an instrument in the hands of the prosecution to echo their case. It cannot be said that the version of a witness has to be accepted, even if it does not appeal to common sense.

(iii) We are convinced that PW3's version in this regard is a result of poor and unimaginative tutoring by the prosecution. That apart, Gopinath, PW3's friend has not been examined by the prosecution. There is no explanation for his non examination. This would assume significance because according to PW3 the said Gopinath knew the deceased and it was he who identified the deceased after the attack. The explanation offered by PW3 for not reporting the incident immediately is that he did not want to create unnecessary trouble for himself and that it was the said Gopinath, who persuaded him to report to the police during the third week of January 2014. As stated earlier, his statement was recorded on 25.01.2014. However, it was despatched to the Magistrate only on 13.02.2014. PW3's explanation for not reporting earlier and thereafter reporting to the police on



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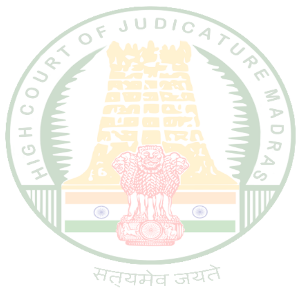
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a particular day would have atleast been corroborated if the said Gopinath has been examined.

(iv) Further, PW3, a chance witness has not given plausible explanation for his presence at the scene of the occurrence at 5.00 p.m., especially on a Saturday, when the banks would not be normally functioning at that time. When the genesis itself is doubtful in as much as, PW3 was examined belatedly; and his friend Gopinath, who had admitted that he know the deceased was not examined by the prosecution; it would be highly unsafe to rely upon the testimony of PW3.

**Test Identification Parade:**

(v) The Test Identification Parade was also not conducted in accordance with the guidelines laid down by this Court in several decisions. PW51, the learned Magistrate had deposed in his evidence that all three accused viz., A8, A9 and PW12 were made to stand together along with the dummies. He had also admitted that all three accused were different in their



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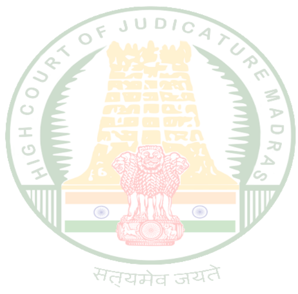
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physical structure, appearances and complexion. However, if all of them were made to stand together with the dummies, then the requirement to have identical people as dummies is obviously violated. The dummies could not have been identical with all three accused. Ex.P151, the report would indicate that in the identification parade, the accused were made to stand along with 29 other dummies and the witnesses were made to identify the accused. This procedure adopted by the learned Magistrate is palpably wrong, in the light of his admission that all three accused were different in their complexion, physical structure and appearance.

(vi) The learned Magistrate ought not to have mixed all three accused along with 29 other prisoners and conducted the Test Identification Parade. The very object of Test Identification Parade is defeated by such a procedure adopted by the learned Magistrate. The learned Magistrate ought to have mixed the accused along with the prisoners who are of the same age group and have the same physical features such as size, weight, colour, beard, scars, marks, bodily injuries etc., and conducted it separately for each of the



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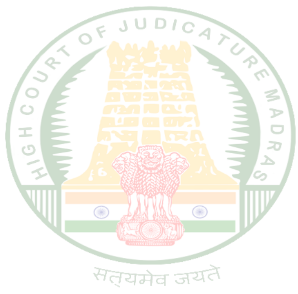
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accused. This would ensure that the Test Identification Parade is not just an empty formality. The Hon'ble Supreme Court in ***Gireesan Nair v. State of Kerala***, reported in **(2023) 1 SCC 180,** held as follows:

> "33. It is significant to maintain a healthy ratio between suspects and nonsuspects during a TIP. If rules to that effect are provided in Prison Manuals or if an appropriate authority has issued guidelines regarding the ratio to be maintained, then such rules/guidelines shall be followed. The officer conducting the TIP is under a compelling obligation to mandatorily maintain the prescribed ratio. While conducting a TIP, it is a sine qua non that the non suspects should be of the same age group and should also have similar physical features (size, weight, color, beard, scars, marks, bodily injuries etc.) to that of the suspects. The concerned officer overseeing the TIP should also record such physical features before commencing the TIP proceeding. This gives credibility to the TIP and ensures that the TIP is not just an empty formality (Rajesh Govind Jagesha v. State of Maharashtra and Ravi v. State [(1999) 8 SCC 428].
>
> 34. It is for the prosecution to prove that a TIP was conducted in a fair manner and that all necessary measures and precautions were taken before conducting the TIP. Thus, the burden is not on the defence. Instead, it is on the prosecution (Rajesh Govind Jagesha v. State of Maharashtra [(1999) 8 SCC 428])."

(vii) PW56 had admitted in his evidence that during the examination of the witnesses he had showed them the CCTV footage, which was stored



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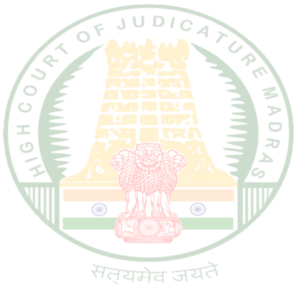
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on his mobile phone. The relevant portion of PW56's evidence reads as follows:

> “இவ்வழக்கில் மேற்படி 4 எதிரிகளை கைது செய்வதற்கு முன்பு அவர்களின் புகைப்படம் ஏதேனும் என் வசம் இருந்ததா என்றால், செல்போனில் சம்பவ காட்சியை படம் பிடித்து வைத்திருந்தேன். சாட்சிகள் வினோத் குமார் மற்றும் முத்துவேல் ஆகியோரை விசாரித்தபோது, அவ்வாறு செல்போனில் இருந்த படம் அவர்களுக்கு காண்பிக்கப்பட்டு விசாரணை செய்யப்பட்டதா என்றால், காண்பித்து தான் விசாரண செய்தேன்.”

(viii) Apart from the video, it is also admitted that the investigating officer had pictures of the accused. This fact also makes the Test Identification Parade, suspicious. In ***Gireesan Nair's*** case [cited supra], this position is reiterated in the following manner.

> “30. It is a matter of great importance both for the investigating agency and for the accused and a fortiori for the proper administration of justice that a TIP is held without avoidable and unreasonable delay after the arrest of the accused. This becomes necessary to eliminate the possibility of the accused being shown to the witnesses before the test identification parade. This is a very common plea of the accused, and therefore, the prosecution has to be cautious to ensure that there is no scope for making such an allegation. If, however, circumstances are beyond control and there is some delay, it cannot be said to be fatal to the prosecution. But reasons should be given as



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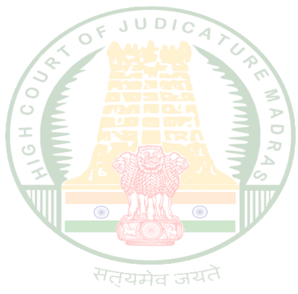
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to why there was a delay (Mulla and Anr. v. State of U.P.[AIR 2010 SC 942] and Suresh Chandra Bahri v. State of Bihar [1995 SCC (CRI) 60]).

31. In cases where the witnesses have had ample opportunity to see the accused before the identification parade is held, it may adversely affect the trial. It is the duty of the prosecution to establish before the court that right from the day of arrest, the accused was kept "baparda" to rule out the possibility of their face being seen while in police custody. If the witnesses had the opportunity to see the accused before the TIP, be it in any form, i.e., physically, through photographs or via media (newspapers, television etc…), the evidence of the TIP is not admissible as a valid piece of evidence (Lal Singh and Ors v. State of U.P. and Suryamoorthi and Anr. v. Govindaswamy and Ors. (1989) 3 SCC 24).

32. If identification in the TIP has taken place after the accused is shown to the witnesses, then not only is the evidence of TIP inadmissible, even an identification in a court during trial is meaningless (Shaikh Umar Ahmed Shaikh and Anr. v. State of Maharashtra). Even a TIP conducted in the presence of a police officer is inadmissible in light of Section 162 of the Code of Criminal Procedure, 1973 (Chunthuram v. State of Chhattisgarh [(2020) 10 SCC 733] and Ramkishan Mithanlal Sharma v. State of Bombay [1 (1955) 1 SCR 903])."

In the light of the law in this regard, the identification parade loses its significance and the consequent identification in Court would have no meaning at all.



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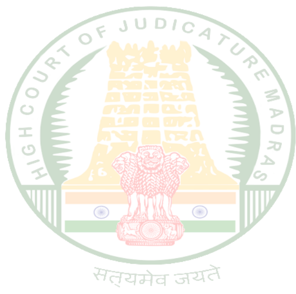
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(ix) Similarly, since the identification parade was conducted for PW2 and PW3, what applies for PW3 would also apply to PW2 also, in so far as the Test Identification Parade is concerned.

(x) The belated examination of PW3 by the investigating officer in January 2014 and the poor explanation given by him for not reporting to the police, besides the above infirmities makes his version totally unreliable.

**29. Evidence of PW2:**

(i) PW2 claimed that he was doing the business of trading in second hand house old articles. PW2's version is that he came to the first main Road, R.A.Puram where the occurrence took place on 14.09.2013 at about 5.00pm on a call made by one Ramalingam who wanted to sell his old Air Conditioner machine. There he enquired with one Chakravarthy, the watchman of the building where the said Ramalingam resided; that at that time, he saw a red-coloured car standing in front of the place where he had parked his TATA Ace vehicle; that a person who was aged about 50 years



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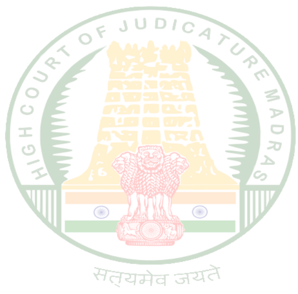
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(deceased) came to take the said red-coloured car; that at that time three persons aged about 30 years came there; that one person cut the deceased with the knife; that another person came from the right side and took the knife from the first person and attacked the deceased on his neck, head and shoulder and right forearm; that the first person, who attacked the deceased was A8 and the second person was A9 and the third person was A10 (PW12). PW2 had also identified the knife-M.O.1.

(ii) PW2 had not stated about the Registration number of his TATA Ace vehicle in any of his earliest statements to the police, his statement under Section 164 Cr.P.C., given to the learned Magistrate or in his deposition. However, for the first time in the cross examination, he would state about the Registration number. Throughout, he had taken the stand that the vehicle belonged to him and he had also stated so before the police. However, for the first time, in the cross examination he had stated that the vehicle belonged to one Dhanapal and to a specific query as to why he did not disclose the same to the police, he would state that he did not state it



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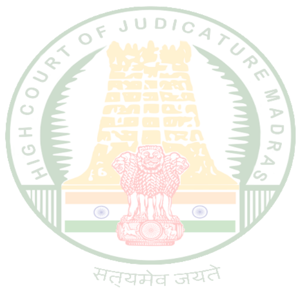
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since they did not ask. In his deposition he had stated that he told one of the assailants, "brother please don't cut". However, he had not stated so in any of the earlier statements. That apart, PW12 also states this aspect for the first time in his deposition. This aspect in our view has been introduced only to highlight PW2's version.

(iii) Therefore, the improvement is material which would make his version doubtful. He had not produced any other record to show that he had come to meet one Ramalingam, who wanted to sell his old Air Conditioner. Though the said Ramalingam was examined during the investigation, for reasons best known to the prosecution, he was not examined during the trial. That apart, PW2, is said to have enquired about the whereabouts of Ramalingam's house from the Watchman Chakravarthy. The said Chakravarthy was also examined during the investigation on 14.09.2013. Strangely, he has also not been examined by the prosecution.



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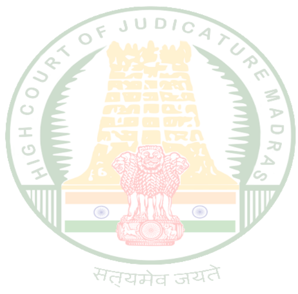

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(iv) It is no doubt true that non-examination of certain witnesses would not by itself render the version of the other witnesses unreliable. However, in this case, we are of the view that the prosecution ought to have examined both Ramalingam and Chakravarthy during trial as their statements were recorded immediately, after the occurrence and also despatched to the Court immediately. Therefore, non examination in the facts of the case is certainly fatal to the prosecution case, as this Court has to necessarily draw an inference that their examination would falsify PW2's version. In this regard, it would be useful to refer to the following observations of the Hon'ble Supreme Court in ***Narain and two others v. State of Punjab***, reported in **AIR 1959 SC 484.**

> "If a material witness has been deliberately or unfairly kept back then a serious reflection is cast on the propriety of the trial itself and the validity of the conviction resulting from it may be open to challenge. The test whether a witness is material is not whether he would have given evidence in support of the defence. The test is whether he is a witness "essential to the unfolding of the narrative on which the prosecution is based". It is not however that the prosecution is bound to call all witnesses who may have seen the occurrence and so duplicate the evidence. But apart from this, the prosecution should call all material witnesses."



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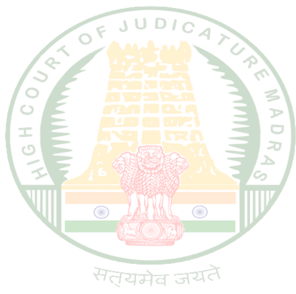
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(v) A chance witness, whose presence is not natural at the scene of the occurrence, ought to be appreciated in a cautious manner, especially when the statements have not been despatched promptly, thereby creating a doubt as to whether he was examined on that date.

(vi) Neither PW2 nor PW3 had identified the assailants in the CCTV footage. Both PW2 and PW3 are chance witnesses. That apart, PW3 was examined belatedly. Though the prosecution claims that PW2 was examined on 16.09.2013, there is nothing on record to confirm the said statement as the statement was sent to the Magistrate with the final report on 06.05.2015. That apart, PW2 had stated in the first statement that Dr.Subbiah died which also confirms that the statement was not recorded on 16.09.2013. Above all PW2 in his Section 164 Cr.P.C. statement had stated that he went to the police station ten or fifteen days after the occurrence, which is contrary to the date mentioned in the Section 161 Cr.P.C., statement.



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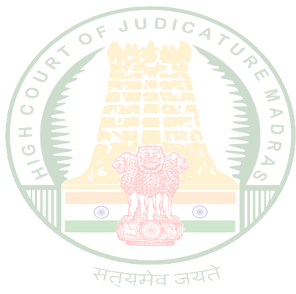
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(vii) In view of the unsatisfactory explanation for not sending the statement immediately and for belated examination and in the light of non-examination of the said Ramalingam and Chakravarthy to prove the presence of PW2, though they were examined as early as on 14.09.2013 throws substantial doubt with regard to the testimony of PW2.

(viii) While appreciating the evidence of chance witness, in ***Jarnail Singh and others v. State of Punjab,*** reported in **(2009) 9 SCC 719**, the Hon'ble Supreme Court had held as follows:

> “21. In Sachchey Lal Tiwari v. State of U.P. (2004) 11 SCC 410, this Court while considering the evidentiary value of the chance witness in a case of murder which had taken place in a street and passerby had deposed that he had witnessed the incident, observed as under:
>
> > "If the offence is committed in a street only passer- by will be the witness. His evidence cannot be brushed aside lightly or viewed with suspicion on the ground that he was a mere chance witness. However, there must be an explanation for his presence there."



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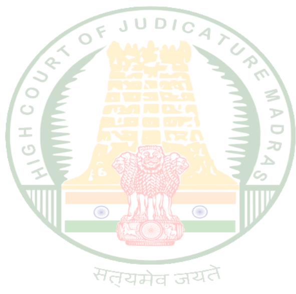
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The Court further explained that the expression `chance witness' is borrowed from countries where every man's home is considered his castle and every one must have an explanation for his presence elsewhere or in another man's castle. It is quite unsuitable an expression in a country like India where people are less formal and more casual, at any rate in the matter of explaining their presence.

22. The evidence of a chance witness requires a very cautious and close scrutiny and a chance witness must adequately explain his presence at the place of occurrence (Satbir v. Surat Singh (1997) 4 SCC 192; Harjinder Singh v. State of Gujarat (2004) 11 SCC 253; Acharaparambath Pradeepan & Anr. v. State of Kerala (2006) 13 SCC 643; and Sarvesh Narain Shukla v. Daroga Singh and Ors. (2007) 13 SCC 360). Deposition of a chance witness whose presence at the place of incident remains doubtful should be discarded (vide Shankarlal v. State of Rajasthan (2004) 10 SCC 632).

23. Conduct of the chance witness, subsequent to the incident may also be taken into consideration particularly as to whether he has informed anyone else in the village about the incident. (vide Thangaiya v. State of Tamil Nadu (2005) 9 SCC 650). 16. Gurcharan Singh (PW-18) met the informant Darshan Singh (PW-4) before lodging the FIR and the fact of conspiracy was not disclosed by Gurcharan Singh (PW-18) and Darshan Singh



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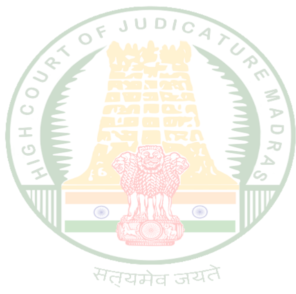
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(PW-4). The fact of conspiracy has not been mentioned in the FIR. Hakam Singh, the other witness on this issue has not been examined by the prosecution. Thus, the High Court was justified in discarding the part of the prosecution case relating to conspiracy. However, in the fact situation of the present case, acquittal of the said two co-accused has no bearing, so far as the present appeal is concerned."

(ix) Similarly, in ***Puran v. State of Punjab****, reported in* ***(1952) 2 SCCC 454,*** *the Hon'ble Supreme Court has held as follows:*

"4. At the trial Rameshwar (P. W. 7) a priest of Ballabgarh, and Kishan Chand, P. W. 8, a boy of 10 or 11 years of age, gave evidence that 'churan' was administered by Puran to the two unfortunate boys in their presence. Their evidence did not impress the Sessions Judge and he declined to place any reliance on it. The High Court accepted it and remarked that the Sessions Judge unnecessarily viewed it with suspicion by being unduly impressed by the fact that in the inquest report the name of Puran was a subsequent interpolation. We have been taken through the evidence of these two witnesses and have no hesitation in endorsing the opinion of the trial Judge that they are not witnesses of truth. Rameshwar stated as follows:

"About 5 months ago one afternoon at about 3 P. M., I was going to my house from the bazar and in the way I saw a snake charmer displaying his show in front of Shambu Dayal's



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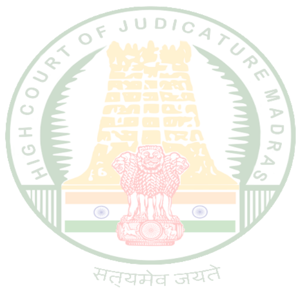

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> house and when I was there I heard someone uttering in a 'loud voice' 'Abe-khale churan'. I turned round and I saw Puran accused giving 'churan' to Tek Chand & Rup Chand, sons of Mulchand. Two or three other little boys were also there. Puran placed his 'churan' on the palms of these boys and they raised palms of their hands and took it near their mouth and then I passed on. I saw all this when passing my way and I did not stay there."

In cross-examination he admitted that there was a dispute between him and the accused's father about a wall built by him on a site claimed by the father of the accused. The witness thus cannot be considered to be quite a disinterested person. He said that he voluntarily went to the police and made his statement there at about 6-15 or 6-30 P. M. His name, however, is not mentioned in the inquest report which was completed by 9-30 P. M. The courts below have found that even the name of the accused was not mentioned therein but was subsequently interpolated in it. In these circumstances it could not be said that the Sessions Judge was in error when he rejected the evidence of this witness and described him as a chance witness. <u>Such witnesses have the habit of appearing suddenly on the scene when something is happening and then of disappearing after noticing the occurrence about which they are called later on to give evidence.</u> The witness did not see that 'churan' was eaten by the boys in his presence, he admitted the presence of a number of women and children at the time when the accused gave 'churan' to the two boys. [emphasis supplied]



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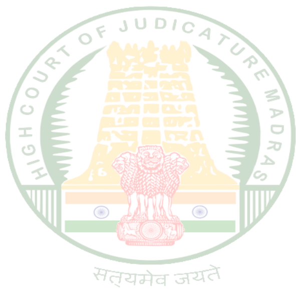
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The above observation would not only apply to the evidence of PW2 and PW3, but also to other witnesses that we have discussed earlier.

(x) In the light of the above infirmities, we are unable to place any reliance on these two witnesses, even for the purpose of corroboration of the approver's evidence. It is a settled law that one weak witness cannot corroborate the evidence of another weak witness.

30. (i) The other circumstances relating to the accused purchasing the bike, bringing the bike to Chennai, staying in Chennai and repairing it also in our view have not been conclusively established by the prosecution.

(ii) PW26 the mechanic, for instance, was able to give the Registration number of the two-wheeler which was taken by the assailants for repair on the day of occurrence. PW26 would admit that he had not kept any record of the vehicles that came for repair and it was out of memory that he remembered the Registration number. He would also admit in the cross examination that he would not be able to recall the Registration number of



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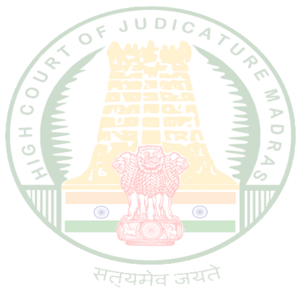

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the other vehicles which had come for repair on the same day. No Test Identification Parade was conducted and the accused were shown to him and therefore, his evidence is also suspicious.

(iii) Likewise, the evidence of the Manager of Aruna Lodge-PW28 had admitted that an Arrival Register was maintained by them, which was not seized by the Investigating Officer. However, only the extract of the Lodge Ledger was marked as M.O.17. In the Bill, there is no reference to the address or any other detail of A8, who is said to have signed in the document. There is no comparison of signature with the admitted signature. No Test Identification Parade was conducted for PW28-Manager of Aruna Lodge.

(iv) Likewise, PW27, the Room Boy of Aruna Lodge identifies the accused for the first time in Court, six years after their alleged stay in the hotel. No Test Identification Parade was conducted, even in respect of this



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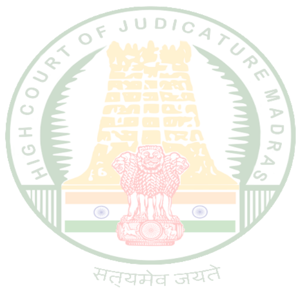
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witness. Therefore, these documents in our view, do not conclusively establish the stay of the accused in the said Lodge at the relevant time.

(v) Though according to the prosecution, the bike was transported on 12.09.2013. Ex.P39 would reveal that a sum of Rs.5,000/- was paid on 13.09.2013. PW36, the Proprietor of Udaya Travels would state that though there is a record to establish the travel of A9, there is no contemporaneous record to show that the vehicle was transported. No Test Identification Parade was conducted for PW36 as well. The seizure of rear view mirrors of the vehicle from him in our opinion would be of no significance, as there is nothing to connect the bike with the rear view mirror except for *mere ipsi dixit* of PW56. The bike was not seized by the investigating officer. That apart, the witnesses from Aruna Lodge have also not spoken about the bike.

(vi) In any case, all the surrounding circumstances would be insignificant in the light of the above discussion on the evidence of PW2 and PW3.



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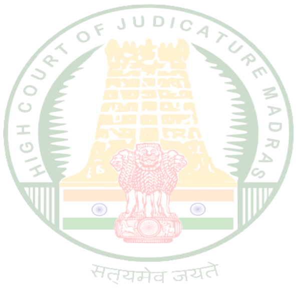
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(vii) The sequence of events during the course of investigation would reveal that PW1 when he made the complaint had made allegations suspecting the involvement of not only A1 to A4 but also an old lady-Annapazham, the mother of A1. From the beginning, the investigation had proceeded on the basis of the involvement of A1 to A4. However strong the suspicion is against the accused A1 to A4, the investigating officer cannot proceed only on the assumption and the suspicion expressed by the victim / defacto complainant. They ought to have conducted the investigation in a fair and unbiased manner.

31. (i) Be that as it may, according to the prosecution, A7 to A9 and PW12 were arrested on 21.09.2013 at a bus stop near Jain College, Thuraipakkam, Chennai. PW56 would state that the accused were arrested based on secret information and on the basis of the further statements of PW1, PW9 and PW13. The relevant portion reads as follows:

> "*.....29.01.2014ஆம் தேதியன்று சாட்சிகளான மோகன், சாந்தி மற்றும் கோபிநாத் ஆகியோர்களை தனித்தனியாக*



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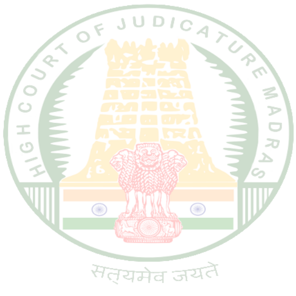

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விசாரித்து மறு வாக்குமூலம் பெற்றேன். அதே நாளில் எனக்கு கிடைத்த ரகசிய தகவல்களின் அடிப்படையிலும் சாட்சிகளின் மறுவாக்குமூலங்களின் அடிப்படையிலும் இவ்வழக்கில் கண்ட எதிரிகள் டாக்டர் ஜேம்ஸ் சதீஸ்குமார், முருகன், செல்வபிரகாஷ், ஐயப்பன் ஆகியோர்களை தகவலின் பேரில் அடையாளம் தெரிந்து ஒக்கியம் துரைப்பாக்கம் ஜெயின் கல்லூரி பஸ் ஸ்டாப் அருகில் வைத்து 29.01.2014ஆம் தேதி மாலை சுமார் 6.00 மணியளவில் கைது செய்து....."

(ii) PW56 had not stated as to how he had come to the conclusion that A7 to A9 and PW12 were involved in the occurrence. Both PW1 and PW13 would state that they came to know on 29.01.2014 morning that A8, A9 and PW12 who were henchmen of A7 were involved in the attack on the deceased. Both of them do not disclose how they came to know about the involvement of these accused. Surprisingly, PW56 accepts the statements of PW1 and PW13 given on 29.01.2014 and coincidentally all of the accused were available in Chennai on that day for him to effect the arrest. After the arrest, witnesses were examined, without any link or explanation as to how they were discovered, connecting the assailants to the occurrence and also the other accused with the conspiracy.



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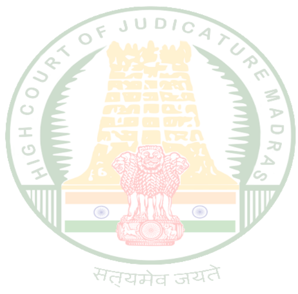
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(iii) The Special Public Prosecutor would submit that by virtue of Section 125 of the Indian Evidence Act, the investigating officer cannot be compelled to disclose as to whence he received information. According to Oxford Dictionary, 'whence' means ***'from where'***. Therefore the investigating officer cannot be compelled to disclose the source of information. However, the investigating officer is bound to disclose the nature of the information which according to him is the further statement given by PW1 and PW13. Neither PW1 nor PW13 had stated as to the nature of information obtained by them, which prompted them to make the further statement to the police about the involvement of A7 to A9 and PW12. In any case, PW1 and PW13 do not enjoy any such privilege. Further, the submissions of the defence that PW1 and PW9 had conducted a private investigation and the investigating officers were mere puppets in their hands, cannot be ignored in the light of the above evidence of PW1, PW9 and PW56.



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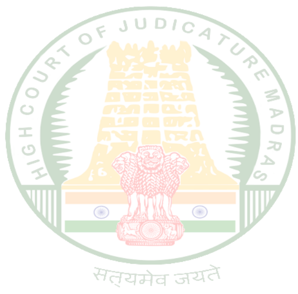

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(iv) It is also admitted that the would-be son-in-law of the deceased took over as DCP, Mylapore Range and Abiramapuram Police Station fell under his jurisdiction. Order transferring him was issued on 06.02.2014 and according to the prosecution he took charge only on 13.02.2014. The said Mr.Balakrishnan married the daughter of the deceased in January 2015, which is admitted by PW13.

(v) Though, it is stated by the prosecution that he had no role in the investigation and it was conducted in a fair and just manner, the manner in which the witnesses have been introduced and their statements sent belatedly and some of it sent with the final report, the submission of the defence that the investigation was not fair, cannot be brushed aside. However, we once again reiterate that though the allegations of bias have been made, our appreciation of the evidence adduced by the prosecution was on its own merits without being influenced by the allegation of bias.



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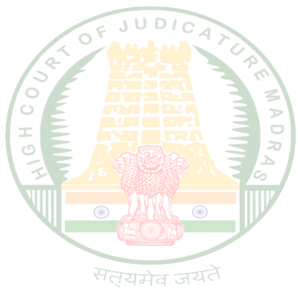
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(vi) Of course, in the case of PW12 as we have already referred to the allegations of bias, his belated examination and the other circumstances did have a bearing while appreciating his evidence. PW12, whose evidence as such suffers from several infirmities pointed above, in our view cannot be even looked into in the absence of corroboration, though we are conscious of the legal position that in certain cases, corroboration can be dispensed with. The corroboration, in the facts of the case, must be in respect of all material facts and unimpeachable. If the witnesses or the circumstances that are relied upon by the prosecution are either unreliable or weak, it would hardly be considered as corroboration for PW12's evidence.

(vii) We have no hesitation to hold in the light of the discussion above that the corroboration offered by the prosecution is totally unreliable so as to record a conviction of guilt of the accused. The manner in which the witnesses who overheard minute details in conspiracy meetings, keeping it to themselves for a long time and appearing from nowhere before the investigating officers and the manner in which a witness witnessed the



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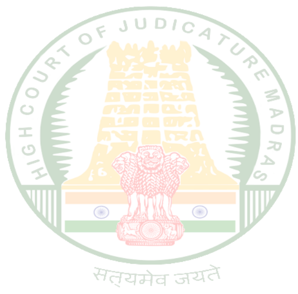
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money transactions, without any plausible explanation as to how the investigating officer discovered their existence and their knowledge of the facts, the belated recording of their statements, the allegation of bias, all make us conclude that the finding of guilt cannot be recorded, although, there is a grave suspicion against some of the accused. The defence has established that there is more than reasonable doubt in the prosecution case.

32. To sum up,

(a) Though the defence had established the reasonable likelihood of bias in the act of grant of pardon to PW12, it would not have the effect of eschewing his evidence. However, it would definitely have a bearing while appreciating his evidence. Therefore, it requires more circumspection and caution than that is usually required for an approver's evidence, while appreciating PW12's evidence. Unless PW12's evidence is corroborated in such a manner as to render his story believable, PW12's evidence would not be of any avail to the prosecution.



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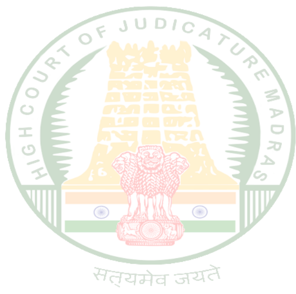

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(b) The evidence of witnesses, who spoke about the conspiracy viz., PW4, PW5 and PW53 as stated above, is of no avail to the prosecution for the reasons stated above.

(c) PW2 and PW3, the eyewitnesses also are unreliable for the reasons stated above and it would be highly unsafe to accept their testimony.

(d) PW12's evidence by itself had inherent improbabilities in view of the improvements made by him in the chief examination from what was stated in the confession given to the police. In the absence of any acceptable unimpeachable evidence to corroborate his version, it would be highly unsafe to render a finding of guilt by relying upon PW12's evidence alone.

(e) The tendency of the investigating officer to create evidence in the form of witnesses to suit their case as discussed above, also makes it highly unsafe to render a finding of guilt.



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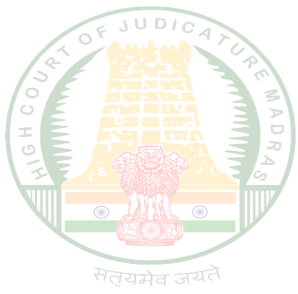

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(f) The evidence adduced on the side of the prosecution at best leads to a grave suspicion as against some of the accused and does not pass the test of proof beyond reasonable doubt. It is trite that suspicion howsoever high, cannot take the place of proof.

(g) For the above reasons, we are of the view that the prosecution has failed to establish its case beyond reasonable doubt. Therefore, the appellants/accused are entitled to benefit of doubt.

33. (i) Now that we have analysed all the evidences available before us and after due consideration of the submissions of all the counsels, have come to the conclusion that the prosecution could not establish their case beyond reasonable doubt, we would also like to touch upon the manner in which the trial Court had sentenced 7 of them to death penalty.

(ii) In its judgment, after recording that none of the accused had argued for a lesser punishment, the trial Court had proceeded to rely upon the decisions in ***State of Karnataka Vs. Raju*** reported in ***AIR 2007 SC***



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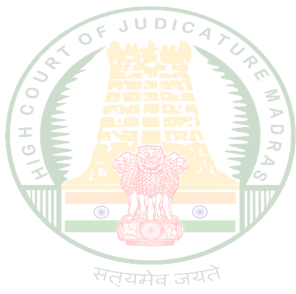
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***3225; Mukesh and Another Vs. State for NCT of Delhi and Others*** reported in ***AIR 2017 SC 2161; Dayal Singh and Others Vs. State of Uttaranchal*** reported in ***(2012) 8 SCC 263; State of Karnataka Vs. Krishnappa*** reported in ***(2000) 4 SCC 75*** and ***Purushottam Dashrath Borate Vs. State of Maharashtra*** reported in ***(2015) 6 SCC 652,*** for imposition of appropriate sentence by the Court. Thereafter, it had also placed reliance on ***Bachan Singh's case (supra), Machhi Singh's case (supra), Ram Singh Vs. Sonia and Others*** reported in ***(2007) 3 SCC 1, Purushottam Dashrath's case (supra)*** and ***C.Muniappan Vs. State of Tamil Nadu*** reported in ***(2010) 9 SCC 567,*** to substantiate that in cases of heinous crime, which is a rarest of rare case, infliction of death penalty would be justifiable. However, we fail to understand as to the fact that the guidelines imposed in ***Bachan Singh's case (supra)***, which requires the Court to weigh the "aggravating circumstances" against the "mitigating circumstances" and which legal ratio has been consistently followed in all subsequent decisions of the Hon'ble Supreme Court, was failed to adhere to by the trial Court. Rather, the trial Court had curiously made an observation



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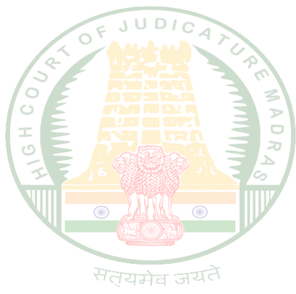
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that there were no mitigating circumstances in this case to show leniency. While holding so, the trial Court lost sight of the defense case that the assailants in this case did not have any previous antecedents and all of them had decent educational qualifications.

(iii) In the case of ***Sundar @ Sundarrajan (supra),*** the Hon'ble Supreme Court, while placing reliance on ***Bachan Singh's case (supra),*** had observed that life imprisonment would not be a choice, only when the sentencing aim of reformation can be said to be unachievable. There is absolutely no deliberation whatsoever between the "aggravating circumstances" against the "mitigating circumstances".

(iv) The trial Court had also placed reliance on the decision in ***Mohammad Ajmal, Mohammad Amir Kasab @ Abu Mujahid Vs. The State of Maharashtra*** reported in ***(2012) 9 SCC 1*** and attempted to justify the award of death sentence to the accused, who where first time offenders. In the said case, the crime relates to an act of terrorism of the infamous



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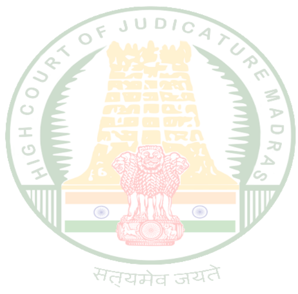
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shooting incident in Mumbai, where the accused had killed 166 innocent people, apart from injuring 238 others. It is in this given set of facts that the death penalty was awarded to the accused, even though he was a first time offender. No comparison can be drawn from this case to the present case we are dealing with for sentencing the first time offenders to death penalty. Per contra, had the trial Court further analysed the decisions referred to by us commencing from ***Bachan Singh to Sundar @ Sundarrajan,*** by deliberating on the "mitigating circumstances", possibly the sentence of death penalty would not have crossed its mind. The trial Court seems to have already made up its decisions to impose death penalty without such discussion and without a proper analysis, as held in ***Bachan Singh's case (supra)*** and all the subsequent decisions of the Hon'ble Supreme Court following the same.

(v) We thought it fit to touch upon this aspect also to highlight the callous approach of the trial Court in not only failing to appreciate the evidences before it, but also disregarded the settled legal propositions for



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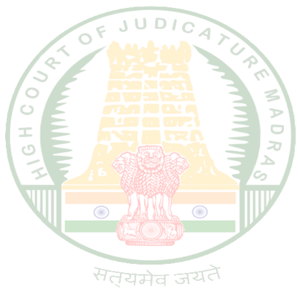
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imposition of death penalty. Having said so, we do not intend to elaborate any further on this aspect.

34. In the result, all the appeals in Crl.A.Nos.262, 454, 455, 456, 457, 458, 459, 460 and 462 of 2022 are allowed. The conviction and sentence imposed upon the appellants in S.C.No.348 of 2015 dated 04.08.2021 on the file of the learned I Additional Sessions Judge, Chennai, are set aside. The appellants are acquitted of all charges and are directed to be released forthwith, unless their presence is required in connection with any other case. The fine amount, if any, paid by the appellants shall be refunded. Bail bonds, if any, executed shall stand discharged.

35. The reference in R.T.No.2 of 2021, in terms of Section 366 Code of Criminal Procedure for execution, is answered accordingly.

36. We hereby record our appreciation for the valuable assistance rendered, by the learned defence counsels, ably assisted by their respective



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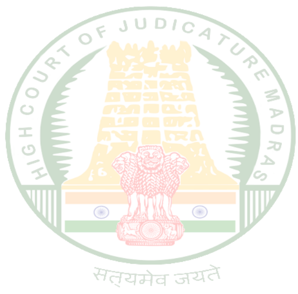
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junior counsels and by the learned Special Public Prosecutor who were all meticulous in their preparation and in their presentation of facts and law.

**(M.S.R., J.) (S.M., J.)**
**14.06.2024**

**List of documents:**
Ex.C6: Letter dt. 30.10.2018 from Ms.M.S.Sameena, II Addnl. Sessions Judge, VIII Additional Sessions City Civil Court, Chennai, to the Registrar General, High Court, Madras.

**(M.S.R., J.) (S.M., J.)**
**14.06.2024**

Index: Yes/No
Speaking/Non-speaking order
Neutral Citation: Yes/No.
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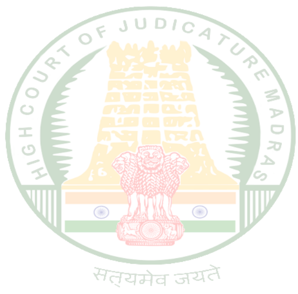


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To

1. The 1st Additional Sessions Judge,
   Chennai.

2. The Inspector of Police (Law and Order),
   E4 Abiramapuram Police Station,
   Chennai – 600 018.

3. The Superintendent of Prisons,
   Central Prison, Puzhal, Chennai.

4. The Public Prosecutor
   High Court of Madras
   Chennai 600 104.



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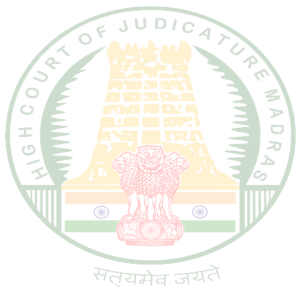

**M.S.RAMESH, J.**
and
**SUNDER MOHAN, J.**

ars

Pre-delivery Common judgment in
R.T. No.2 of 2021 &
Crl.A.Nos.262, 454, 455, 456, 457, 458, 459, 460 and 462 of 2022

14.06.2024



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