

**(2009) 06 MAD CK 0269**

**Madras High Court**

**Case No:** Criminal Appeal No's. 354 of 2008 and 579,469,412,459 and 463 of 2007

E. Selvam and Others

APPELLANT

Vs

State by the Inspector of Police

RESPONDENT

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**Date of Decision:** June 15, 2009

**Acts Referred:**

- Criminal Procedure Code, 1973 (CrPC) - Section 313
- Penal Code, 1860 (IPC) - Section 147, 148, 302, 323, 324

**Citation:** (2009) 6 CTC 9

**Hon'ble Judges:** M. Chockalingam, J; C.S. Karnan, J

**Bench:** Division Bench

**Advocate:** Sathyachandran, No. 1 in Crl.A. No. 354 of 2008; Mr. B. Kumarasamy, Nos. 3 and 6 in Crl.A. No. 579 of 2007 No. 4 in Crl.A. No. 469 of 2007 Nos. 7 and 8 in Crl.A. No. 459 of 2007; Mr. T.P. Sekar, Nos. 5 and 11 in Crl.A. No. 412 of 2007 No. 9 in Crl.A. No. 459 of 2007; Mr. John Sathyan, No. 10 in Crl.A. No. 463 of 2007, for the Appellant; N.R. Elango, Additional Public Prosecutor, for the Respondent

**Final Decision:** Allowed

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**Judgement**

M. Chockalingam, J.

This judgment shall govern the following Criminal Appeals, namely, Crl.A. Nos. 354/2008 by A-1, 579/2007 by A-2, A-3 and A-6, 469/2007 by A-4, 412/2007 by A-5 and A-11, 459/2007 by A-7 to A-9 and 463/2007 by A-10. All these Appeals challenge a judgment of the Sessions Division, Villupuram, made in S.C. No. 303 of 2004, whereby the Appellants in these six Appeals stood charged, tried and found guilty as follows:

The sentences imposed on the respective accused were ordered to run concurrently.

2. The necessary facts for the disposal of these Appeals can be stated thus:

(a) P.W. 1 is the cousin brother of the deceased Dhanasekaran. P.W. 2 is the wife of the deceased. All the accused and the deceased belonged to Wakkur New Colony. P.W. 2 was the Panchayat Member. The deceased was the Secretary of the Republic Party. The deceased and A-2 were on inimical terms because of the previous Panchayat election. There were number of Criminal Complaints lodged against them at Vikkiravandi Police Station. The accused were threatening to do away with the deceased. Hence, the deceased was hiding himself for some time.

(b) On 16.11.2003, Dhanasekaran came to his village. The accused, who came to know about the same, visited the house of P.W. 1-Perumal armed with deadly weapons at about 10.30 am and enquired about Dhanasekaran. When P.W. 1 informed that he did not know anything about him, A-3, A-6 and A-7 attacked him with weapons while others attacked him with hands.

(c) P.W. 2, on coming to know about the said incident, sent her husband to the house of P.W. 4 Mani Balan. P.W. 1 immediately proceeded to the house of P.W. 4 Mani Balan and kept Dhanasekaran inside the house and locked the doors with cycle chain. At that time, all the accused armed with deadly weapons, came there asking the whereabouts of Dhanasekaran, broke open the lock and went inside. A-1 attacked with Veecharuval on the chest of the deceased and blood was sprinkling out. A-2 pierced on the chest of the deceased with a crowbar and by these attacks, Dhanasekaran met with his end instantly. All of them fled the scene of occurrence along with the weapons.

(d) P.W. 1 was taken to the Government Hospital, Villupuram. P.W. 8, the doctor on duty, at about 11.50 a.m. examined him and gave treatment. The copy of the accident register is marked as Ex.P-10.

(e) P.W. 9, the Head Constable attached to the Vikkiravandi Police Station, on receipt of information, proceeded to the Government Hospital, Villupuram, and recorded the statement given by P.W. 1, which is marked as Ex.P-1, on the strength of which, he registered a case in Crime No. 737 of 2003 under Sections 147, 148, 448, 323, 324 and 302, IPC. Express FIR, Ex.P-12 was prepared and sent to the concerned authorities.

(f) P.W. 12, Inspector of the Circle took up investigation, proceeded to the spot, prepared Ex.P-2-Observation Mahazar and also Ex.P-13-Rough Sketch. P.W. 13, the photographer, took the photos of the scene of occurrence and the photos are marked as M.O.6 series and the negatives are marked as M.O.7 series. Then, P.W. 12 conducted inquest on the body of Dhanasekaran in the presence of witnesses and panchayatdars and prepared the Inquest Report Ex.P-14. Then, he sent the dead body to the hospital for the purpose of postmortem along with a requisition.

(g) On receipt of the said requisition, P.W. 8-Doctor attached to the Villupuram Government Hospital, conducted autopsy on the dead body of Dhanasekaran and gave a Post-mortem Certificate, Ex.P-11, wherein he opined that the deceased would

appear to have died of shock and haemorrhage due to injuries sustained.

(h) On 18.11.2003 at about 5.30 a.m., the Investigating Officer-P.W. 12 arrested A-3, A-4 and A-13. A-3 gave a confessional statement voluntarily. The same was recorded, and the admissible part is marked as Ex.P-4. Following the same, he produced M.O.3, iron pipe, which was recovered under the cover of mahazar, Ex.P-5. Further, P.W. 12 came to know that A-1 and A-5 to A-9 had surrendered before the Judicial Magistrate, Pondicherry. Then, he made a requisition for Police custody and the same was ordered and pending interrogation, A-1 gave a confessional statement voluntarily and the admissible part is marked as Ex.P-7. Following the same, he produced M.O.1-Veecharuval, which was recovered under the cover of mahazar Ex.P-8. A-2 gave a confessional statement voluntarily and the admissible part is marked as Ex.P-9. Following the same, he produced M.O.2 crowbar, which was recovered under the cover of mahazar-Ex,P-6. Then, all the accused were sent for judicial custody and all the material objects were subjected to chemical analysis by the forensic department pursuant to the requisition given by P.W. 12. Ex.P-22 is the Chemical Analysis Report and Ex.P-23 is the Serologist Report. On completion of investigation, the Investigating Officer filed the final report under Sections 147,148,448,323, 324 and 302, IPC.

(i) The case was committed to the Court of Session, Villupuram and necessary charges were framed. In order to substantiate the charges, the prosecution examined 14 Witnesses and also relied on 27 exhibits and 7 Material Objects. On completion of the evidence on the side of the prosecution, the accused were questioned u/s 313 of Cr.P.C. as to the incriminating circumstances found against them in the evidence of prosecution witnesses, which they flatly denied as false. No defence witness was examined. But, one document was marked as Ex.D1. The Trial Court heard the arguments advanced, found the Appellants/accused guilty and awarded the punishment referred to above. Hence these Appeals at the instance of the Appellants.

3. Advancing arguments on behalf of A-1 (Appellant in C.A. No. 354 of 2008), the learned Counsel would urge that the prosecution has not proved the factual position that there was an occurrence as put forth by P.Ws.1 and 2, who are the eye witnesses, and that there are lot of discrepancies in their evidence and even assuming that the evidence of prosecution is taken to have been proved as to the factual position, A-1 was juvenile at the time of occurrence. Further, the learned Counsel took the Court to the statement of A-1 u/s 313, Cr.P.C. and submitted that at that time, his age was 20. The occurrence had taken place in the year 2003 and he was questioned by the Trial Court in 2007 and thus, he was only 16 years old at the time of occurrence and at the time of Application for suspension of sentence was filed, the same plea was raised. Then, there was a direction to the District Court and an enquiry was conducted and a report was also received to the effect that the age of A-1 was really found as 16 at the time of occurrence. As such, it will be quite clear

that he was a juvenile at the time of occurrence and hence, the benefit should go to him by recording the said fact.

4. It was also brought to the notice of the Court that pending trial, A-2 died. Therefore, no Appeal has been preferred. Even assuming the overt act attributed to A-2 that he had attacked the deceased with crowbar-M.O-2 at the time of occurrence is taken to have been proved, in view of his death, the charge levelled against him stands abated and hence, it has got to be recorded.

5. Advancing arguments on behalf of other Appellants, learned Counsel would submit that in the instant case, the prosecution relied on the evidence of P.Ws.1 and 2, eye witnesses; that in so far as the evidence of P.W. 1 is concerned, there are lot of discrepancies in his evidence; according to P.W. 1, he was attacked by eight persons armed with deadly weapons and thereafter, he went to the house of P.W. 4 Mani Balan and when he along with P.W. 2, wife of the deceased, locked Dhanasekaran inside the house with cycle chain and came out, the accused persons, 11 in number, came with armed deadly weapons, broke open the cycle chain and got entry into the house of P.W. 4 and attacked the deceased with deadly weapons; that it was specifically stated by him that it was A-1 who attacked the deceased with Veecharuval and A-2 with crowbar and nowhere, P.W. 1 has stated that other accused got any overt act.

6. Added further the learned Counsel that in so far as the evidence of P.W. 1 relating to the incident that had taken place in his house is concerned, in the earliest document i.e. Ex.P-10 the AIR copy, he has specifically stated that he was attacked by 8 persons; that there was a development at the time of evidence and at one stage he said that there were 11 persons and at another stage, as seen in the FIR (Ex.P-1), and thereafter at the time of evidence, he developed to state that there are some more persons along with the accused persons and thus, he was not sure about the number of the accused persons.

7, Added further the learned Counsel that according to P.W. 1, he and P.W. 2 kept Dhanasekaran inside the room and closed the same and that there was darkness and if that be so, he could not have identified the assailants at all; according to P.W. 8-Doctor, P.W. 1 was admitted in the hospital at about 11.50 a.m.; but, according to P.W. 9, Head Constable, who recorded the complaint, after getting information, he proceeded to the hospital and recorded the statement of P.W. 1 at about 11.30 a.m., which could not have taken place at all and that according to P.Ws.1 and 2, the occurrence took place at 10.30 a.m. But according to P.W. 9, Ex.P-1 was recorded at 11.30 a.m. in the hospital.

8. Added further the learned Counsel that P.W. 5, the Village Administrative Officer has stated mat he sent the information to the Tahsildar through phone but he did not record anything and he came to the spot after the arrival of Police and it would go to show that there was an information and the same has been suppressed.

Added further the learned Counsel that so far as A-10 is concerned, his name was really found as Kamaraj; but in Ex.P-1-Complaint and also in Ex.P-12, the FIR, the name of A-10 is shown as Ramaraj; that then an enquiry was made in which P.W. 1 said that it was a mistake done; and thus, the identity of A-10 is highly doubtful. Added further the learned Counsel that these discrepancies found in the evidence of P.Ws.1 and 2 would go to the root of the matter, raising a doubt as to whether any such incident had taken place at all and the discrepancy as to the number of accused persons and the number of assailants would clearly raise a doubt whether any unlawful assembly having a common object attacked the deceased and the deceased died on account of the injuries sustained and that the prosecution has miserably failed to prove the guilt of the accused and that they are entitled for an acquittal in the hands of this Court.

9. The Court heard the learned Additional Public Prosecutor on all the above contentions and paid its anxious consideration on the submissions made.

10. It is not in controversy that one Dhanasekaran, the husband of P.W. 2 was done to death in an incident that had taken place in the house of P.W. 4 at about 10.30 am as put forth by the prosecution. Following the inquest made by the Investigating Officer, the dead body was subjected to postmortem by P.W. 8, the Medical Officer, who has given his opinion as a witness before Court and also through the contents of the. Post-mortem Certificate, Ex.P-11, that the deceased died of shock and haemorrhage due to the injuries. The fact that he died out of homicidal violence was never disputed by the Appellants at any stage of the proceedings. Hence no impediment is felt in recording so.

11. As could be seen above, the gist of the case of the prosecution is that in pursuance of common object to cause death of Dhanasekaran, the accused went to the house of P.W. 1 and attacked him and thereafter, they proceeded to P.W. 4-Mani Balan's house and broke open the lock, went inside and A-1 and A-2 attacked Dhanasekaran with deadly weapons, namely, Veecharuval and crowbar respectively and other accused were standing nearby and due to the severe injuries sustained, he died.

12. At the outset, it has to be noted that P.W. 1 has stated that all the accused persons were actually armed with deadly weapons. They first enquired and attacked P.W. 1 and thereafter, proceeded to the house of P.W. 4. P.W. 4's house was actually locked with a cycle chain by P.Ws.1 and 2 and the same was broken open and they went inside.

13. In so far as A-3 to A-11 are concerned, their participation in the incident remains doubtful in view of the following suspicious circumstances. In a given case like this, when all the accused persons assembled in furtherance of the common object of attacking the deceased Dhanasekaran and they were also armed with deadly weapons, it would be naturally expected that all would attack the deceased.

According to P.Ws.1 and 2, all accused armed with deadly weapons, broke open the lock and went inside, but A-1 and A-2 alone attacked the deceased and others did not attack the deceased and they remained as silent spectators.

14. Further, the earliest document that has come into existence is Ex.P-10, the copy of Accident Register, wherein it is mentioned that the assailants, who attacked the deceased are 8 in number. Subsequently, in the First Information Report Ex.P-12, FIR copy, it is found that they are 11 in number and before the Court, P.W. 1 deposed that apart from 11 accused, there were some more persons, who were actually not known. It could be seen from the evidence of P.W. 1, who has actually been attacked, that he went to the house of P.W. 4 and all these accused assembled again unlawfully and made a Criminal trespass and attacked the deceased. Considering all these circumstances, it is highly doubtful, whether all these persons could have participated in the crime and in the instant case, the discrepancies in the evidence of P.Ws.1 and 2 as to the number of participants, number of assailants and also the time of occurrence cast a doubt whether A-3 to A-11 would have participated in the commission of offence. All these things indicate the fact that the names of these accused persons could have been added subsequently. But the Trial Court has not taken into account these discrepancies and it has believed the evidence of P.Ws.1 and 2. Therefore, in view of the discrepancies noticed above, this Court is of the considered opinion that it is highly doubtful at all whether A-3 to A-11 would have been at the time of occurrence at all and place of occurrence. Thus, that part of the evidence of P.Ws.1 and 2 could not be believed and this Court is of the considered view that A-3 to A-11, who stood charged for various offences, have got to be acquitted.

15. But in so far as A-1 and A-2 are concerned, a careful analysis of the entire evidence would clearly reveal that there is direct evidence to accept the case of prosecution, which is sufficient to prove the guilt of A-1 and A-2 i.e., attacking and causing simple injury on P.W. 1 and thereafter, attacking the deceased Dhanasekaran and causing his instantaneous death. Therefore, it is quite clear that A-1 and A-2 proceeded to the place of occurrence, first attacked P.W. 1 and then broke open the door of P.W. 4's house and went inside and attacked the deceased and caused his instantaneous death and thereby, both of them shared the common intention and hence, they have got to be found guilty under Sections 302 and 324, IPC. At this juncture, it is to be noted that A-2 is dead and hence, the conviction and sentence against him stand abated.

16. So far as A-1 is concerned, as rightly pointed out by the learned Counsel, he was a juvenile at the time of occurrence since he was only 16 years old. At the time of questioning u/s 313, Cr.P.C, it was brought to the notice of the Trial Court that A-1 was 20 years old. Hence, in 2003 when the occurrence took place, he was only 16 years old. When A-1 filed an Application seeking suspension of sentence of imprisonment before this Court, an enquiry was ordered and the learned Trial Judge

conducted enquiry and sent a report which revealed that A-1 was only 16 years at the time of commission of offence. When A-1 was a juvenile, the question would naturally arise whether the judgment of the Trial Court in respect of A-1 could be set aside and the matter could be remitted for fresh consideration before the Court of Juvenile Justice. But in the instant case, no purpose will be served for the simple reason that he crossed 16 years now. Even if the Juvenile Justice Court is directed to conduct an enquiry against A-1, no useful purpose would be served. Under these circumstances, he has to be set at liberty, giving the benefit under Juvenile Justice Act.

In the result, all the Criminal Appeals are allowed. The conviction and sentence imposed by the Trial Court in respect of A-3 to A-11 are set aside, and they are acquitted of all the charges levelled against them. In so far as A-2 is concerned, the conviction and sentence imposed on him stand abated since he is dead. In so far as A-1 is concerned, he is set at liberty, giving the benefit under Juvenile Justice Act. The fine amounts, if any, paid by A-1 and A-3 to A-11 will be refunded to them.