

BAIL SLIP

Crl.A.No.1 of 2012 :

Accused No.2, Narayanaswamy @ Narayanan, S/o.Sankarappa Naidu, enlarged on Bail by the Order of this Court dated 31.07.2012 in M.P.No.2 of 2012 in Crl.A.No.1 of 2012.

Crl.A.No.59 of 2012 :

Accused No.3, M.Suresh Babu, S/o.Murugesan and Accused No.8, M.Sukumar, S/o.Mohanraj are enlarged on Bail by the Order of this Court dated 09.07.2012 in M.P.No.2 of 2012 in Crl.A.No.59 of 2012.

Crl.A.No.73 of 2012 :

Accused No.4, Suresh @ Suresh Babu, S/o.Nagalingam, enlarged on Bail by the Order of this Court dated 09.07.2012 in M.P.No.1 of 2012 in Crl.A.No.73 of 2012.

Crl.A.No.108 of 2012 :

Accused No.5, Murali, S/o.Pandurangan, enlarged on Bail by the Order of this Court dated 09.07.2012 in M.P.No.2 of 2012 in Crl.A.No.108 of 2012.

Crl.A.No.169 of 2012 :

Accused No.6, Sundaram, S/o.Manickam, enlarged on Bail by the Order of this Court dated 13.07.2012 in M.P.No.2 of 2012 in Crl.A.No.169 of 2012.

Crl.A.No.18 of 2012 :

Accused No.7, Palani @ Palanikumar, S/o.Krishnan, enlarged on Bail by the Order of this Court dated 09.07.2012 in M.P.No.1 of 2012 in Crl.A.No.18 of 2012.

Crl.A.No.46 of 2012 :

Accused No.9, Arumugam, S/o.Subbarayan, enlarged on Bail by the Order of this Court dated 06.02.2012 in M.P.No.1 of 2012 in Crl.A.No.46 of 2012.

Crl.A.No.77 of 2012 :

Accused No.10, N.Muniyendran, S/o.Narayanan, enlarged on Bail by the Order of this Court dated 14.02.2012 in M.P.No.1 of 2012 in Crl.A.No.77 of 2012.

Crl.A.No.825 of 2011 :

Accused No.11, Palaniyappan, S/o.Palaniyappan, enlarged on Bail by the Order of this Court dated 09.01.2012 in M.P.No.1 of 2011 in Crl.A.No.825 of 2011.

Crl.A.No.52 of 2012 :

Accused No.12, Viji, S/o.Radha Krishnan, enlarged on Bail by the Order of this Court dated 06.02.2012 in M.P.No.1 of 2012 in Crl.A.No.52 of 2012.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgement Reserved on : 18.03.2016
Judgement Pronounced on : 30.03.2016

CORAM

THE HONOURABLE MR.JUSTICE M.JAICHANDREN
AND
THE HONOURABLE MR.JUSTICE S.NAGAMUTHU

Criminal Appeal Nos.825 of 2011
1, 18, 46, 52, 59, 73, 77, 108 and 169 of 2012

Narayanaswamy @ Narayanan [A2]
... Appellant in Cr1.A.No.1 of 2012
1.M.Suresh Babu [A3]
2.M.Sukumar [A8]
... Appellants in Cr1.A.No.59 of 2012
Suresh @ Suresh Kumar [A4]
... Appellant in Cr1.A.No.73 of 2012
Murali [A5]
... Appellant in Cr1.A.No.108 of 2012
Sundaram [A6]
... Appellant in Cr1.A.No.169 of 2012
Palani @ Palanikumar [A7]
... Appellant in Cr1.A.No.18 of 2012
Arumugam [A9]-(Died)
... Appellant in Cr1.A.No.46 of 2012
N.Muniyendran [A10]
... Appellant in Cr1.A.No.77 of 2012
Palaniappan [A11]
... Appellant in Cr1.A.No.825 of 2011
Viji [A12]
... Appellant in Cr1.A.No.52 of 2012

-Versus-

State Rep. by
The Inspector of Police,
R-4, Pondy Bazaar Police Station,
Thiyagaraya Nagar, Chennai 600 017.
[Crime No.424 of 1993]

... Respondent in all Criminal Appeal

Appeals filed under Section 374(2) of the Code of Criminal Procedure against the conviction and sentence passed by the learned III Additional Sessions Judge, Chennai, in S.C.No.119 of 1997 dated 29.11.2011.

For Appellant(s) : Mr.R.John Sathyan for Appellants [A2, A3, A4, A5, A8 and A9] in CrI.A.Nos.1, 46, 59, 73 and 108 of 2012

Mr.S.Madhusudhanan for Appellant [A6] in CrI.A.No.169 of 2012

Mr.V.Bharathidasan for Appellant [A7] in CrI.A.No.18 of 2012

Mr.P.Pandiyaraj for Appellant [A10] in CrI.A.No.77 of 2012

Mr.AR.L.Sundaresan, Senior Counsel for Mrs.AL.Ganthimathi for Appellant [A11] in CrI.A.No.825 of 2011 and Appellant [A12] in CrI.A.No.52 of 2012

For Respondent(s) : Mr.M.Maharaja, APP for respondent/State in all Criminal Appeals

COMMON JUDGEMENT

[Judgment of the court was delivered by S.NAGAMUTHU.J.,]

The appellants are Accused Nos.2 to 12 in S.C.No.119 of 1997 on the file of the learned III Additional Sessions Judge, Chennai. Against all the twelve accused, the trial court framed charges under various penal provisions of Indian Penal code on 06.02.1998. Subsequently, the trial court, after due notice to both parties, altered the charges on 03.08.2011. Thus, all the twelve accused stood charged as detailed below:-

Serial Number of charge	Charge(s) framed against	Charge(s) framed
1	A1 to A12	U/s.147 of IPC
2	A1 to A12	U/s.148 of IPC
3	A1 to A12	U/s.452 of IPC
4	A3	U/s.326 of IPC
5	A8	U/s.326 of IPC
6	A1 to A12	U/s.302 r/w 34 of IPC [Two counts]
7	A1 to A12	U/s.506(ii) of IPC

The 1st Accused was one Mr.Saleem, Son of Khader. He died during trial and, therefore, charges against him stood abated. The Accused Nos.2 to 12 alone faced the trial. The trial court, by Judgement, dated 29.11.2011, convicted all the eleven accused and sentenced them as detailed below:-

Rank of the Accused	Penal provision (s) under which convicted	Sentenced to undergo
A2	U/s.147of IPC	Rigorous Imprisonment for one year
	U/s.452 of IPC	Rigorous Imprisonment for three years and to pay a fine of Rs.1,000/- in default to undergo Rigorous Imprisonment for a further period of three months
	U/s.302 r/w 34 of IPC [Two counts]	Imprisonment for life for each count and to pay a fine of Rs.5,000/- each in default to undergo Rigorous Imprisonment for a further period of six months
	U/s.506(ii) of IPC	Rigorous Imprisonment for three years
A4 to A7 and A9 to A12	U/s.148 of IPC	Rigorous Imprisonment for two years
	U/s.452 of IPC	Rigorous Imprisonment for three years and to pay a fine of Rs.1,000/- each in default to undergo Rigorous Imprisonment for a further period of three months
	U/s.302 r/w 34 of IPC [Two counts]	Imprisonment for life for each count and to pay a fine of Rs.5,000/- each for each count in default to undergo Rigorous Imprisonment for a further period of six months
	U/s.506(ii) of IPC	Rigorous Imprisonment for three years

A3 and A8	U/s.148 of IPC	Rigorous Imprisonment for two years
	U/s.452 of IPC	Rigorous Imprisonment for three years and to pay a fine of Rs.1,000/- each in default to undergo Rigorous Imprisonment for a further period of three months
	U/s.302 r/w 34 of IPC [Two counts]	Imprisonment for life for each count and to pay a fine of Rs.5,000/- each for each count in default to undergo Rigorous Imprisonment for a further period of six months
	U/s.324 of IPC	Rigorous Imprisonment for two years
	U/s.506(ii) of IPC	Rigorous Imprisonment for three years.

Challenging the above said conviction and sentence, A2 to A12 are now before this court with these criminal appeals.

2.0. The case of the prosecution in brief is as follows:- The 1st Accused [Since deceased] Mr.Saleem owned a shop building at No.1, Sali Street, North Uzman Road, Thiagaraya Nagar, Chennai. P.W.1-Mr.Ashokan was in occupation of the said building as a tenant and he was running a shop in the same. P.W.1's brother was also a tenant, under A1, of the adjoining portion in the same building. He was also running a shop in that portion. Both the shops were facing towards North Uzman Road. On the back of these portions, where P.W.1 and his brother were running shops, a dance hall was situated in the same building. A1 was a Dance Director in film industry. A portion in the first floor also was under the tenancy occupation of P.W.1. After six months from the date of commencement of the tenancy, P.W.1's brother handed over the possession of his portion to his brother-in-law [P.W.4] and thus, P.W.4 was running the shop in that portion. In the year 1990, A1 issued a legal notice to P.W.1's brother to vacate the said portion. A reply notice refusing to vacate was issued by his brother.

2.1. A1 also borrowed some amount from P.W.1. There was a dispute in respect of that also. After two years, again, A1 wanted P.W.1 and his brother-in-law to vacate the building and handover the possession to him. P.W.1 and his brother in law refused to handover possession of the shop. On one occasion,

the compound wall and the asbestos sheets of the shops were found damaged. P.W.1 gave a complaint regarding the same to the police [Vide FIR-Ex.P.2]. There was a panchayat held in respect of the said dispute also. Besides P.W.1-Mr.Ashokan, Mr.Murugesan [hereinafter referred as "D1"] and Mr.Anandan [hereinafter referred to as "D2"], P.W.4-Mr.Prabhakaran, one Mr.Jagadeesh participated in the said compromise talks on the side of P.W.1. On the side of A1-Saleem, he himself, A2-Mr.Narayanasamy @ Narayanan and an Advocate and one sand businessman participated. In that compromise talks, A1 insisted that P.W.1 and his brother in law should vacate the premises. No compromise could be arrived at in the panchayat and, therefore, P.W.1 filed cases against the defaulted tenants before the civil court. They were still pending. This is stated to be the motive for the occurrence.

2.2. On 26.04.1993, P.W.4 had gone to the shop at about 08.30 a.m. to open the same. At that time, P.W.4 found that the shops had been extensively damaged and the movable properties from the shops had been thrown on the street. P.W.1 was then attending a marriage at Dash Mahal. P.W.4 informed him over phone about the occurrence. P.W.1 instructed P.W.4 to give a complaint to the police and informed that he would return immediately after the marriage was over. At 10.15 a.m. P.W.1 returned. P.W.3, the driver under P.W.1 had accompanied him. D1-Murugesan and D2-Anandan and one Mr.Jagadeesh also came to the shop on hearing about the occurrence. P.W.1 found that all the movable properties in the shop had already been thrown out by the miscreants. P.W.1, with the help of his employees, D1 and D2 and others, started restoring back all the movable properties into the shops.

2.3. The said work was over by about 01.35 p.m. Then, all of them had gone to a nearby tender coconut stall run by P.W.5. When they were drinking tender coconut water, the employees of P.W.1 were taking tea in a nearby tea shop. D1 and D2 were sitting just in front of the shop. At that time, it is alleged that all the sixteen accused came to the shop of P.W.1 in an unlawful assembly. They were all armed with wooden logs, sickles, patta knives and soda bottles. They were led by A1 and A2. A person, who had nothing to do with the shop, was just passing through the shop of P.W.1. At that time, believing that he was one among the employees of P.W.1, one of the persons in the unlawful assembly attempted to stab him with patta knife. He cried that he had nothing to do with the shop and ran away. A1 and A2 shouted at P.W.1, D1, D2 and others. Then, they directed A3 to A12 and the deceased accused to attack and kill the persons in the shop. On the instigation of A1 and A2, it is alleged that the persons in the unlawful assembly attacked D1 and D2 with the weapons like wooden logs, knives, aruval and soda bottles. They sustained serious injuries and fell down. P.W.2, an auto driver by

profession, who was standing in the beeda shop situated near the place of occurrence, was returning to his house. When he was passing through the shop of P.W.1, these accused who came from the house of A1, started attacking D1 and D2. Believing that P.W.2 was also an employee of P.W.1, they attacked him also. He ran away from the scene of occurrence to his locality. Then, gathering some supporters, he returned to the shop of P.W.1. At that time, he found D1 and D2 lying in a pool of blood with serious injuries and they were unconscious. P.W.3 is the driver of P.W.1. On the day of occurrence, from the marriage hall, he had accompanied P.W.1 to the place of occurrence. He also witnessed the entire occurrence. P.W.4 is the brother in law of P.W.1, who found the shop at 08.30 p.m. extensively damaged and the properties had been thrown out from the shop. He also witnessed the entire occurrence. After the occurrence, all the accused fled away from the scene of occurrence.

2.4. D1 and D2, with extensive injuries, were struggling for life. P.W.4 with the assistance of P.W.1 and others took D1 and D2 to the Government Royapettah Hospital at Chennai. At 02.50 p.m. on 26.04.1993, P.W.13-Dr.Khadri, who was the Casualty Medical Officer at Government Royapettah Hospital, examined D1 and D2 and declared them as dead. He made entries in the accident registers and kept the bodies in the mortuary. Exs.P11 and P12 are the accident registers.

2.5. On the same day, at 03.00 p.m. P.W.2 came to the said hospital for treatment. P.W.13 examined him. He told the Doctor that he was assaulted with knife. On examination, he found a cut injury measuring 2 cm on the forehead and a long superficial cut at the back. P.W.13 treated him as out patient for the said injuries. Ex.P.14 is the accident register.

2.6. On the same day at 03.30 p.m. P.W.3 was brought to the same hospital. P.W.13-the Doctor, examined him. P.W.3 told the Doctor that he was attacked at 02.00 p.m. by ten persons with knives and other weapons. On examination, P.W.13 found the following injuries on him (1) a curved laceration on the right parietal area measuring 3 cm; (2) a laceration on the forehead; (3) a small laceration on the upper lip. P.W.13 treated him as out patient. Ex.P.13 is the accident register.

2.7. After P.W.13 declared D1 and D2 dead, P.W.1 immediately proceeded to R4-Pondy Bazaar Police Station and presented a written complaint [vide Ex.P3]. In the said complaint, he mentioned A1 and A2 as the known assailants. He also mentioned the name of A5, A3 and A8 respectively as assailants, besides five others whose names were not known. P.W.15, the then Inspector of Police on receipt of the said complaint under Ex.P.1, registered a case in Crime No.424 of 1993 under Sections 147, 148, 452, 302, 307 and 324 of IPC.

Ex.P.17 is the FIR. Then, he forwarded both the complaint and the FIR to the court which were received by the jurisdictional Magistrate at 06.00 p.m. on 26.04.1993. Then, P.W.15, handed over the case diary to the Inspector of Police for investigation.

2.8. P.W.16, the then Inspector of Police, took up the case for investigation on 26.04.1993 itself as per the orders of the Deputy Commissioner of Police, Central Zone, Chennai under Ex.P.18. At 04.30 p.m. on the same day, he visited the place of occurrence and prepared an observation mahazar (Ex.P4) in the presence of P.W.7 and another witness. He also prepared a rough sketch showing the place of occurrence and recovered the following material objects (1) a black colour chappal, (2) blood stained PVC pipe, (3) another PVC pipe measuring 2 feet, (4) blood stained earth, (5) sample earth, (6) blood stained broom stick and various other blood stained materials [M.Os.8 to 27] found at the place of occurrence. On the same day, between 06.30 p.m. and 10.30 p.m., he conducted inquest on the body of D1. Then, between 10.30 p.m. and midnight, he conducted inquest on the body of D2. During inquests, he examined P.Ws.1 to 4 and few more witnesses. Exs.P.20 and 21 are the inquest reports. Then, he forwarded the bodies D1 and D2 for postmortem.

2.9. One Dr.S.Diwakar, who was the professor in the Department of Forensic Medicine, at Royapettah Government Hospital, Chennai, conducted autopsy at 11.15 a.m. on 27.04.1993 on the body of D1. [Since the presence of Dr.S.Diwakar could not be secured, P.W.14-Dr.Baskar, the Professor, Department of Forensic Medicine, Government Royapettah Hospital, Chennai, has spoken about the autopsy conducted on D1 based on the postmortem certificate]. Dr.S.Diwakar had found the following injuries on the body of D1:-

(1) An oblique, contused abrasion of 11 cms x 2 cms over the upper and outer aspect of left shoulder.

(2) An oblique, contused abrasion of 7 cms x 1 1/2 cms over the upper and outer aspect of left shoulder, 2 cms below the wound No.1.

(3) An oblique, contused laceration of 4 cms x 1 1/4 cms over the left side of forehead, with diffuse bruising beneath in the scalp.

(4) An oblique, contused laceration of 5 cms x 1 1/4 cms over the outer aspect of left side of forehead.

(5) A contused laceration of 6 cms x 2 cms over the posterior aspect of top of the head in the scalp, with diffuse bruising

beneath.

(6) An oblique, incised, gaping wound of 2 cms x 1/4 cm over the left side of the chin.

(7) A vertical, incised, gaping wound of 2 1/2 cm x 1 cm below and inner aspect of right collar bone, found entering the right thoracic cavity, with an incised gaping wound of (sic) cms x 1 cm x 5 cms over the front of right upper lobe of the lung, with 600 cc of blood and clots in the thoracic cavity.

(8) An oblique, incised, gaping wound of 2 1/2 cms x 1 cm over the outer aspect of left loin, found entering the thoracic cavity, piercing the left side diaphragm, with diffuse haematoma around.

Other findings:

Brain: Surface vessels congested

Heart: All chambers contained minimal amount of blood

Lungs: Both pale

Hyoid bone: Intact

Stomach: Contained blackish fluid. Mucosa: pale

No specific smell could be made out.

All other internal organs were found pale."

Ex.P.15 is the postmortem certificate. According to the Doctor, all those injuries were antemortem in nature. He gave opinion that the deceased had died due to shock and hemorrhage due to the stab injury over the right lung.

2.10. On the same day, Dr.S.Dhiyakar had conducted autopsy on the body of D2. He found the following injuries:-

(1) A vertical, incised, gaping wound of 2 1/2 cms x 1 cm, muscle deep, over the root of the neck in front.

(2) A vertical, incised, gaping wound of 2 cms x 1 cm, muscle deep, over the right hypochondrium

(3) An oblique, incised, gaping wound of 2 1/2 cms x 1/2 cm, muscle deep, over the back and base of left thumb.

(4) An oblique, incised, gaping wound of 3 cms x 1 1/2 cms over the right side front of chest in the lower aspect, 10 cms below the nipple found entering the thoracic cavity and penetrating the lower border. The thoracic cavities contained 1500 cc of blood and clots.

Other findings:
Brain: Surface vessels empty.
Heart: All chambers contained minimal amount of blood
Lungs: Both pale
Hyoid Bone: Intact
Stomach: Contained rice particles in a yellowish fluid.
Mucosa: Pale
All other internal organs were found pale."

Ex.P.16 is the postmortem certificate. He opined that the death was due to shock and heamorrhage due to the stab injury to the heart.

2.11. After the postmortem examination, P.W.16, the investigating officer, recovered the blood stained clothes from the bodies of D1 and D2 and forwarded the same to the court.

2.12. During the further course of investigation, on 26.04.1993, at 08.30 p.m. he arrested A1, A2 and A5 at Pushpa Colony, Saligramam, Chennai, in the presence of one Mr.Devaraj and Mr.Kanagaraj. On such arrest, A2 gave a voluntary confession in which he disclosed the place where he had hidden a knife and a wooden log. In pursuance of the same, he took P.W.16 and the witnesses to a place near Kodambakkam Railway Station and produced two knives, one with brass handle and the other with aluminum handle, a patta knife and four numbers of casuarina sticks. P.W.16 recovered the same in the presence of the same witnesses under a mahazar. Then, A5 gave a voluntary confession. He brought all the three accused to the police station. Then, he made a body search of A2, at the police station, during which he found a letter of authority under Ex.P.27 given by A1 to A2. A.5, in pursuance of the disclosure statement, took the police and the witnesses to his house and produced a blood stained full hand shirt and a blood stained dhoti (M.Os.37 and 38). P.W.16 recovered the same in the presence of the same witnesses under a mahazar [Ex.P27]. Then, he forwarded the accused to the court for judicial remand. He forwarded the material objects also to the court with a request for chemical examination.

2.13. In the course of further investigation, he recovered certain documents pertaining to the dispute regarding tenancy [Ex.P29 series]. On 02.05.1993 at Lylods Colony, he arrested the accused Suresh Babu (A3), Kumar @ Karuppu Kumar (since deceased), Sugumar (A8), Muniyendran (A10), Palaniappan (A11), Pavulraj (since deceased), Viji (A12) and Suresh @ Suresh Kumar (A4). On such arrest, A4 gave a disclosure statement that he had hidden the blood stained clothes near the railway land. In pursuance of the said

disclosure statement, he took the police and the witnesses to the said place of hide out and produced two shirts (M.Os.39 and 40). P.W.16 recovered the same in the presence of the same witnesses under a mahazar (Ex.P.32). Then, he forwarded all the accused to the court for judicial remand. On 06.05.1993 at 07.30 a.m., he arrested A6 and A7 at Saiva Muthaiah Pillai Street in Royapettah in the presence of one Mr.Vasu and Mr.Karunakaran. He recovered two material objects namely (M.O.41 series) from them in the presence of the same witnesses under a mahazar (Ex.P.33). On returning to the police station, he forwarded the accused to the court for judicial remand. He made a request to the court to conduct test identification parade.

2.14. P.W.11, the then XVI Metropolitan Magistrate, conducted test identification parade on 20.05.1993 for A2 to A12 and few other accused in the case who are now no more. P.W.1 identified all the accused correctly on all three occasions. P.W.2 identified A2, A3, A5 and A11. P.W.3 identified A2, A4, A5, A8 and A11.

2.15. In the course of further investigation, at 10.00 p.m. on 10.07.1993 P.W.16 arrested the accused Ravi and Jaisankar [since deceased]. On completing the investigation, he laid the charge sheet against all the accused.

3. Based on the above materials, the trial court framed as many as seven charges as detained in the first paragraph of this judgement. The accused denied the same. In order to prove the same, on the side of the prosecution, as many as 16 witnesses were examined, 41 documents and 41 materials objects were marked.

4. Out of the said witnesses, P.Ws.1 to 4 are the eye witnesses to the occurrence who have vividly spoken about the entire occurrence. P.Ws.1 and 4 have also spoken about the motive. P.Ws.2 and 3 are the injured eye witnesses. P.W.5, the owner of the tender coconut stall has turned hostile and she has not supported the case of the prosecution in any manner. She has only stated that a gang of persons came and indulged in rioting. P.W.6 has also turned hostile. P.W.7 has spoken about the motive and he has also spoken about the preparation of observation mahazar and the rough sketch and also the recovery of material objects. P.Ws. 8 and 9 have also turned hostile and they have not supported the case of the prosecution in any manner. P.W.10 has stated that he carried the dead bodies, as requested by the investigating officer, for postmortem. P.W.11 has spoken about the test identification parade conducted by him. P.W.12 has stated that he was present at the time of post mortem as directed by the investigating officer and after the postmortem he recovered the clothes from the bodies of D1 and D2 and handed

over the same to the investigating officer. P.W.13-the Doctor, has spoken about the treatment given to P.Ws.2 and 3 and also the fact that he only declared D1 and D2 dead. P.W.14-the Doctor, has spoken about the autopsy conducted on the bodies of D1 and D2 by one Dr.S.Diwakar and his final opinion regarding the cause of death of D1 and D2. P.W.15 has spoken about the registration of the case and handing over the case diary to P.W.16 as per the orders of the Deputy Commissioner of Police. P.W.16 has spoken about the entire investigation done by him and the filing of final report against the accused.

5. When the above incriminating materials were put to the accused under Section 313 of the Code of Criminal Procedure, they denied the same. The accused did not choose to examine any witness on their side, however, they marked three documents on their side as Exs.D1 to D3. Ex.D1 is the plaint copy in O.S.No.3019 of 1993 on the file of the learned Assistant Judge, City Civil Court, Chennai, between A1 and P.Ws.1 and 4 ; Ex.D2 is the photographs [series]; and Ex.D3 is the copy of the Medical Code. Their defence was a total denial.

6. Having considered all the above, the trial court convicted the accused under various penal provisions of IPC and accordingly punished them as detailed in the first paragraph of this judgement. That is how, A2 to A12 are now before this court with these criminal appeals.

7. It was reported, during the course of argument, by the learned counsel Mr.John Sathyan, that the sole appellant/A9 in CrI.A.No.46 of 2012 died. He has also made an endorsement to the said effect. In view of the above, the criminal appeal in CrI.A.No.46 of 2012 as against A9-Arumugam stands abated and the same accordingly stands dismissed.

8. We have heard the learned counsel for the Appellants/A2 to A8 and A10 to A12 and the learned Additional Public Prosecutor appearing for the respondent/State and also perused the records carefully.

9. There is no controversy over the fact there was a long standing enmity between A1 and P.W.1 in respect of the building premises which were under the occupation of P.Ws.1 and 4 of which A1 was the land lord. There are documents to show that there were civil litigations pending between the parties about which also there is no dispute. Thus, it is crystal clear that there was enmity for A1 against P.Ws.1 and his brother-in-law [P.W.4] who are tenants under A1. In our considered view, the prosecution has clearly proved the motive for the occurrence.

10. P.Ws.1 and 4 have stated that on 04.04.1993, the

compound wall of the premises and asbestos sheets were damaged by the people engaged by A1. In respect of the above said occurrence, P.W.1 gave a complaint under Ex.P.2 to the police. On the same day, on the instructions of the police, they sat together for a panchayat . It is the evidence of P.W.1 that in the said panchayat, A1, his agent, A2 and an Advocate by name Mr.Rajkumar and yet another person participated on the side of A1. On the side of P.W.1, he himself, D1, D2 , P.W.4 and one Mr.Jagadeesh participated in the said panchayat. In the said panchayat, A1 insisted that P.Ws.1 and 4 should vacate the premises and hand over the vacant possession of the shop buildings. Since P.Ws.1 and 4 were not willing for the same, the panchayat could not fructify. It was only thereafter all the civil litigations came to be filed between the parties. On the arrest of A1 and A2, Ex.P.27 letter dated 03.05.1992 was recovered from A2 which is an authorization given by A1 to A2 authorizing him to take steps to vacate P.Ws.1 and 4. The said panchayat which was held on 04.04.1993 has not been disputed by the accused during cross examination of P.Ws.1, 4 and 7. Similarly, the participation of A1 and A2 in the said panchayat has also not been disputed by the accused when this fact was spoken by P.Ws., 4 and 7 in their chief examination. Thus, as of now there is no dispute that A2 also participated in the panchayat. From this the prosecution has clearly established that A1 and A2 were already known to P.Ws.1, 4 and 7 and also to D1 and D2.

11. The alleged occurrence was on 26.04.1993. When P.W.4 had gone to his shop at about 08.30 a.m. he found that both the shops belonging to P.Ws. 1 and 4 had been broken and all the movable properties had been thrown out of the shop. This is seriously disputed by the accused. But, in respect of the same, a complaint had been given on the same day as instructed by P.W.4. We do not find any reason to reject the evidence of P.Ws.1, 3 and 4 who have vividly stated about the fact that the movable properties had been thrown on the street. The details about the investigation done in respect of the said occurrence which had taken place before 08.30 a.m. on the day of alleged occurrence are not available. Therefore, we do not propose to go into that as it is not absolutely necessary to resolve the issues in the present case. But, one thing is very clear that the movable properties were thrown out and P.Ws.1, 3 and 4, D1 and D2 and the other employees of P.W.1 were engaged in restoring back the thrown out movable properties into the shop. They completed the work by about 01.45 p.m. We do not find any reason to reject this part of the evidence of P.Ws.1, 3 and 4.

12. It is the further case of the prosecution that after restoring all the movable properties into the shops, P.Ws.1, 3 and 4 had gone to the nearby tender coconut stall run by P.W.5 and they were drinking tender coconut water. The employees had

gone to the nearby tea stall where they were taking tea. Thus, according to the case of the prosecution, D1 and D2 were then sitting in front of the shop of P.W.1. At that time, a gang of 16 persons came to the place of occurrence and they were all armed with deadly weapons, like aruval, patta knife, wooden logs, etc. P.Ws.1 to 4 have vividly spoken about the same. After registration of the case, when P.W.16 visited the scene of occurrence, he found the traces of occurrence which are evident from the observation mahazar and the rough sketch prepared and also from the recoveries of material objects with blood stains. There is no denial of the fact that D1 and D2 sustained injuries in the said occurrence and similarly, P.Ws.2 and 3 also sustained injuries in the very same occurrence. Thus, there is enormous evidence to prove that the occurrence took place around 02.00 p.m. on 26.04.1993 in which a gang of 16 persons, all armed with deadly weapons, came in an unlawful assembly indulged in rioting, attacked P.Ws.2 and 3 and D1 and D2. Immediately after the occurrence, D1 and D2 were taken to the Government Royapettah Hospital where they were declared dead. Thus, from the evidence of P.Ws.1 to 4 and the other evidences available on record, we hold that the prosecution has proved that a gang of persons came in an unlawful assembly, to the place of occurrence and indulged in rioting. To this extent, the prosecution has succeeded.

13. Now, the important question to be examined is as to whether these accused were members of the said unlawful assembly. So far as A1 is concerned, P.Ws.1 to 4 have mentioned about his presence and the participation in the occurrence. His name had been mentioned as one of the assailants in the earliest document, namely, Ex.P.3 itself. Thus, the gang of people who indulged in rioting was headed by A1. We do not find any ground to reject the case of the prosecution as against A1.

14. Now turning to A2, it is contended by the learned counsel Mr. John Sathyan that A2 was not known previously to these witnesses and that is the reason why he was put up for test identification parade. In the test identification parade held, the prosecution witnesses have identified him correctly. The learned counsel would submit that in the absence of mentioning of the identifying features of A2 during investigation, the belated identification of A2 in the test identification parade as well as the identification made by the witnesses in court cannot carry any weightage. The learned counsel would therefore submit that the participation of A2 in the alleged occurrence has not been established by the prosecution and so A2 is entitled for acquittal.

15. But, we are not at all persuaded by the said argument. Ex.P.27 is the letter of authorization dated 03.05.1992 given by A1 to A2 empowering him to act on his

behalf to take steps to vacate P.Ws.1 and 4 from the buildings in dispute. A2 is none else than the friend of A1. It is also in evidence, as we have already concluded, in the panchayat held to settle the issue before the initiation of the civil suit, A2 also participated on behalf of A1 in the said panchayat. The said panchayat went on for a long time. In that panchayat P.Ws.1 and 4, D1 and D2 and one Mr.Jagadeesh participated. P.W.7 also participated in the panchayat. P.W.7 has very specifically spoken about the fact that A2 also participated in the said panchayat. A close reading of cross examination of P.W.7 would clearly go to show that the accused had not disputed the fact spoken by P.W.7 that in that panchayat, A2 also participated. There is also no dispute raised by any of the accused that P.Ws.1 and 4 and D1 and D2 also participated in the panchayat. There is also no dispute raised by any of the accused that A2 also participated in the said panchayat. Apart from P.W.7, P.Ws.1 and 4 have also spoken about the same to whom also there was no challenge or dispute raised in respect of participation of A2 along with A1 in the panchayat. From these unchallenged evidences of P.W.1, P.W.4 and P.W.7 it has been clearly established that A2 was already known to P.Ws.1 and 4 as he participated in the panchayat along with A1. Thus, there was no need for the prosecution to conduct test identification parade in respect of A2. But, unmindful of the above fact spoken by these witnesses even during investigation, the investigating officer had taken steps to put up A2 also in the test identification parade to test P.Ws.1 and 4. It is not as if P.W.1 and 4 were not able to identify A2 in the test identification parade. Since A2 was already known to them, they would have found it easy to identify him in the test identification parade. Thus, from the evidences of P.Ws.1 and 4 it has been clearly established by the prosecution beyond any pale of doubt that A2 was in the unlawful assembly which indulged in the rioting.

16. The learned counsel would point out that P.W.1 during cross examination has stated that before 26.04.1993, he had not seen A2. Thus, according to the learned counsel, the identification made for the first time in the test identification parade without mentioning the identifying features of A2 during investigation will not carry any weightage. We have gone through the evidence of P.W.1 carefully. The alleged occurrence was admittedly on 26.04.1993. P.W.1 was examined before the trial court on 21.09.1998 and was cross examined on 22.09.1998 at length by the counsel for A1. But, the counsel for A2 to A12 did not cross examine P.W.1 either on 21.09.1998 or on 22.09.1998. No reasons have been stated as to why the learned counsel did not chose to cross examine P.W.1 at the earliest point of time. The records reveal that P.W.1 was recalled and allowed to be cross examined by the counsel for A2 to A12 only on 07.10.2003, that is, nearly after five years after the chief

examination was over. There is no explanation on the side of the accused as to why he was not cross examined on the same day when he was examined in chief and as to why it took five years for the learned counsel to cross examine P.W.1. If a witness is recalled after five years for the purpose of cross examination in respect of the facts spoken in the chief examination, quite naturally there are bound to be some discrepancies in his evidence on account of the fading memory. Therefore, it would be unwise and imprudent to give much weightage to such stray answers, which were elicited after five years, during cross examination. Therefore, we do not attach any importance to the answer elicited from P.W.1 on 07.10.2003 that before 26.04.1993, he had no occasion to see A2. In the chief examination, he has categorically stated that A2 also participated in the panchayat held representing A1. Thus, we hold that A2 was previously known to P.W.1.

17. So far as P.W.4 is concerned, he has categorically stated in chief examination that at the place of occurrence, A2 also shouted and directed the other accused to attack. Thus, the evidence of P.W.4 would clearly go to prove the presence and participation of A2 in the occurrence as a member of the unlawful assembly.

18. So far as P.Ws.2 and 3 are concerned, P.W.3 had nothing to do with the shops in question. He was only a passer by. Believing that he was an employee of the shops, the rioters attacked him. He has admitted during cross examination that he did not notice the face and other physical features of the assailants. Therefore, though he had identified A2 also in the test identification we cannot give any weightage for his evidence in this regard because he had not mentioned the identifying features of A2 during investigation and also because during cross examination has admitted that he did not see the face of any of the assailants. Therefore, his evidence could be used only to establish that there was rioting by a gang which came there in an unlawful assembly with deadly weapons. But his evidence would not, however, prove the presence and participation of A2. Similar is the case of P.W.3 also. P.W.3 is the driver of P.W.1 who came to the place of occurrence along with P.W.1. He had witnessed the entire occurrence. He has also identified A2 during test identification parade. But, no weightage could be given for the identification made by this witness during test identification because during investigation he has not mentioned anything about the physical features of A2. Therefore, his evidence also is useful for the prosecution only to prove that there was rioting by a gang of people who came there in unlawful assembly with deadly weapons. His evidence also would not go to prove the participation of A2 in the crime.

19. In view of the foregoing discussions, we conclude that the prosecution has clearly proved the presence and participation of A2 in the commission of the crime. Therefore, he is liable for punishment for the charges levelled against him.

20. Now turning to the case of A3 to 12, some of them were identified by P.W.1 during test identification parade and few were not even identified like A6. Now, the question is whether relying on the evidences of P.Ws.1 to 4 could it be safe to sustain the conviction of A2 to A12 (A9 is no more). Admittedly, A3 to A12 were not previously known to any of these witnesses. That is the reason why test identification parade was conducted by the learned Magistrate on the order of the Chief Metropolitan Magistrate. It is the case of the prosecution that A1, A2 and A5 were arrested on 26.04.1993 itself; A3, A4, A8, A10, A11 and A12 were arrested on 02.05.1993; and A6 and A7 were arrested on 06.05.1993. But, the requisition for test identification parade was given by P.W.16 only on 11.05.1993. The test identification parade was held on 20.05.1993. The learned counsel for the appellants would submit that though A1, A2 and A5 were arrested on 26.04.1993 and the other accused were arrested subsequently on 02.05.1993 and 06.05.1993, after a long unexplained delay, test identification was conducted and therefore no weightage could be given for the same. The learned counsel would further submit that during investigation none of these witnesses had stated about the identifying features of the assailants and in the absence of the same, even assuming that these witnesses had identified the accused during test identification that will not carry any weightage and therefore relying on the identification made during test identification and the identification made after several years in court conviction cannot be sustained.

21. In this regard, the learned senior counsel Mr. AR. L. Sundaresan appearing for some of the accused would rely on a judgement of the Hon'ble Supreme Court in *Satrughana alias Satrughana Parida v. State of Orissa*, 1995 Supp (4) SCC 448 wherein test identification parade was conducted after 1 1/2 months after the occurrence in question. Considering the delay caused, the Hon'ble Supreme Court has held as follows:-

"2. There is nothing on record to show that the prosecution had taken care to ensure that their identity was not revealed when they were taken to court and produced as required by law. In these circumstances, when the prosecution witnesses had admitted in their oral statements that they had not noticed any special identifying features, it becomes unsafe to place implicit

reliance on the evidence regarding identification emanating from the proceedings at the test identification parade. In these circumstances since there is no other corroborate evidence, we find it difficult to place implicit reliance on the identification made at the test identification parade. We are, therefore, of the opinion that the appellants are entitled to benefit of doubt."

22. The learned senior counsel nextly rely on the judgement of the Hon'ble Supreme Court in Rajesh Govind Jagesha v. State of Maharashtra, (1999) 8 SCC 428 wherein in an identification situation, the Hon'ble Supreme Court has held as follows:-

"4. The test identification is considered as a safe rule of prudence for corroboration. Though the holding of the identification proceedings may not be substantive evidence, yet such proceedings are used for corroboration purposes in order to believe or not the involvement of the person brought before the court for the commission of the crime. The holding of identification parade being a rule of prudence is required to be followed strictly in accordance with the settled position of law and expeditiously. The delay, if any, has to be explained satisfactorily by the prosecution."

23. Lastly, the learned senior counsel would rely on a judgement of the Hon'ble Supreme Court in Manzoor v. State of Uttar Pradesh, (1982) 2 SCC 72 wherein the Hon'ble Supreme Court has held as follows:-

"12. It is seen from the evidence of P.W.12 that the home guards did not give him the description of any of the culprits when he examined them and that he did not even ask them about it though it is stated in the report Ex.Ka-1 that the home guards had seen the culprits thoroughly and identified them. If at the earliest opportunity the home guards did not mentioned any identifying features of the culprits when they were examined by P.W.12, it is difficult for us to believe how P.W.2 could have identified both the appellants nearly two months later on

November 17, 1978. It has to be noted that the appellants have stated in the trial court that they were shown to the witnesses before the identification parade was held. In these circumstances we are not impressed with the evidence of P.Ws.1 and 2."

24. As has been observed by the Hon'ble Supreme Court in the above judgements, when, admittedly, the assailants were not previously known to the witnesses, the identification parade lends assurance by way of corroborating the identification made during trial. Thus, the identification parade is a step in aid to prove the identity of the assailants. As held by the Hon'ble Supreme Court, in the instance case also, there was delay in conducting the test identification parade for which absolutely there is no explanation offered by the prosecution. Further, in the test identification parade not all the accused were identified by these witnesses as some of them only were identified. None of the witnesses has given identifying features of any of the accused during investigation. As has been held by the Hon'ble Supreme Court, in the absence of mentioning of physical features of the accused during the course of investigation by the witnesses, the identification made either during test identification parade or during trial cannot carry any weightage. If there are other evidences, thereby establishing the circumstances against the accused to corroborate the eye witnesses account, then the court may tend to accept such identification made by the witnesses for the first time in court. But, in the instant case, absolutely there is no other evidence against A3 to A12. Therefore, ignoring the defects which we have elaborately dealt with hereinabove, we cannot sustain the conviction of A3 to A12 on the basis of the evidence of P.Ws.1 to 4 alone. Therefore, we hold that A3 to A12 are entitled for acquittal. But, since A9 is no more, the appeal as against him stands abated and thus, CrI.A.No.46 of 2012 alone is dismissed as abated.

25. Before parting with this case we would like to make the following remarks:-

26. We have the experience that gone are the days that the trial of sessions cases were conducted on day-to-day basis and unnecessary adjournments for the purpose of cross examination of witnesses were rarely given. Now a days, we see, it has become the order of the day that the legal fraternity choose not to cross-examine the witnesses on the day of chief-examination and at their whims and fancies they make applications to recall the witnesses after several days, several months and even after several years and then they cross examine the witnesses at length which might include several unnecessary questions which are unlawful. Due to

fading memory, witnesses ultimately make some errors which result in discrepancies. These discrepancies are blown out of proportion and the arguments are advanced that on account of these discrepancies the accused should be acquitted. It also happens that the courts fall prey to the said unethical tactics and acquit the accused who may be the real perpetrators of the crime. The Code of Criminal Procedure as well as the Criminal Rules of Practice envisage that the trial should be conducted on day to day basis and cross examination of witnesses should not be postponed unnecessarily. In gross violation of these statutory provisions, now, a different trend has been set in by the legal fraternity to take it for granted that taking adjournments are their right and cross examination could also be done at their whims and fancies at any time later. The fair procedure enshrined in Article 21 of the Constitution of India is not confined only to a fair procedure to the accused alone. Fairness in action is common to the prosecution witnesses, the police, the accused and the public at large. One of the objects of punishing the criminal is to sustain an orderly society. Thus, the society is much interested in ensuring that the real perpetrators of the crime are punished. But, because of the delaying tactics, day in and day out adopted by the accused, the witnesses are unnecessarily harassed by dragging them to the courts for several days. If this trend continues then, a common man would be afraid to come forward as a witness to tell truth on oath during trial. Already for want of witness protection, the witnesses are under extreme fear for the accused. Only some people, who are brave enough, boldly come to court to give evidence. If the courts of law do not treat them fairly and instead let them to be harassed, it would amount to injustice to him. Eventually, the criminal justice delivery system will fail.

27. Take for example, in the instant case, the alleged occurrence was on 26.04.1993, the final report was filed on 24.07.1993 itself as against 16 accused out of them four persons by name Kumar @ Karuppu Kumar, Pavulraj, Ravi and Jaisankar died after filing of charge sheet. Finally, after committal, the trial court framed charges as against 12 accused on 11.02.1998. The following tabulation would show as to how the trial was conducted in the instant case before the trial court:-

Sl. No.	Prosecution side witnesses	Date of Chief Examination	Date of Cross Examination by the counsel for A1	Date of Cross Examination by the counsel for A2 to A12	Date of further Cross Examination of witnesses
1	P.W.1	21.09.1998	22.09.1998	07.10.2013	29.07.2008
2	P.W.2	09.12.2003	25.09.2008	"Nil"	No further cross examination
3	P.W.3	02.09.2004	11.06.2008	01.09.2005	No further examination
4	P.W.4	19.01.2006	24.01.2008	30.01.2008	10.09.2008 by the counsel for A1
5	P.W.5 [Hostile]	19.12.2007	No cross examination	"Nil"	No further cross examination
6	P.W.6 [Hostile]	19.12.2007	No cross examination	"Nil"	No further cross examination
7	P.W.7	30.01.2008	17.09.2008	"Nil"	No further cross examination
8	P.W.8 [Hostile]	30.01.2008	No cross examination	"Nil"	No further cross examination
9	P.W.9 [Hostile]	20.02.2008	No cross examination	"Nil"	No further cross examination
10	P.W.10	15.10.2008	15.10.2008	"Nil"	No further cross examination
11	P.W.11	15.10.2008	15.10.2008	"Nil"	No further cross examination
12	P.W.12	15.10.2008	15.10.2008	"Nil"	No further cross examination
13	P.W.13	25.11.2008	25.11.2008	"Nil"	No further cross examination

14	P.W.14	23.12.2008	23.12.2008	"Nil"	No further cross examination
15	P.W.15	04.08.2009	04.08.2009	"Nil"	No further cross examination
16	P.W.16	08.02.2010	08.02.2010 04.03.2010	"Nil"	No further cross examination

28. The accused were questioned under Section 313 of Cr.P.C. on 18.09.2010. Thereafter, the arguments on either side was heard and judgement was delivered only on 29.11.2011.

29. The fact narrated hereinabove would clearly go to show that this is a case of classic illustration for harassment of the prosecution witnesses by the defence. Section 309 of Cr.P.C. States that the trial shall be continued from day to day until all the witnesses in attendance have been examined, unless the Court finds the adjournment of the same beyond the following day to be necessary for reasons to be recorded. The fourth proviso to sub-section (2) of Section 309 of Cr.P.C. states that no adjournment shall be granted at the request of a party, except where the circumstances are beyond the control of that party; and the fact that the pleader of a party is engaged in another court, shall not be a ground for adjournment. It further states that where a witness is present in Court but a party or his pleader is not present or the party or his pleader though present in Court, is not ready to examine or cross-examine the witness, the Court may, if thinks fit, record the statement of the witness and pass such orders as it thinks fit dispensing with the examination-in-chief or cross examination of the witness, as the case may be. But, in the instant case, the records reveal that no reason whatsoever was recorded as to why the case was adjourned for several years and as to why the trial court had not conducted trial of the case on day to day basis and as to why the accused were given a free hand to recall any witness after any number of years on a petition at the whims and fancies of the accused to harass the prosecution witnesses by dragging them to court repeatedly. Having dragged on the proceedings for several years, a strange argument has also been advanced before this court to take advantage of the discrepancies, which were the result of the fading memory of the witnesses. We are much pained by the conduct of the trial in this case, and we hope that the subordinate judiciary will be conscious of their constitutional obligation and will be fair in conducting trial not only to the accused but to the victims and witnesses as well, so as to ensure that none is the simple reason of being a witness in a case.

We expect that the subordinate judiciary should avoid these type of adverse comments from the watchful and concerned public at least in future. In the instant case, we originally thought of recommending for initiation of disciplinary proceedings against the presiding officers, who were responsible for the above anomalies. But, at this length of time, since many of the Presiding Officers who had dealt with the case would have retired from services, we refrain ourselves from making any such recommendation to the Hon'ble Chief Justice.

30. In the result, (i) Crl.A.No.1 of 2012:- This Criminal Appeal is dismissed. The convictions and sentences imposed upon the sole Appellant/A2-Narayanaswamy @ Narayanan by the trial court are confirmed. It is reported that the Appellant/A2 is on bail and therefore, the learned III Additional Sessions Judge is directed to secure the Appellant/A2 and to commit him to prison so as to undergo the sentences imposed on him by the trial court and as confirmed by this court.

(ii) Criminal Appeal Nos.825 of 2011, 18, 52, 59, 73, 77, 108 and 169 of 2012:- These Criminal Appeals are allowed. The convictions and sentences imposed on the Appellants/A3 to A8, A10 to A12 are set aside and they are acquitted of all charges. Fine amount paid, if any, shall be refunded to them. Their bails bonds shall stand terminated.

(iii) Crl.A.No.46 of 2012:- The sole Appellant/A9-Arumugam died pending appeal. Hence, the criminal appeal appeal as against Appellant/A9 stands abated.

Sd/-

Assistant Registrar(CCC)

//True Copy//सत्यमेव जयते

Sub Assistant Registrar

kmk

To

- 1.The III Additional Sessions Judge,
Chennai.
- 2.The Inspector of Police,
R-4, Pondy Bazaar Police Station,
Thiyagaraya Nagar, Chennai 600 017.
- 3.The Superintendent,
Central Prison,
Chennai.

4.The 17th Metropolitan Magistrate,
Saidapet, Chennai.

5.The Public Prosecutor,
High Court, Madras.

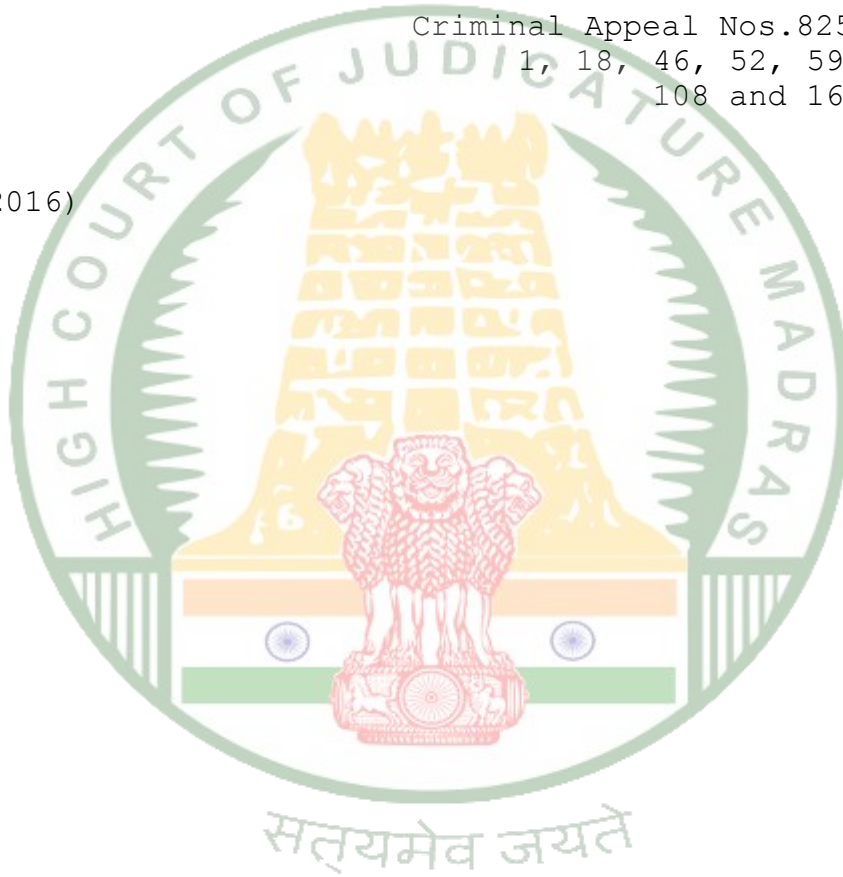
+2cc's to Mr.V.Bharathidasan, Advocate, S.R.No.20006

+3cc's to Mrs.AL.Ganthimathi, Advocate, S.R.No.20068

+1cc to Mr.R.John Sathyan, Advocate, S.R.No.20297

Criminal Appeal Nos.825 of 2011
1, 18, 46, 52, 59, 73, 77,
108 and 169 of 2012

CNR(CO)
CA(29/04/2016)



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