

CrI.A. (MD) No. 226 of 2016

Saravanan v. State

2019 SCC OnLine Mad 549

In the High Court of Madras[±]
(BEFORE P.N. PRAKASH AND B. PUGALENDHI, JJ.)

CrI.A. (MD) No. 226 of 2016

Saravanan Appellant/De facto complainant;

v.

State represented by the Inspector of Police CB-CID and Others .
.... Respondents.

With

CrI.A. (MD) No. 246 of 2016

State represented by the Public Prosecutor High Court
Appellant/Complainant;

v.

A. Velmurugan and Others Respondents.

And

CrI.A. (MD) No. 324 of 2016

P. Karthick Appellant;

v.

State represented by the Inspector of Police, CB-CID
Respondent/Complainant.

CrI. A. (MD) Nos. 226, 246 and 324 of 2016

Decided on February 20, 2019, [Reserved On: 06.02.2019]

Advocates who appeared in this case :

For appellant in CrI.A. (MD) No. 226 of 2016 Mr. K. Samidurai

For R1 in Mr. K. Chellapandian, A.A.G. CrI.A. (MD) No. 226 of 2016 assisted by Mr.
R. Anandharaj, Addl. P.P.

For RR 2-3 & 8-10 Mr. V. Gopinath, Sr. Counsel for Mr. P. Audiraj

For R4 Mr. N. Chandran

For RR 5 & 6 Mr. Antony S. Prabhakar

For R7 Mr. V. Kathirvelu, Sr. Counsel for Mr. C. Christopher

For appellant in Mr. K. Chellapandian, A.A.G. CrI.A. (MD) No. 246/2016 assisted by
Mr. R. Anandharaj, Addl. P.P.

For RR 1, 2, 7, 8 & 9 in Mr. V. Gopinath, Sr. Counsel CrI.A. (MD) No. 246/2016
assisted by Mr. P. Audiraj

For RR 4 & 5 in CrI.A. (MD) No. 246/2016 Mr. Antony S. Prabhakar

For R3 in CrI.A. (MD) No. 246/2016 Mr. N. Chandran

For R6 in Mr. V. Kathirvelu, Sr. Counsel CrI.A. (MD) No. 246/2016 for Mr. C.
Christopher

For appellant in Mr. V.R. Balasubramanian CrI.A. (MD) No. 324 of 2016

For respondent State in Mr. K. Chellapandian, A.A.G. CrI.A. (MD) No. 324 of 2016
assisted by Mr. R. Anandharaj, Addl. P.P.

Prayer in CrI. A. (MD) No. 226 of 2016: Criminal Appeal filed under Section 372 Cr.P.C. seeking to call for the records and set aside the judgment dated 28.01.2016 passed by the IV Additional District and Sessions Court in S.C. No. 403 of 2010.

Prayer in CrI. A. (MD) No. 246 of 2016: Criminal Appeal filed under Section 378 Cr.P.C. seeking to set aside the judgment of acquittal dated 28.01.2016 passed by the IV Additional District and Sessions Court in S.C. No. 403 of 2010 and convict A1 to A7, A9 and A10 for the offences framed against them.

Prayer in CrI. A. (MD) No. 324 of 2016: Criminal Appeal filed under Section 374 Cr.P.C. against the conviction and sentence made vide judgment dated 28.01.2016 passed by the IV Additional District and Sessions Court in S.C. No. 403 of 2010.

The Judgment of the Court was delivered by

P.N. PRAKASH, J.:— This case is a fall out of cable TV turf war.

2. Inasmuch as all the instant criminal appeals arise from one judgment, *viz.*, judgment dated 28.01.2016 passed by the IV Additional District and Sessions Judge in S.C. No. 403 of 2010, the same are considered and decided by this common judgment.

3. The facts giving rise to these criminal appeals were briefly these.

3.1 It is the case of the prosecution that the deceased Gandhi was into cable TV business and had a running feud with his competitors, *viz.*, A1 to A6, in pursuance of which, the latter conspired and eliminated the former on 16.12.2005 around 9.30 p.m. when he was in his office in the second floor at Door No. 20/42, Kakkan Street, Shenoy Nagar, Madurai, by engaging hirelings, two of whom, belaboured him with deadly weapons, which incident was allegedly witnessed by Saravanan (P.W.1), brother of Gandhi, Suresh (P.W.2), Saravanan (P.W.3), Kirubakaran (P.W.4), Dhanapandiaraja (P.W.5) and Nagarathinam (P.W.6).

3.2 On the complaint (Ex.P.1) given by Saravanan (P.W.1), K. Venugopal, (not examined), Sub Inspector of Police, Mathichiyam Police Station, registered a case in Cr. No. 2539 of 2005 on 16.12.2005 at 22.00 hrs. under Section 302 IPC against unnamed, but, identifiable accused and prepared the printed FIR (Ex.P.50), which reached the jurisdictional Magistrate on 17.12.2005 at 0.15 hrs. (12.15 a.m.), as could be seen from the endorsement thereon.

3.3 The investigation of the case was taken over by Gnanavel (P.W.26), Inspector of Police, Mathichiyam Police Station, who went to the place of occurrence and in the presence of witnesses, Raja David (P.W.18) and Ravi (not examined), prepared the observation mahazar (Ex.P.51) and rough sketch (Ex.P.52). He requisitioned the services of Janakiraman (P.W.23), forensic expert, to assist him in gathering the clue materials from the place of occurrence. He had the scene of occurrence photographed by Srinivasan (P.W.21). From the place of occurrence, he seized pieces of tiles, with and without blood stains, *viz.*, M.Os. 7 and 8 respectively under the cover of mahazar (Ex.P.15). He conducted inquest over the body of the deceased in the presence of panchayatdars and prepared the inquest report (Ex.P.53). He despatched the body to the Government Hospital, Madurai for post-mortem, where, Dr. K. Meiazhagan (P.W.20) conducted autopsy on the body of the deceased and issued post-mortem certificate (Exs.P.41 and 42). Dr. K. Meiazhagan (P.W.20), in his evidence as well in the post-mortem report, has noted 24 cut injuries from head to toe on the body of the deceased and has opined that the deceased would appear to have died of "shock and hemorrhage due to injuries 1 to 9 and their corresponding internal injuries and cumulative effect of all the other injuries".

3.4 At this juncture, it may be relevant to refer to a disquieting fact in the trial of this case. The prosecution have summoned and examined Mahalakshmi (P.W.22) Scientific Assistant, Grade-I from the Forensic Science Department for proving the

Biology Report (Ex.P.46) and Serology Report (Ex.P.47), notwithstanding a clear indication in the footnote therein that the said two reports can be used as evidence under Section 293 Cr.P.C., as they have been issued under the hand and seal of the Assistant Director and Assistant Chemical Examiner to Government, Regional Forensic Science Laboratory, Madurai. This is not the first occasion that this Court is coming across this practice of summoning Serologist for marking Serology Report as an exhibit. Section 293 Cr.P.C. clearly states that a report of the Chemical Examiner or Assistant Chemical Examiner to Government can be used as evidence in any enquiry, trial or other proceedings under the Code. Such experts can be summoned under Section 293(2) Cr.P.C. on the special orders of the Court and not as a matter of routine, for, these experts are required to give their opinion in hundreds of cases which are referred to them by the Courts throughout the State. Section 293 Cr.P.C. applies to the Serologist of the Government also. This pernicious practice of summoning these experts routinely by the prosecution without application of mind deserves to be put an end to. In fact, in every session on Criminal Law to trial Judges and Prosecutors in the State Judicial Academy, this has been expounded but to no avail. We are informed that the day fee for the District Court tenure Prosecutor is metered on examining such an expert alone on one day. If that is so, we remind them that Court is not a business house for money making and we may not hesitate to recommend to the Government to sack such a Prosecutor if he were to leech on public money.

3.5 Ergo, we direct the Registrar General, Madras High Court, to issue a circular to all the Trial Courts in the State, to follow the mandate of Section 293 (1) Cr.P.C. and not to insist upon examination of the officers mentioned in Section 293(4) Cr.P.C. at the mere asking of the prosecution. The Director of Prosecution, Chennai - 5 is also directed to send a circular to all the Public Prosecutors to scrupulously follow Section 293(1) Cr.P.C. and not to routinely summon the experts referred to in Section 293(4) Cr.P.C. and warn them of departmental action on their failure to adhere to the law.

3.6 Now, turning to the case at hand, Gnanavel (P.W.26), Inspector of Police examined the persons referred to in the complaint (Ex.P.1) given by Saravanan (P.W.1) and also others, but, to no avail. Since there was no breakthrough in the investigation, on the orders of the Director General of Police, the case was transferred to the CB-CID on 20.01.2007 and the investigation of the case was entrusted to Mari Rajan (P.W. 27), Inspector of Police, CB-CID, who would be, hereinafter, to avoid verbosity, referred to as the Investigating Officer.

3.7 The CB-CID mounted surveillance over the suspects and started gathering intelligence. The Investigating Officer once again examined Saravanan (P.W.1), Suresh (P.W.2), Saravanan (P.W.3) and Kirubakaran (P.W.4) on 31.05.2008 and recorded their statements. He arrested Velmurugan (A1), Balamurugan (A2), Chandrasekar (A3), Mathiyalagan (A4), Sundarrajan (A5), Kannamuthupandian (A6) and Mujibur Rahman (A7) on 10.06.2008, after which, there was a breakthrough in the case.

3.8 On the disclosure made by Velmurugan (A1), the Investigating Officer seized a Toyota Qualis car (M.O.5) that is said to have been used by the accused for the commission of the offence. Pursuant to the disclosure statement of Balamurugan (A2), he recovered a TVS Suzuki motorbike (M.O.6).

3.9 On 22.06.2008, Karthik (A8) was arrested and a knife (M.O. 1) was recovered. Meanwhile, Isakki Selvam (A9) surrendered on 19.06.2008 before the Judicial Magistrate No. 1, Tirunelveli and the Investigating Officer took him into police custody on 01.07.2008. Rajkumar @ Kumuli Rajkumar (A10) (for brevity "Rajkumar") surrendered on 18.09.2008 before the Judicial Magistrate, Tuticorin, in

connection with Tirunelveli Taluk P.S. Cr. No. 36 of 2007 and the Investigating Officer placed him under formal arrest in this case on 20.09.2008.

3.10 The Investigating Officer made arrangements for the conduct of Test Identification Parade (for brevity "the TIP") and accordingly, the TIP was conducted by Mr. Nagarajan (P.W.19), Special Judicial Magistrate, on 05.09.2008 and 25.09.2008 at the Central Prison, Madurai.

3.11 In the TIP conducted on 05.09.2008, Saravanan (P.W.1) and Suresh (P.W.2) identified Karthik (A8) and Isakki Selvam (A9) and in the TIP conducted on 25.09.2008, they identified Rajkumar (A10).

3.12 After examining the witnesses and collecting various reports, the Investigating Officer filed final report in P.R.C. No. 63 of 2008 before the Judicial Magistrate No. II, Madurai, against ten named accused.

3.13 On the appearance of the accused, the provisions of Section 207 Cr.P.C. were complied with and the case was committed to the Court of Session and was later, made over to the IV Additional District and Sessions Court, Madurai, for trial.

3.14 The Trial Court framed charges against the ten accused under Sections 120-B and 302 read with Section 149 IPC. When questioned, they pleaded not guilty.

3.15 To prove their case, the prosecution examined 27 witnesses and marked 59 exhibits and 8 material objects. On behalf of the accused, Ex.D.1 was marked and no witness was examined. When the accused were questioned under Section 313 Cr.P.C. about the incriminating circumstances appearing against them, they denied the same.

3.16 After considering the evidence on record and hearing either side, the Trial Court, vide judgment dated 28.01.2016 in S.C. No. 403 of 2010, acquitted all the accused, except Karthik (A8), who was convicted and sentenced as under:

<i>Provision of law under which convicted</i>	<i>Sentence</i>
302 IPC	Life imprisonment and fine of Rs. 2,000/-, in default to undergo simple imprisonment for three months
148 IPC	Fine of Rs. 1,000/-, in default to undergo simple imprisonment for one month
449 IPC	Imprisonment for ten years and fine of Rs. 2,000/-, in default to undergo simple imprisonment for three months

The aforesaid sentences were ordered to run concurrently.

3.17 Assailing the conviction and sentence slapped on him, Karthik (A8) has preferred CrI.A. (MD) No. 324 of 2016. Calling in question the acquittal of the other accused, viz., A1 to A7, A9 and A10, while the State has preferred CrI.A. (MD) No. 246 of 2016, Saravanan (P.W.1/*de facto* complainant) has preferred CrI.A. (MD) No. 226 of 2016.

4. Before advertng to the rival submissions, it may be necessary to briefly recapitulate the indictments and the overt acts attributed to the accused by referring to their name.

5. Velmurugan (A1) and Balamurugan (A2) are brothers and they own Rahul Cable Vision. Chandrasekar (A3) owns Nandhinee Cables. Mathiyalagan (A4) owns Nirma Vision. Sundararajan (A5) operates cable TV network in Devar Nagar. Kannamuthupandian (A6) is a close associate of Balamurugan (A2) and Mujibur Rahman (A7) is the driver of Balamurugan (A2).

6. Gandhi, being the main operator, had appointed Velmurugan (A1) as his Link Agent for an area and prompt payments were not forthcoming from Velmurugan (A1). When Gandhi talked tough, Velmurugan (A1) and Balamurugan (A2) got irked and so, they vandalised the office of Gandhi on 07.02.2003. A case in Cr. No. 123 of 2003

under Sections 147, 148, 427 and 506(II) IPC was registered against the Velmurugan gang and some of the accused in that case were arrested by the Tallakulam police. Chandrasekar (A3) was intending to buy the cable TV business of Beer Musdan (P.W.9), but, Gandhi intervened and spoiled the deal and diverted the sale to one Ragavar and therefore, Chandrasekar (A3) was nursing a grouse against Gandhi. Similarly, Mathialagan (A4) and Sundarrajan (A5) also had a grievance that Gandhi was eating into their business by adopting sharp practices.

7. Therefore, it is alleged that one month prior to the incident, A1 to A6 met in the office of Chandrasekar (A3) and in that meeting, Chandran (since deceased), Karthik (A8), his brother, Isakki Selvam (A9) and Rajkumar (A10) participated and they were given a sum of Rs. 1,25,000/- to eliminate Gandhi. Velmurugan (A1) had taken Chandran and Karthik (A8) and showed them their target.

8. On 16.12.2005, Chandran (since deceased), Karthik (A8), Manikkaraj (since deceased), Isakki Selvam (A9), Rajkumar (A10) and Mujibur Rahman (A7 and driver of A1 and A2) met in the office of Velmurugan (A1). Thereafter, armed with weapons, the assailants went in a Toyota Qualis car (M.O.5) bearing Regn. No. TN 69 F 6567 belonging to Velmurugan (A1) to the office of Gandhi around 17.30 hrs. They were followed by Balamurugan (A2) and Mujibur Rahman (A7) in TVS Suzuki motorbike (M.O.6). Both the vehicles stopped in a street near Gandhi's office and Sundarrajan (A5) went to Gandhi's office located in the second floor of the building complex to find out if Gandhi was present. Ascertaining that Gandhi was there, Sundarrajan (A5) informed the other accused of the presence of Gandhi, in pursuance of which, Chandran and Karthik (A8) entered Gandhi's office and hacked him to death. Armed with a knife, Manikkaraj stood in the reception in Gandhi's office and held out threats to those who were there. Armed with weapons, Isakki Selvam (A9) and Rajkumar (A10) were standing in the staircase leading to Gandhi's office, in order to prevent anyone from coming to his rescue. After Gandhi was murdered, the assailants fled from the place in the Toyota Qualis car (M.O.5) and Balamurugan (A2) and Mujibur Rahman (A7) went away in their TVS Suzuki motorbike (M.O.6).

9. In the complaint (Ex.P.1) given by Saravanan (P.W.1), he has stated about the business rivalry his brother, viz., Gandhi, had with other cable TV operators and specifically suspected the involvement of Kanakaraj and Andavar of Madurai; Thamizhan and Thirumurugan, chief cable TV operators of Theni; one Siva, a K TV distributor; Kumarasamy and Raja, chief cable TV operators in Kanyakumari; Travels Pandi, T.V. Ramesh and Santhoshan of Coimbatore; and Solaimalai and Mani of ESPN pay channel. He has not whispered about Velmurugan (A1) in the complaint. After the above narration, Saravanan (P.W.1) has stated in the complaint (Ex.P.1) that while he was in the office of his brother on 16.12.2005, two persons, whom he can identify, entered the cabin of his brother and started attacking him. He has stated in the complaint (Ex.P.1) that one of them was tall, stout and of wheatish white complexion, while the other was of medium height; a third person, armed with a knife, was standing in the office reception and was threatening those who were there; after the attack, the trio threatened the onlookers by brandishing their weapons and left the premises. Saravanan (P.W.1), in his complaint (Ex.P.1), has further stated that apart from him, the incident was witnessed by his father Srinivasan (not examined), Suresh (P.W.2), Saravanan (P.W.3), Dhanapandiaraja (P.W.5), Nagarathinam (P.W.6), Muthuvel (P.W.8) and John Sundar (not examined).

10. In column no. 7 of the FIR (Ex.P.50) qua name of the accused/suspects, it is stated as "three identifiable persons". As per the indictments in the final report, Karthik (A8) and Chandran were the assailants and Manikkaraj was standing in the reception and threatening the visitors.

11. While Chandran was murdered on 05.07.2006, in connection with which, a case

in Alangulam P.S. Cr. No. 221 of 2006 was registered, Manikkaraj was murdered on 06.01.2007, in connection with which, a case in Thachanallur P.S. Cr. No. 3 of 2007 was registered. Thus, the death of Chandran and Manikkaraj occurred prior to 20.01.2007, the date on which, the CB-CID took over the investigation of the case. Until then, the case of the eyewitnesses was that three persons had come to the premises, of whom, one stood in the reception and the other two hacked Gandhi to death. After the CB-CID took over the investigation of the case, for the first time, it came to light that A1 to A7 were involved in the conspiracy to eliminate Gandhi, pursuant to which, they had engaged Karthik (A8), Chandran, Manikkaraj, Isakki Selvam (A9) and Rajkumar (A10).

12. The role attributed to Sundarrajan (A5) is that he went on a recce to the office of Gandhi to find out if he was there and informed the others who were waiting in the Toyota Qualis car (M.O.5). The role that is attributed to Isakki Selvam (A9) and Rajkumar (A10) is that they were standing guard in the staircase leading to the office of Gandhi, while the assailants were at work.

13. After the CB-CID took over the investigation of the case, further statements were obtained from Saravanan (P.W.1), Suresh (P.W.2) and other eyewitnesses implicating Isakki Selvam (A9) and Rajkumar (A10). Only on this basis, charges were framed against A1 to A10, as stated above.

14. The trial in the case began with the examination of Saravanan (P.W.1) on 04.02.2014. Many of the witnesses, viz., Kirubakaran (P.W.4), Kannayiram (P.W.7), Muthuvel (P.W.8), Beer Musdan (P.W.9), Rajesh (P.W.10), Ramamurthy (P.W.12), Baskaran (P.W.13) and Damodaran (P.W.14) turned hostile, for reasons which are not far to seek. Thus, we are now left only with the evidence of Saravanan (P.W.1), Suresh (P.W.2), Manager of Vaigai TV Cable Network and Saravanan (P.W. 3) and Thanapandiaraja (P.W.5), employees of Gandhi.

15. Saravanan (P.W.1), in his evidence, has stated that Gandhi and he were running Vaigai TV Cable Network and were having their office at Door No. 18/1 at Narimedu, Madurai; they had appointed link operators, of whom, Velmurugan (A1) was one; since there was huge arrears from Velmurugan (A1), Gandhi called him (A1) on 07.02.2003 and demanded payment and shouted at him; on the same night, Velmurugan (A1), his brother Balamurugan (A2), Sundarrajan (A5) and others came to Gandhi's office and vandalised the office, in connection with which, a case was registered by the Tallakulam police, who arrested Balamurugan (A2 in this case) and others; Gandhi shifted their office to the second floor in Door No. 20/40, Kakkan Street, Shenoy Nagar, Madurai; again, in the year 2004, Velmurugan (A1) defaulted in making payment and hence, Gandhi disconnected the link; Velmurugan (A1) came to their office and berated them and threatened that he would eliminate Gandhi; thereafter, Velmurugan (A1) went to their branch office at Pudur and threatened the staff members there; in connection with this, Gandhi gave a police complaint and mediation was conducted in the police station; Velmurugan (A1) cut the supply lines of Gandhi in Valar Nagar area, for which, Gandhi lodged a complaint with the Othakadai police against Velmurugan (A1); the police enquired A2 to A5 in this regard; once again, there was default in payment of money by Velmurugan (A1); hence, the link given to him was disconnected; incensed by that, Velmurugan (A1) came to their Shenoy Nagar office and abused them, during which time, Gandhi was not there; on coming to know of this, Gandhi telephoned Velmurugan's (A1's) house and his wife attended the call; Gandhi told Velmurugan's (A1's) wife that her husband should not have come to his office and abused the women staff working there. Both Saravanan (P.W.1) and Suresh (P.W.2) gave evidence about the disputes between Chandrasekar (A3) and Mathiyalagan (A4) with Gandhi in detail. The long and short of the evidence of Saravanan (P.W.1) and Suresh (P.W.2) is that A1 to A4 who were cable TV operators. had serious business disputes with Gandhi.

16. Coming to the actual incident, Saravanan (P.W.1) has stated that on 16.12.2005, when he was in the office with his brother Gandhi, two persons came and hacked Gandhi to death, with knives, of whom, he identified Karthik (A8) as one of them. He has further stated that Manikkaraj was in the reception and was threatening the visitors.

17. As regards Isakki Selvam (A9) and Rajkumar (A10), Saravanan (P.W.1) has stated that he saw them both standing in the staircase leading to their office. He has further stated that in the TIP conducted on 05.09.2008, he identified Karthik (A8) and Isakki Selvam (A9) and in the TIP conducted on 25.09.2008, he identified Rajkumar (A10).

18. Suresh (P.W.2), a staff who was working in Vaigai TV Cable Network run by Gandhi and Saravanan (P.W.1), has corroborated the evidence of Saravanan (P.W.1) substantially. He has spoken to about the disputes Gandhi had with Velmurugan (A1), Chandrasekar (A3), Mathiyalagan (A4) and Sundarrajan (A5). He has also stated that he was present on 16.12.2005 when the incident occurred in the office of Gandhi. However, he has stated that he saw Sundarrajan (A5) peeping into the cabin of Gandhi and leaving; thereafter, on hearing a commotion, he came out of his room and in the reception, he found a person standing with a knife and threatening everyone; he also saw two persons attacking Gandhi indiscriminately. He has further stated that he saw two other persons standing with knives at the entrance of the office. He has also stated that in the TIP held on 05.09.2008, he identified two persons, viz., Karthik (A8) and Isakki Selvam (A9) and in the TIP conducted on 25.09.2008, he identified Rajkumar (A10). In the Court, he identified Karthik (A8) and Isakki Selvam (A9) as the persons whom he identified on 05.09.2008 and identified Rajkumar (A10) as the person whom he identified in the TIP conducted on 25.09.2008. He identified the knife (M.O.1), with which, Karthik (A8) attacked Gandhi. He has further stated that the other person who attacked Gandhi and the person who was standing in the reception with knife are not available in the Court, obviously because, both of them were murdered even before the case was transferred to the CB-CID as stated above and so, they were not available even for the TIP.

19. Saravanan (P.W.3), an employee of Vaigai TV Cable Network, run by Gandhi and Saravanan (P.W.1), has stated in his evidence that on 16.12.2005, when he was in the office, Saravanan (P.W.1) and his father Srinivasan were also there; around 9.00 p.m., he heard a commotion in the office; when he went to the reception, he saw a person standing with a knife and threatening the onlookers; seeing him, he was shocked and he ran away to his room and hid; he identified Isakki Selvam (A9) as the person who was in the reception with the knife, whereas, the prosecution case is that Manikkaraj was in the reception and Isakki Selvam (A9) was in the staircase with Rajkumar (A10).

20. Dhanapandiaraja (P.W.5), in his evidence, has stated that he was working as Computer Operator in Vaigai TV Cable Network in the year 2005; on 16.12.2005, around 9.30 p.m., when he heard a commotion in the office, he came out of his room to see what it was; in the reception, he saw Saravanan (P.W.1) and his father, Suresh (P.W.2) and Saravanan (P.W.3); at that time, he saw a person in the reception with a knife threatening everyone; at the entrance of the office, he saw two other persons; two persons came out of the cabin of Gandhi, one of whom is Karthik (A8).

21. Nagarathinam (P.W.6), an eyewitness, has spoken to about the incident, but, stated that he cannot identify the assailants.

22. In the light of the aforesaid facts, we now proceed to deal with the appeals before us.

CrI.A. (MD) No. 324 of 2016 filed by Karthik (A8) challenging his conviction and sentence:

23. The prosecution have proved beyond iota of doubt that Gandhi and his brother Saravanan (P.W.1) were running Vaigai TV Cable Network and had business rivalry with several persons, including Velmurugan (A1). The prosecution have also proved beyond any scintilla of doubt that on 16.12.2005, Gandhi was done to death around 9.30 p.m. in the second floor of his office at Door No. 20/42, Kakkan Street, Shenoy Nagar, Madurai.

24. It is the specific case of the prosecution that on 16.12.2005, around 9.30 p.m., Chandran and Karthik (A8) entered the cabin of Gandhi and attacked him with knives and Manikkaraj was standing in the reception and threatening everyone with a knife. As alluded to above, Chandran and Manikkaraj breathed their last on 05.07.2006 and 06.01.2007 respectively, even before the case was transferred to the CB-CID. Therefore, out of the trio, we are left only with Karthik (A8).

25. The attack mounted by Karthik (A8) has been spoken to vividly by the eyewitnesses, viz., Saravanan (P.W.1), Suresh (P.W.2) and Dhanapandiaraja (P.W.5). In the TIP that was conducted by the Magistrate on 05.09.2008, Saravanan (P.W.1) and Suresh (P.W.2) have clearly identified Karthik (A8). However, Dhanapandiaraja (P.W.5) was not included in the TIP, but, he identified Karthik (A8) in the dock.

26. The learned counsel for Karthik (A8) submitted that the name of Karthik (A8) did not figure in the complaint (Ex.P.1) given by Saravanan (P.W.1) and only after the CB-CID took over the investigation of the case, he has been falsely implicated in the case. He further contended that Karthik (A8) was arrested on 22.06.2008 and the TIP was conducted only on 05.09.2008 and therefore, the TIP proceedings stood vitiated, inasmuch as, the witnesses would have had sufficient opportunity to see the accused.

27. On reading of the evidence of Mr. Nagaraj (P.W.19), Special Judicial Magistrate, who conducted the TIP, it is seen that the CB-CID filed an application on 05.08.2008 itself for the conduct of TIP for the eyewitnesses to identify Karthik (A8) and Isakki Selvam (A9). Pertinent it is to point out at this juncture that Karthik (A8) and Isakki Selvam (A9) were in Madurai Central Prison and Palayamkottai Central Prison, respectively. Therefore, Mr. Nagaraj (P.W.19) was taking steps to have Isakki Selvam (A9) transferred to the Madurai Central Prison for the purpose of conduct of TIP and that had resulted in the delay. Mr. Nagaraj (P.W.19) has spoken to about this in his evidence.

28. Relying upon the following three judgments of the Supreme Court, the learned counsel for Karthik (A8) contended that the TIP should have been done immediately, i.e., within the first 15 days of remand:

Ø *Ravindra @ Ravi Bansi Gohar v. State of Maharashtra*¹;

Ø *Rajesh Govind Jagesha v. State of Maharashtra*²; and

Ø *Md. Sajjad @ Raju @ Salim v. State of West Bengal*³.

29. In *Ravindra* (supra), the Supreme Court rejected the TIP report holding that, not only the photographs of the appellants and other accused therein were shown before the TI parades, but they were held in the lock-up of the investigating agency, thereby giving sufficient opportunity to the identifying witnesses of seeing the persons to be identified and having regard to the fact that the two identifying witnesses were police constables attached to the police station concerned, it was all the more necessary for the investigating agency to ensure that the TI parade was held in a manner and at a place (preferably in jail) so as to avoid any criticism about its legitimacy.

30. In *Rajesh Govind Jagesha* (supra), the Supreme Court did not accept the TIP report on the ground that the explanation for delay in holding the identification parade was not trustworthy and that the non-availability of a Magistrate in a city like Bombay for over a period of five weeks from the date of the arrest of A1 and A2 therein and three weeks from the arrest of A3 and A4 therein, cannot be accepted.

31. In *Md. Sajjad* (supra), the Supreme Court has refused to place any credence on the identification of the accused by the witnesses in view of the reasoning in paragraph no. 15 therein, which is profitably extracted hereunder:

"15. In the case in hand, apart from the fact that there was delay in holding the Test Identification Parade, one striking feature is that none of the concerned prosecution witnesses had given any identification marks or disclosed special features or attributes of any of those four persons in general and the accused in particular. Further, no incident or crime had actually taken place in the presence of those prosecution witnesses nor any special circumstances had occurred which would invite their attention so as to register the features or special attributes of the concerned accused. Their chance meeting, as alleged, was in the night and was only for some fleeting moments."

32. It is trite that identification of the accused in the TIP is only a corroborative piece of evidence and not substantive evidence. The Supreme Court has held that even if TIP is not conducted, if the dock identification of the accused by the witness inspires the confidence of the Court, conviction can be maintained. [See *Malkhansingh v. State of Madhya Pradesh*⁴]. In the instant case, even in the complaint (Ex.P.1), Saravanan (P.W.1) has broadly described the physical features of the two persons who attacked his brother Gandhi with knives and he has also stated that he can identify them. Had there been any ill motive for Saravanan (P.W.1) to implicate Karthik (A8) in the case, he would have given his name in the complaint (Ex.P.1) itself nor has it been suggested to Saravanan (P.W.1) that he has falsely implicated Karthik (A8) owing to previous ill will. Apart from Saravanan (P.W.1), Suresh (P.W.2) has identified Karthik (A8) in the TIP and in the dock. These two witnesses have withstood the grilling cross-examination by the defence and the defence were not able to make any dent in their testimony relating to identification of Karthik (A8). There is also nothing on record to show that Saravanan (P.W.1) and Suresh (P.W.2) were acquainted with Karthik (A8) prior to the murder of Gandhi. The presence of Suresh (P.W.2) has been stated in the complaint (Ex.P.1) given by Saravanan (P.W.1) itself. Therefore, this Court does not find any reason to reject the testimonies of Saravanan (P.W.1) and Suresh (P.W.2) qua the role played by Karthik (A8) in the attack, albeit the alleged delay in the conduct of the TIP.

33. As regards the evidence of Dhanapandiaraja (P.W.5), though he was not included in the TIP proceedings, yet, his evidence qua Karthik (A8) does inspire the confidence of this Court. The defence have not been able to make any dent in the cross-examination of this witness also.

34. That apart, after the arrest of Karthik (A8), the Investigating Officer has recorded his confession statement, pursuant to which, the knife (M.O.1) has been recovered under mahazar (Ex.P.11) in the presence of Paramasivam (P.W.15), V.A.O. and Murugesan (not examined). Paramasivam (P.W.15) has spoken to about the disclosure statement of Karthik (A8) and the recovery of knife (M.O.1) effected under the cover of mahazar (Ex.P.11) on the showing of Karthik (A8). Saravanan (P.W.1) and Suresh (P.W.2) have identified the weapon (M.O.1) in their evidence.

35. The learned counsel for Karthik (A8) drew the attention of this Court to the statement made by Karthik (A8) to the Mr. Nagaraj (P.W. 19) who conducted the TIP, saying that the police had taken photographs of Karthik (A8) and had made some persons identify him in the station. This statement of Karthik (A8) has been recorded by Mr. Nagaraj (P.W.19) in the inspection report (Ex.C.1.). Very frequently, we come across suspects making such complaints and the Magistrates dutifully recording it in the TIP report. What is the evidentiary value of such a statement? Can it be held by the Court *ipso facto* that such a statement of the suspect proves the allegation that photos were taken and the suspect was also shown to the witnesses in the station? We

find no pigeonhole in the Evidence Act to place this statement. A previous statement can be used to either contradict or corroborate the subsequent testimony in the Court. Had Karthik (A8) got into the witness box and deposed, then, his previous statement to the Magistrate could have been used to corroborate his testimony. He has given an exculpatory statement implicating the police and therefore, it cannot be relevant as an admission under Section 21 of the Evidence Act, because, a self-serving statement will not be relevant under Section 21, *ibid*, unless it falls within the exceptions thereof. This statement of Karthik (A8) does not fall within the exceptions referred to in Section 21 (1) to (3), *ibid*. The said statement cannot be treated as a complaint within Section 8 of the Evidence Act, because, the said provision deals with the conduct of a person, be it the accused or a witness in relation to a fact in issue or relevant fact. Illustrations (h), (i) and (j) under Section 8, *ibid*, will clear the cloud, if any. The allegation is essentially against the conduct of the police, which is neither a fact in issue nor a relevant fact in this case. This issue is no more *res integra* in the light of the judgment of the Supreme Court in *Deep Chand v. State of Rajasthan*⁵, which was affirmed by a Constitution Bench of the Supreme Court in *Harnath Singh v. The State of Madhya Pradesh*⁶. In the latter case, the TIP Magistrate recorded the self-incriminating statement of the accused in the TIP report and the Supreme Court refused to consider it by holding that any such statement should have been recorded under Section 164 Cr.P.C. Law cannot say that if such a statement is self-incriminatory, it should be rejected, but, if it is exculpatory, it should have to be accepted. Law knows no such distinction. If that were the law, every suspect can point his accusing finger at another during the TIP and pray for acquittal by contending that he has proved his innocence. The TIP proceedings are conducted as an aid in investigation and statements made by witnesses and accused to the Magistrate cannot be treated as substantive evidence of proof of facts stated therein. This can be viewed from yet another angle. The said statement by Karthik (A8) is a positive assertion of an alleged fact. Therefore, the burden is on Karthik (A8) to bring on record at least some evidence to prove the said allegation within the meaning of the word "proved" under Section 3 of the Evidence Act. Having failed to do so, his statement remains a mere allegation sans proof.

36. The next contention of the learned counsel for Karthik (A8) is that when the Trial Court had disbelieved the evidence of Saravanan (P.W.1) and Suresh (P.W.2) qua the acquitted accused, it ought not to have convicted Karthik (A8) on their evidence. The maxim *falsus in uno falsus in omnibus* has no application in India. The Trial Court had rejected the evidence of Saravanan (P.W.1) and Suresh (P.W.2) qua Isakki Selvam (A9) and Rajkumar (A10) on the ground that their presence was not spoken to by them at the earliest point of time when the complaint (Ex.P.1) was lodged. That apart, in *Gangadhar Behera v. State of Orissa*⁷, the Supreme Court has held that merely because some of the accused persons have been acquitted, though evidence against all of them, so far as direct testimony went, was the same, does not lead as a natural corollary that those who have been convicted must also be acquitted.

37. Thus, in the light of the aforesaid discussion, this Court has no incertitude in coming to the conclusion that the prosecution have proved beyond cavil, the presence of Karthik (A8) and the attack mounted by him on Gandhi on 16.12.2005 around 9.30 p.m. at his office.

38. In view of the foregoing discussion, the conviction and sentence slapped on Karthik (A8) by the Trial Court for the charges under Sections 302 and 449 IPC are confirmed.

39. As regards the charge under Section 148 IPC against Karthik (A8), the prosecution have not been able to establish the participation of five or more members in the attack and hence, the conviction of Karthik (A8) under Section 148 IPC and the sentence thereof. warrant interference and accordingly. the conviction and sentence

slapped on Karthik (A8) for the charge under Section 148 IPC are set aside.

CrI.A. (MD) Nos. 226 of 2016 preferred by Saravanan (P.W.3/*de facto* complainant) and CrI.A. (MD) No. 246 of 2016 preferred by the State against the acquittal of the remaining accused:

40. While dealing with an appeal against acquittal, this Court is required to bear in mind the guidelines issued by the Supreme Court in various decisions, which have been referred to in *V. Sejappa v. State by Police Inspector Lokayukta, Chitradurga*, the relevant portion of which reads extracted hereunder:

"23. In Muralidhar alias Gidda v. State of Karnataka (2014) 5 SCC 730, this Court noted the principles which are required to be followed by the appellate court in case of appeal against order of acquittal and in paragraph (12) held as under:

"12. The approach of the appellate court in the appeal against acquittal has been dealt with by this Court in Tulsiram Kanu AIR 1954 SC 1, Madan Mohan Singh AIR 1954 SC 637, Atley AIR 1955 SC 807, Aher Raja Khima AIR 1956 SC 217, Balbir Singh AIR 1957 SC 216, M.G. Agarwal AIR 1963 SC 200, Noor Khan AIR 1964 SC 286, Khedu Mohton (1970) 2 SCC 450, Shivaji Sahabrao Bobade (1973) 2 SCC 793, Lekha Yadav (1973) 2 SCC 424, Khem Karan (1974) 4 SCC 603, Bishan Singh (1974) 3 SCC 288, Umedbhai Jadavbhai (1978) 1 SCC 228, K. Gopal Reddy (1979) 1 SCC 355, Tota Singh (1987) 2 SCC 529, Ram Kumar 1995 Supp (1) SCC 248, Madan Lal (1997) 7 SCC 677, Sambasivan (1998) 5 SCC 412, Bhagwan Singh (2002) 4 SCC 85, Harijana Thirupala (2002) 6 SCC 470, C. Antony (2003) 1 SCC 1, K. Gopalakrishna (2005) 9 SCC 291, Sanjay Thakran (2007) 3 SCC 755 and Chandrappa (2007) 4 SCC 415. It is not necessary to deal with these cases individually. Suffice it to say that this Court has consistently held that in dealing with appeals against acquittal, the appellate court must bear in mind the following:

- (i) There is presumption of innocence in favour of an accused person and such presumption is strengthened by the order of acquittal passed in his favour by the trial court;*
- (ii) The accused person is entitled to the benefit of reasonable doubt when it deals with the merit of the appeal against acquittal;*
- (iii) Though, the powers of the appellate court in considering the appeals against acquittal are as extensive as its powers in appeals against convictions but the appellate court is generally loath in disturbing the finding of fact recorded by the trial court. It is so because the trial court had an advantage of seeing the demeanour of the witnesses. If the trial court takes a reasonable view of the facts of the case, interference by the appellate court with the judgment of acquittal is not justified. Unless, the conclusions reached by the trial court are palpably wrong or based on erroneous view of the law or if such conclusions are allowed to stand, they are likely to result in grave injustice, the reluctance on the part of the appellate court in interfering with such conclusions is fully justified; and*
- (iv) Merely because the appellate court on reappreciation and re-evaluation of the evidence is inclined to take a different view, interference with the judgment of acquittal is not justified if the view taken by the trial court is a possible view. The evenly balanced views of the evidence must not result in the interference by the appellate court in the judgment of the trial court."*

41. This case is predicated upon both direct and circumstantial evidence. The direct evidence is for the attack on Gandhi by two persons and one another who was in the reception threatening the onlookers. As regards A1 to A6, there is no direct evidence about their involvement in the conspiracy to eliminate Gandhi. Of course, conspiracy is hatched in secrecy and seldom will the police get direct evidence to nail all the

conspirators [See *Kehar Singh v. State-Delhi Administration*²]. The prosecution wanted to establish the offence of conspiracy by examining Kannayiram (P.W.7) and Beer Musdan (P.W.9). But, these two witnesses turned hostile lock, stock and barrel. Albeit they have given statements to the Magistrate under Section 164 Cr.P.C., they have simply stated that they know nothing about the case and hence, the Prosecutor cross-examined them with their previous statements by putting suggestions which they denied. Even to invoke Section 154(2) of the Evidence Act, there is no material in their evidence. Though Saravanan (P.W.1) and Suresh (P.W.2) have spoken to extensively about the animosity between Gandhi on the one hand and A1 to A5 on the other, that, by itself, cannot substitute the absence of legal evidence against them for the charge of conspiracy. In fact, the complaint (Ex.P.1) given by Saravanan (P.W.1) is like an encyclopaedia, wherein, he has given the names of so many persons alluded to in paragraph 9 supra, as suspects. But, strangely, there is no whisper about A1 to A5 in the complaint (Ex.P.1). Assuming for a moment that he had inadvertently omitted to mention the names of A1 to A5 in the complaint (Ex.P.1) given by him, yet, his evidence showing that A1 to A5 were inimical to Gandhi, cannot, by itself, be a ground to convict them, without anything more. It should be borne in mind that motive provides the missing link for completing the chain of circumstances. In the case at hand, there is no evidence to show the chain of circumstances for this Court to use the motive as a missing link.

42. Coming to the cases of *Isakki Selvam (A9) and Rajkumar (A10)*, it is the clear case of the eyewitnesses that till the CB-CID took over the investigation, only three persons had entered the office of Gandhi. There was no reference to anybody waiting in the staircase. However, in the evidence before the Court, Saravanan (P.W.1) and Suresh (P.W.2) have spoken to about the presence of Isakki Selvam (A9) and Rajkumar (A10) as two persons who were standing in the staircase, apart from the three persons, who came into the office of Gandhi. In fact, there is a contradiction in the evidence of Saravanan (P.W.1) and Suresh (P.W.2) on this aspect. Saravanan (P.W.1) has stated that Isakki Selvam (A9) and Rajkumar (A10) were standing in the staircase, whereas, Suresh (P.W.2) has stated that they were standing in the office entrance. Had Isakki Selvam (A9) and Rajkumar (A10) been visible to Saravanan (P.W.1) and Suresh (P.W.2), then, even in the complaint (Ex.P.1), there would have been a reference to them. That is not the case here. The Trial Judge has taken pains to conduct local inspection under Section 310 Cr.P.C. by visiting the scene of crime and has found that the staircase will not be visible from any part of the scene of crime, viz., office, cabin and reception, which are located in the second floor and therefore, it would have been impossible for Saravanan (P.W.1) and Suresh (P.W.2) to have seen Isakki Selvam (A9) and Rajkumar (A10) standing in the staircase keeping guard. In this regard, the Trial Judge has submitted his inspection report which has been marked as Ex.C.1. This Court places on record its appreciation to Mr. C. Sanjai Baba, the trial Judge, for being proactive in the quest for unravelling the truth. Therefore, we hold that the omission of Saravanan (P.W.1) and Suresh (P.W.2) to tell the police at the earliest about the presence of two others laying in wait in the staircase, amounts to contradiction and the improvement made by them in their testimony, coupled with the observation report of the Trial Judge, fails to inspire any confidence in us to reverse the acquittal of Isakki Selvam (A9) and Rajkumar (A10).

43. The learned Additional Advocate General submitted that on account of the turf war amongst the cable TV operators, a gruesome murder has taken place and hence, in the interests of justice, the acquittal of A1 to A7, A9 and A10 should be reversed. Undoubtedly, on account of business rivalry, a ruthless attack resulting in 24 cut injuries on Gandhi had ensued and the guilty cannot be allowed to go scot-free. However, be it noted that moral conviction regarding the involvement of an accused in the commission of crime cannot be a substitute for a legal verdict based on facts and

law [See *Dhanajaya Reddy v. State of Karnataka*¹⁰]. Further, in *Vikramjit Singh @ Vicky v. State of Punjab*¹¹, the Supreme Court has held that suspicion, however grave, cannot be a substitute for proof. It is quite understandable that none would come forward to depose against such ganglords and that is exactly the reason why so many witnesses have turned turtle in this case. Unfortunately, that is the order of the day, for, delay in prosecutions naturally gives room for tampering with the witnesses. In the instant case, two of the accused, viz., Chandran and Manikkaraj, perhaps, received poetic justice.

44. In the ultimate analysis, this Court finds no reason whatsoever to reverse the acquittal of A1 to A7, A9 and A10 made by the Trial Court and as a sequitur, CrI.A. (MD) No. 226 of 2016 preferred by Saravanan (P.W.1/*de facto* complainant) and CrI.A. (MD) No. 246 of 2016 preferred by the State fail and are accordingly dismissed.

To sum up:

Ø CrI.A. (MD) Nos. 226 of 2016 preferred by Saravanan (P.W.1/*de facto* complainant) and CrI.A. (MD) No. 246 of 2016 preferred by the State, both seeking reversal of the acquittal of A1 to A7, A9 and A10 are dismissed.

Ø CrI.A. (MD) No. 324 of 2016 preferred by Karthik (A8) is allowed, only to the limited extent mentioned in paragraph 39 supra, setting aside the conviction and sentence slapped on him for the charge under Section 148 IPC and dismissed, qua his challenge to the conviction and sentence slapped on him for the charge under Sections 302 and 449 IPC. The Trial Court is directed to secure the presence of Karthik (A8) and commit him to prison to undergo the period of sentence.

[†] Madurai Bench

¹ (1998) 6 SCC 609

² (1999) 8 SCC 428

³ (2017) 11 SCC 150 : AIR 2017 SC 642

⁴ (2003) 5 SCC 746

⁵ AIR 1961 SC 1527

⁶ AIR 1970 SC 1619

⁷ (2002) 8 SCC 381

⁸ (2016) 12 SCC 150

⁹ (1988) 3 SCC 609 : AIR 1988 SC 1883

¹⁰ (2001) 4 SCC 9

¹¹ (2006) 12 SCC 306