

(2005) 09 MAD CK 0124

Madras High Court

Case No: Criminal A. No. 682 of 2003

Ali and Others

APPELLANT

Vs

The Inspector of Police

RESPONDENT

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**Date of Decision:** Sept. 20, 2005**Acts Referred:**

- Criminal Procedure Code, 1973 (CrPC) - Section 164, 164(1), 313
- Penal Code, 1860 (IPC) - Section 147, 148, 149, 302, 34

**Citation:** (2005) 2 LW(Cri) 904**Hon'ble Judges:** S. Sardar Zackria Hussain, J; P. Sathasivam, J**Bench:** Division Bench**Advocate:** K. Thirumalairaj for Nos. 1, 2, 5 and 6 and T. Lajapathi Roy for Nos. 4, 7 to 9, for the Appellant; K. Thirupathi and K. Chellapandian, Addl. P. P., for the Respondent**Final Decision:** Allowed

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**Judgement**

P. Sathasivam, J.

Aggrieved by the conviction and sentence imposed by the District and Sessions Judge, Special. Court for Communal Clashes-Southern District, Madurai, by the judgment dated 28-1-2003, made in Sessions Case No. 37 of 2001, accused Nos. 1 to 9 have preferred the above criminal appeal.

2. The prosecution case is briefly stated hereunder :

(a) P.W. 1 Dharmaraj was having Bakery Shop at Melapalayam.. The deceased Sathyaseelan, second son of P. W. 1, was assisting his father in his bakery shop. P.W. 2 Thangaraj and P. W, 3 Mohan are brothers of the deceased Sathyaseelan.

(b) The deceased Sathyaseelan used, to celebrate Saraswathi and Ayudha poqjas in a grand manner and used to distribute prasadams to people who are residing in and around VST Palllvasal. The deceased Sathyaseelan was having illicit intimacy with one Muslim lady, namely Nabisath (PW 7). Further, one Abdul Rasheed was

murdered at Crescent Nagar Pallivasal.

(c) Accused Nos. 1 to 9 belonged to Alumma. Because of the abovesaid reasons, accused Nos. 1 to 9 joined together and committed the murder of Sathyaseelan. Accused Nos. 6 and 7 were armed with aruvals, accused Nos. 2, 4, 5 and 9 were all armed with knives and accused Nos. 1, 3 and 8 were all armed with wooden logs, formed an unlawful assembly and on 11-1-2001 at about 11.15 p.m., when the deceased Sathyaseelan was returning from his bakery shop, near Alangar Theatre at Melapalayam, all the accused prevented him and at that time accused No. 8 Kaleel alias Kalleelur Rehman beat him with wooden log and because of that Sathyaseelan fell down. Immediately accused No. 6 Ismail alias Mohammed Ismail and accused No. 7 Syed Ali cut Sathyaseelan with aruvals, accused No. 4 Alam alias Kothu Alam, accused No. 5 Basheer Sheik Abdul Khader and accused No. 9 Mohammed Nithul Hariss stabbed Sathyaseelan with knives. Accused No. 1 Ali alias Mohammed beat Sathyaseelan indiscriminately and all the accused ran away from the spot.

(d) P. W. 5 Peer Mohamed, an auto driver, took the injured Sathyaseelan to Tirunelveli Medical College Hospital and he was admitted by P.. W. 18 Doctor Arumugapandian at 00.05 hours on 12-1-2001 and at that time he found nine cut injuries on the body of Sathyaseelan. Sathyaseelan died in the hospital on 12-1-2001 at 00.35 hours. P. W. 20 Dr. Selvaraj conducted postmortem on the body of Sathyaseelan on the next day and he found 14 injuries and Ex. P-5 is the postmortem certificate issued by him.

(e) Regarding occurrence, P. W. 1 Dharmaraj, lather of the deceased, accompanied by P. W. 2 Thangaraj, brother of the deceased, went to Melapalayam Police Station and preferred Ex. P-1 complaint on 12-1-2001 at 1.15 a.m. and the same was registered as Crime No. 10 of 2001 for the offences under Sections 341 and 302, I. P. C. Printed FIR is Ex. P-25. Police Station is half-a-kilometre away from the occurrence place. FIR was recorded by P. W. 34 Seemairaj, Sub-Inspector of Police, Melapalayam Police Station.

(f) P. W. 34 Sub-Inspector of Police gave information to P. W. 40 Subramaniam, Inspector of Police. P. W. 40 came to the police station on 12-1-2001 by 2.00 a.m. He got FIR copy at 2.15 a.m., visited the occurrence place, made an observation and prepared Ex. P-8 observation mahazar. He also drew Ex. P-26 rough sketch. From the occurrence place, he has seized some chappals, one Hercules Cycle M. O. 8, bloodstained earth M. O. 9 and sample earth M. O. 10 under Ex. P-9 mahazar.

(g) P. W. 40 Inspector of Police conducted inquest on the body of the deceased on 12-1-2001 between 7.00 a.m. and 10.00 a.m. and prepared Ex. P-27 inquest report.

(h) P. W. 40 Subramaniam, Inspector of Police, on 14-1-2001 at 4.00 p.m. arrested accused No. 7 Syed Ali and accused No. 5 Basheer Sheik Abdul Khader. After questioning them, he gave a requisition to the Revenue Divisional Officer, Tirunelveli, for recording their confession statements and as per the direction of

Revenue Divisional Officer, P. W. 24 Sudarmani Pandiyan, Tahsildar (Executive Magistrate), along with P. W. 25 Hangovan, Deputy Tahsildar, went to Palyamkottai Police Station.

(i) Accused Nos. 7 and 5 were produced before P. W. 24. P. W. 24 Tahsildar recorded the statement of accused No. 7 Syed Ali on 15-1-2001, which is marked as Ex. P-10. He also recorded the statement of accused No. 5 Basheer Sheik Abdul Kader and the same has been marked as Ex. P-11.

(j) As per the statement of accused No. 5, P. W. 40 visited Door No. 33, Kalvathnayagam Street, Melapalayam and seized one Polythene Bag M. O. 14, with M. O. 11 Veecharuval M. O. 12 Kozhival Aruval, M. O. 12 knife produced by one Nagoor Meeran and the said material objects were seized by P. W. 40 in the presence of P. W. 26 Ramachandran, Village Administrative Officer, as per Ex. P-14 Mahazar. Thereafter, accused No. 7 and accused No. 5 were remanded to custody.

(k) On 15-1-2001, accused No. 2 Mujipur Rehman, Accused No. 1 Ali alias Mohammed Ali, accused No. 6 Ismail alias Mohammed Ismail, accused No. 8 Kaleel alias Kalleelur Rehman and accused No. 4 Alam alias Kothul Alam were arrested by P. W. 40 in the presence of P. W. 27 and all the accused gave confession statements. Admissible portion of the confession statement of A-2 is marked as Ex. P. 28 and as per his confession, M. O. 16 cycle was seized in the presence of P. W. 27 as per Ex. P-16 Mahazar. The admissible portion of the confession statement of accused No. 6 is marked as Ex. P-29 and as per his confession, from Door No. 27 Akbar Street, black colour cycle M. O. 15 was seized by P. W. 40 in the presence of P. W. 27 as per Ex. P-19 Mahazar. Ex. P-30 is the admissible portion of the confession statement given by accused No. 1 and as per his confession, one black colour cycle was recovered by P. W. 40 in the presence of P. W. 27.

(1) P. W. 41 took up the further investigation from 21-1-2001. He gave a requisition for police custody of accused Nos. 7 Syed Ali, accused No. 2 Mujipur Rehman, accused No. 6 Mohammed Ismail. Accused No. 3 Abdul Lateef gave a confession statement and the same was recorded u/s 164, Cr. P. C. by P. W. 24 Tahsildar on 30-1-2001 and his statement is marked as Ex. P-12.

(m) After investigation, P. W. 41 filed final report on 30-8-2001 against accused No. 1 to 9 for the offences under Sections 147, 148, 341 read with 149, I. P. C. and Section 302 read with Section 34, I. P. C.

3. The prosecution examined as many as 41 witnesses as P. W. 1 to P. W. 41, marked Exs. P-1 to P-30 and produced and marked M. Os. 1 to 24. When the accused were questioned u/s 313, Cr. P. C. about the incriminating circumstances found in the evidence of prosecution witnesses, they have denied them either as false or not known. On the side of defence, as many as three witnesses as D. W. 1 to 3 were examined and no documents were marked. The learned Special Judge, accepted the prosecution case and convicted accused Nos. 1, 3 and 8 u/s 147, I. P. C. and

sentenced each of them to undergo two years rigorous imprisonment, accused Nos. 2, 4, 5, 6, 7 and 9 u/s 148, I. P. C. and sentenced each of them to undergo three years rigorous imprisonment, accused Nos. 1 to 9 u/s 341, I. P. C. and sentenced each of them to undergo one month simple imprisonment, accused Nos. 1, 4 to 9 u/s 302 read with Section 149, I. P. C. and sentenced each of them to undergo life imprisonment and also to pay a fine of Rs. 10,000/- each, in default to undergo two years rigorous imprisonment and accused Nos. 2 and 3 u/s 302 read with Section 34, I. P. C. and sentenced each of them to undergo life imprisonment and also to pay a fine of Rs. 10,000/- each, in default to undergo two years rigorous imprisonment. Questioning the same, the accused/appellants have filed the above appeal.

4. Heard Mr. K. Thirumalairaj, learned Counsel appearing for appellants 1, 2, 5 and 6, Mr. K. Thirupathi for appellant No. 3 and Mr. T. Lajapathi Roy for appellants 4 and 7 to 9 and also the learned Additional Public Prosecutor for the State.

5. Let us first consider whether the prosecution has established the motive for the occurrence. We are aware of the fact that even in the absence of motive, if clinching evidence is available, the prosecution case can be accepted.

6. In support, of the motive, three incidents have been pressed into service by the prosecution.

(i) Performance of Saraswathi and Ayudha Poojas in a grand manner by the deceased in the bakery shop of P. W. 1 which is located just opposite to VST Pallivasal and distribution of prasadams to large gathering.

(ii) Illicit intimacy of the deceased with one Nabisath (P. W. 7), a Muslim lady.

(iii) A Muslim priest was murdered and the present act is in retaliation to the said incidence.

7. As far as performance of Saraswathi and Ayudha Poojas in the bakery shop, where the deceased Sathyasaleen was assisting his father Dharmaraj (P. W. 1), it is claimed that since the area in question is dominated by Muslim people, the performance of Saraswathi and Ayudha poojas in a grand manner and distributing prasadams to various persons was not liked by the Muslim community, particularly the appellants/accused, for which they formed an unlawful assembly and decided to do away with the deceased. Even according to P. W. 1, father of the deceased, Saraswathi and Ayudha Poojas were being performed for the last 20 years in his bakery shop and no one objected for it. In such circumstances the performance of Saraswathi and Ayudha Poojas in a grand manner amidst Muslim community people cannot be a strong motive for murdering the deceased.

8. Coming to the second incident, namely illicit intimacy of the deceased with one Muslim lady, namely Nabisath P. W. 7, it is not in dispute that she herself turned hostile and she denied the entire allegation connecting her with the deceased. P. W. 5 Peer Mohamed, an auto driver, who took the injured Sathyaseelan to the hospital,

immediately after the occurrence, has stated before the Court that while he was taking the injured to the hospital, the injured informed him that five or six persons came and inflicted various injuries on him, since he had connection with a lady. When a specific question was put to him in cross-examination with reference to alleged intimacy with a Muslim lady, P. W. 5 has stated :

(Vernacular text omitted)

It is clear that even according to P. W. 5, except a reference to a lady, the deceased has not specifically stated that he had intimacy with a Muslim lady by name Nabisath. Inasmuch as P. W. 7 herself has turned hostile, the statement of P. W. 5 is also unacceptable. The trial Judge has rightly disbelieved the version of P. W. 5 and also the theory of illicit, intimacy of the deceased with P. W. 7, a Muslim lady.

9. Likewise, the third reason that a Muslim priest was murdered in the recent time, which made the accused to take the life of the deceased, even for this, there is no material from any of the witnesses examined on the prosecution side.

10. The learned trial Judge has rightly disbelieved the case of the prosecution insofar as the motive for the murder is concerned. We concur with the said conclusion and hold that the prosecution has not established their version of motive for the murder as claimed.

11. Coming to the merits of the case, in the complaint Ex. P-1, which was given by P. W. 1, father of the deceased, at 00.15 hours on 12-1-2001, it is stated that when he returned to home, he heard that his son , Sathyaseelan, while returning home after closing his bakery at 11.00 p.m. on 11-1-2001, at about 11.15 p.m., when he was coming opposite to Alankar Theatre, certain unknown persons waylaid him and inflicted multiple injuries and ran away. Though P. W. 1 is not an eye-witness to the occurrence, the fact remains that in Ex. P-1 he made a statement that some unknown persons murdered his son.

(Vernacular text omitted -- Ed.)

Even in printed FIR Ex. P-25 in Column No. 7 it is stated only as "unknown accused". In the inquest report Ex. P-27 also, it is referred as "accused not known". P. W. 40 Subramaniam, Inspector of Police, has also admitted that till 14-1-2001, there was no clue regarding the involvement of the accused in the murder of Sathyaseelan.

12. It is clear that though P. W. 1 Dharmaraj, father of the deceased, accompanied by P. W. 2 Thangaraj, brother of the deceased, went, to Melapalayam Police Station and preferred a complaint on 12-1-2001 at 0.15 a.m., which was marked as Ex. P-1 and the FIR was marked as Ex. P-25, admittedly there is no specific reference therein implicating the appellants for the murder of Sathyaseelan. It was merely stated therein that some unknown persons attacked the deceased due to which he sustained multiple injuries. In Ex. P-25 FIR it is mentioned as "accused not known". P. W. 40 Inspector of Police, though conducted inquest and prepared Ex. P-27 inquest

report, in columns 19 and 25 of Ex. P 27, it is specifically mentioned by him that "accused not known". All the above particulars show that the appellants/accused were implicated only at a later point of time.

13. The prosecution mainly relied on the evidence of P. Ws. 9, 10 and 37, who are said to be the ocular witnesses. Let us consider whether they have spoken to the case of the prosecution and the learned trial Judge is justified in accepting their evidence.

14. It is the defence of the appellants/ accused that the above said eye-witnesses P. Ws. 9, 10 and 37 are only chance witnesses. It is also their claim that they are not from the locality where the occurrence is said to have taken place.

15. Before considering their evidence, let us see whether the prosecution has properly explained the inordinate delay in examining P. Ws. 9, 10 and 37. As per the prosecution, the occurrence had taken place on 11-1-2001. Though according to the prosecution, the above referred persons witnessed the occurrence, admittedly they have not informed about the occurrence to any one, including the police till 4-4-2001. In his cross-examination, P. W. 9 has stated that

(Vernacular text omitted)

16. Regarding the same, P. W. 10 in his cross-examination has stated

(Vernacular text omitted)

P. W. 37 has also reiterated the same in his cross-examination. No doubt, he alone expressed fear at the hands of the accused.

17. As rightly pointed out by the learned Counsel for the appellants, though all the abovesaid witnesses were loadmen in the same area, where the murder had taken place, they did not inform the said incident to their neighbours, either to the family members of the deceased or to the police till 4-4-2001. As stated earlier, though P. W. 37 alone expressed some fear at the hands of the accused, in the absence of any such apprehension from other two witnesses, they being loadmen, their conduct in not informing the same to the police is not appreciable one. In that event, their evidence have to be scrutinized cautiously to find out whether they are speaking truth.

18. Apart from the above infirmity, that is inordinate delay in examining P. Ws. 9, 10 and 37, admittedly there is no identification parade conducted by the prosecution. If the belated examination of occurrence witnesses is not properly explained by the prosecution, the courts have, held that such kind of evidence cannot be believed.

In [Balakrushna Swain Vs. State of Orissa](#), the Supreme Court held that unjustified and unexplained long delay on the part of investigating officer in recording statement of material witness during investigation of murder case will render evidence of such witnesses unreliable.

Similar view has been expressed by a Division Bench of this Court [In Re: Thangarai and Others](#), . The Division Bench has held that unexplained delay renders the evidence of such witnesses unreliable.

Similar view is reiterated by the Supreme Court in the decision reported in [The State of Rajasthan Vs. Shri Teja Singh and Others](#), .

In the decision reported in 2005 (1) Mad

LW (Crij 440 Manoharan v. State, a Division Bench of this Court, after finding that the witnesses leaving the village and absconding for 10 days would show their inimical nature towards the accused and in implicating the accused in the crime, rejected the prosecution case and awarded benefit of doubt in favour of the accused.

19. We have already referred to the evidence of the Investigating Officer P. W. 40 and he was not able to explain the delay in the examination of crucial eye-witnesses.

20. Even if P. Ws. 9, 10 and 37 are considered as occurrence witnesses, let us see whether their evidence establish the prosecution theory. Learned Counsel appearing for the appellants, by taking us through their evidence, would submit that even in chief examination, they have not stated regarding the overt acts of the accused as stated in the charges framed. Though P. W. 9 in his chief examination has referred to nine persons, however he implicated only accused Nos. 4, 5 and 6. P. W. 10 speaks about the presence of only accused Nos. 7 and 8. P. W. 37 refers about the presence of accused Nos. 1, 2, 3 and 9. The answers given by these witnesses in their cross-examination would show that they could not have witnessed the occurrence as claimed by the prosecution. In cross-examination, P. W. 9 has stated (Vernacular text omitted)

Likewise, though he claims that he is a loadman near the scene of occurrence, he was not in a position to give address and other particulars of his employer. He also admitted that no identification parade was conducted at any point of time either at the police station or in prison.

21. Coming to the evidence of P. W. 10, though he has stated that the deceased was beaten by six or seven persons in front of a tiffin shop, admittedly the prosecution has not examined any one from that shop. It is relevant to note that though P. W. 10 has stated that a boy from the tea stall lifted the injured and at that time all the accused ran away, there is no explanation for not examining the said boy from the tea stall. In cross examination though P. W. 10 has admitted that he is residing near Tirunelveli Junction for a period of five years, he has not mentioned the Door Number when he was examined by the police. Admittedly, he was not having any document such as Ration Card to prove his address. He also admitted that neither his name nor the names of his family members find place in voters list According to him, the incident was witnessed by 20 to 25 persons.

22. Coming to the evidence of P. W. 37, he has admitted that he saw the injured at a distance of 40 feet from the cinema theatre. However, he did not raise any alarm, He also stated that apart from P. W. 9 and P. W. 10 and himself, 200 to 300 persons, who were coming out from the cinema theatre, also witnessed the occurrence.

23. As rightly pointed out, the above mentioned occurrence witnesses are not consistent about the overt acts of the accused and the number of persons who saw the incident, etc. As stated earlier, P. Ws. 9, 10 and 37 are alleged to be loadmen, they went to Alankar Theatre for a night show and while they were returning, five minutes prior to the end of the show, at about 11.15 p.m., a mob of 7 to 8 persons were stabbing the deceased and according to them, they had seen the occurrence and then went to Tirunelveli and for a period of three months they did not disclose the occurrence to any one, but informed the same to the police after three months. As observed earlier, the said three eye-witnesses, as rightly pointed out, are forming independent islands and they do not support each other, P. W. 9 deposed that only three persons have witnessed the occurrence, whereas P. W. 10 deposed that 20 to 25 persons have witnessed the occurrence and P, W, 37 deposed that 200 to 300 persons have witnessed the occurrence.

24. As per the prosecution case, accused Nos. 6 and 7 carried billhooks, accused Nos. 2, 4, 5 and 9 were armed with knives, accused Nos. 1, 3 and 8 armed with wooden logs and they along with accused Nos. 1 and 3 had prevented the deceased Sathyaseelan who was returning in a bicycle. It was stated that accused Nos. 1 to 9 had prevented him and accused No. 8 had attacked him with wooden log, accused Nos. 1, 4, 5, 6, 7 and 9 had surrounded him, accused Nos. 6 and 7 hacked him with billhooks, accused Nos. 4, 5 and 9 stabbed with knives and accused No. 1 beat with hands and caused the death of Sathyaseelan.

25. Though P. Ws. 9, 10 and 37 have deposed that the appellants have attacked the deceased with knives, billhooks and wooden logs, the doctor, who conducted postmortem, P. W. 20 did not find a single injury of contusion made with stick, but only found cut and stab injuries. The doctor also opined that "V" shaped injury could be possible by a "V" shaped weapon, whereas no such weapon was seized from any accused. 26. As per the evidence of P. W. 10, accused Nos. 2 and 4 were having aruvals and accused No. 5 was having knife and accused No. 7 was having wooden log and accused Nos. 2 and 4 cut Sathyaseelan with aruvals, As rightly pointed out, the evidence of P. W. 10 is contrary to the charges framed against the accused. Regarding overt acts, what all stated in Exs. P-11 and P-12 are also contrary to the charges framed against the accused.

27. An analysis of the evidence of occurrence witnesses P. Ws. 9, 10 and 37 leads to an inference that they are only chance witnesses and in view of their contradictory statement, it is not safe to rely upon their evidence without further corroboration.



28. Now we shall consider the statements recorded by P. W. 24, Tahsildar, Palayamkottai, According to the prosecution, he recorded the confession statements of the accused u/s 164 of the Code of Criminal Procedure and those statements are marked as Exs. P-10, P-11 and P-12. P. W. 24 in his evidence has stated that he worked as Tahsildar, Palayamkottai, from 27-7-2000 to 31-11-2001 and during the said period on 14-1-2001, on the direction from the Revenue Divisional Officer, Tirunelveli, he went to Melapalayam Police Station with reference to Crime No. 10 of 2001 and recorded the confession statements of the accused. P. W. 24 Tahsildar, Palayamkottai, went to Palayamkottai Police Station along with P. W. 25 Deputy Tahsildar and before him accused Nos. 7 and 5 were produced. P. W. 24 recorded the statement of accused No. 7 Syed Ali on 15-1-2001 and that statement is marked as Ex. P-10. He also recorded the statement of accused No. 5 Bazeer Sheik Abdul Kather and the same has been marked as Ex. P-11 and in which accused No. 5 signed in the last page as Meeran. On 30-1-2001, P. W. 24 also recorded the confession statement given by accused No. 3 Abdul Lateef and the same is marked as Ex. P-12.

28. The prosecution mainly relied on the confession statements of accused No, 7 and 5, i.e. Exs. P-10 and P-11, respectively and the statement of accused No. 3, Ex. P-12, dated 30-1-2001. As stated earlier, all these statements were recorded by P. W. 24, Tahsildar (Executive Magistrate) u/s 164, Cr. P.. C. It is the argument of the learned Counsel for the appellants that since P. W. 24, being a Tahsildar, he has no power to record a statement of an accused u/s 164 of the Code of Criminal Procedure and therefore Exs. P-10, P-11 and P-12 are inadmissible in evidence.

Section 164(1), Cr. P. C. reads as under :

164. Recording of confessions and statements.-- (1) Any Metropolitan Magistrate or Judicial Magistrate may, whether or not he has jurisdiction in the case, record any confession or statement made on him in the course of an investigation under this Chapter or under any other law for the time being in force, or at any time afterwards before the commencement of the inquiry or trial:

Provided that no confession shall be recorded by a police officer on whom any power of a Magistrate has been conferred under any law for the time being in force.

30. It is clear that only Metropolitan Magistrates or Judicial Magistrates are authorised to record confessions and statements of accused in the course of an investigation or at any time before the commencement of the enquiry or trial. A confession is a statement made by an accused which must either admit in terms, the offence or substantially all the facts constituting the offence. A judicial confession is one which is made by an accused before a Magistrate in accordance with the provisions of Section 164, Cr.P.C. Rules have been framed for the guidance of the Magistrates recording judicial confession. In the light of the language used in Sub-section (1) of Section 164, Cr.P.C., only Metropolitan Magistrates or Judicial

Magistrates of any other place are competent to record confession or statement of an accused at any point of time before the commencement of the enquiry or the trial.

31. In the present case, according to the prosecution, P. W. 24 is a Tahsildar and even if we treat him as an Executive Magistrate, he has no power to record the statements of accused u/s 164, Cr. P. C. It is also not brought before the trial Court any instruction or circular by the competent authority empowering Tahsildars for recording confessions or statements of the accused even though he is fit to act as an Executive Magistrate. In such circumstances, as rightly argued by the learned Counsel for the appellants, we hold that P. W. 24, being an Executive Magistrate, has no power to record the statements of the accused in this case u/s 164, Cr. P. C., consequently Exs. P-10, P-11 and P-12 are inadmissible in evidence.

32. In [Nika Ram Vs. State of Himachal Pradesh](#), the Supreme Court, after finding that record of confession by Second Class Magistrate not specifically empowered in that behalf, has concluded that the record was inadmissible evidence at the trial.

33. We have already referred to Section 164, Cr. P. C. and it makes it clear that the power to record statement or confessions is conferred upon the Judicial Magistrates only and not on the Executive Magistrates. The object of empowering the Judicial Magistrate to record confessional statement is obvious and is intended to minimise the apprehension of the Investigating Agency getting the statement recorded according to their choice and upon their asking. The provisions of Section 164, Cr. P. C. empowering the Judicial Magistrates only to record the confessional statement is mandatory having no exception. Confessional statement recorded by a Magistrate not empowered to do so under this section is not admissible in evidence. Though it was pointed out that P. W. 24 has scrupulously followed the formalities provided u/s 164, Cr. P.C., in the light of the infirmity, as pointed out above, we hold that Exs. P-10, P-11 and P-12 are inadmissible in evidence, as a corollary the recoveries made based on the same cannot be used on the side of the prosecution.

34. As discussed earlier, P. W. 5 Auto Driver, according to the prosecution, is a witness who had seen the deceased on the spot and had taken the deceased to the hospital. But the deceased did not say to him anything about the identity or description of the accused who attacked him and as rightly pointed out, he did not even say Muslims attacked him. The trial Court rightly disbelieved the version of P. W. 5.

35. Apart from the delay in recording the statements of the witnesses, the eyewitnesses did not disclose the occurrence for more than three months to anyone, including his friends or relatives. Though the accused were arrested within a week from the occurrence date, accused No. 10 Nahoor Meeran was dropped from the charge, though he had given a confession. Further, chemical examination also revealed no blood-stains and hence recovery has no evidentiary value. All the

aforesaid facts would make the prosecution case doubtful. As rightly pointed out, the evidence of P. W. 2 would indicate that there are civil and criminal cases among two factions in Nadar Sangam and the murder because of factional dispute is not ruled out.

36. Under these circumstances, we are satisfied that the prosecution has not proved all the charges against any of the accused and the Special Court convicted the accused/appellants contrary to the evidence available on record and so the judgment of the trial Court cannot be sustained. The appellants are entitled to be acquitted of all the charges framed against them.

37. In the light of what is stated above, the appeal is allowed and the conviction and sentence imposed by the trial Court on the appellants/accused in its judgment, dated 28-1-2003 are set aside and the appellants/ accused are acquitted of all the charges framed against them. The appellants are directed to be released forthwith, unless their presence is required for some other case.