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Crl.A.No.804 of 2018

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 20.02.2024 / 11.03.2024

Pronounced on : 18.03.2024

CORAM :

THE HON'BLE MR. JUSTICE M.S.RAMESH

AND

THE HON'BLE MR. JUSTICE SUNDER MOHAN

Crl.A.No.804 of 2018

1. Manikandan

2. Venkatachalam

3. Nagaraj

... Appellant/Accused No.1 to 3

vs.

State by the Inspector of Police Circle,

Vazhavanthi Nadu Police Station,

Namakkal District.

(Crime No.40/2011)

... Respondent/Complainant

Criminal Appeal filed under Section 374(2) of Code of Criminal Procedure, 1973, to call for the entire records in connection with the S.C.No.41/2016 on the file of the learned Additional Sessions Judge, Namakkal, Namakkal District and set aside the Judgment dated 26.10.2018.

For Appellants : Mr.V.Parthiban (A1 to A3)

for Mr.W.Camyles Gandhi

A3 - Died



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For Respondent : Mr.A.Gokulakrishnan
Additional Public Prosecutor

JUDGMENT

(Order of the Court was delivered by SUNDER MOHAN,J.)

This Criminal Appeal has been filed by accused 1 to 3, challenging the conviction and sentences imposed upon them vide judgment dated 26.10.2018 in S.C.No.41 of 2016 on the file of the learned Additional Sessions Judge, Namakkal, Namakkal District.

2(i) It is the case of the prosecution that the son of the deceased fell in love with his uncle's (Mr.Panayakali) daughter; that they got married with the help of Mr.Panayakali and there have been differences of opinion between the two families ever since then; that A2 and A3 were sons of Mr.Panayakali and A1 is the cousin of A2 and A3 and they decided to do away with the male members of the family of the deceased; that on 12.04.2011 at about 7.00 a.m. the first and second accused shot the deceased with an unlicensed gun; that the third accused attacked the deceased with bill hook (aruval), as a result of which the deceased died.

(ii) It is further the case of the prosecution that P.W.1/the wife of the



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deceased and sister of the said Mr.Panayakali, lodged a complaint

[Ex.P1] on 12.04.2021 at 10.00 a.m., which was registered in FIR [Ex.P21] by the Sub Inspector of Police [P.W.14] in Crime No.40 of 2011, for the offences under Sections 302, 506 (ii) of the IPC and Section 25 (1-B) (a) of the Arms Act.

(iii) P.W.14 commenced an investigation and sent the FIR to the Court. He went to the scene of the occurrence and prepared the Observation Mahazar [Ex.P22] and Rough Sketch [Ex.P23]. He seized the phosphorous pellets [M.O.8], a rope [M.O.7] by Seizure Mahazar [Ex.P24]. He seized the blood stained earth [M.O.9] and the earth that was not blood stained [M.O.10] under Seizure Mahazar [Ex.P25]. He conducted the inquest, prepared the Inquest Report [Ex.P26] and made a requisition for conducting [Post-mortem]. P.W.12 conducted Post-mortem and issued a Post-mortem certificate [Ex.P19].

(iv) P.W.15/the Inspector of Police, took up the investigation.



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Thereafter, on 04.04.2012 all the accused surrendered and P.W.15 took the accused into police custody on 12.04.2012 after obtaining orders from the learned Judicial Magistrate – II, Namakkal. On 13.04.2012, he recorded the confession of the accused. On the confession of A1, he seized an unlicensed gun (M.O.1 series) under Seizure Mahazar (Ex.P27). The admissible portion of the confession of the first accused was marked as Ex.P7. On the confession given by the second accused, he seized an unlicensed gun (M.O.1 series) under Seizure Mahazar [Ex.P29]. The admissible portion of the confession statement of the second accused was marked as Ex.P9. On the confession given by the third accused, he seized a bill hook [M.O.2] under Seizure Mahazar [Ex.P31]. He thereafter sent the pellets found in the body of the deceased and the guns seized for analysis. On 06.02.2013, he sought sanction to prosecute the accused under the Arms Act.

(v) PW15 handed over the investigation to P.W.16/the Inspector of Police. After receipt of the order of sanction from the Collector and examining the other witnesses, PW16 filed the Final Report before the learned Judicial Magistrate – II, Namakkal, on 06.11.2014 for the offences



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under Sections 302, 506 (ii), 25(1-b) (a) r/w 3 of the Arms Act against the accused.

(vi) On the appearance of the appellant, the provisions of Section 207 Cr.P.C., were complied with, and the case was committed to the Court of Session in S.C.No.41 of 2016 and was made over to the learned Additional Sessions Judge, Namakkal, for trial. The trial Court framed charges u/s.302 r/w 34 and 506 (2) r/w 34 of the IPC and 25(1-B) (a) r/w 3 of the Arms Act as against the appellants and when questioned, the appellants pleaded 'not guilty'.

(vii) To prove the case, the prosecution examined 16 witnesses as P.W.1 to P.W.16 and marked 33 exhibits as Exs.P1 to P33, and marked 10 Material Objects as M.O.1 to M.O.10. When the appellants were questioned, u/s.313 Cr.P.C., on the incriminating circumstances appearing against them, they denied the same. The appellants/accused neither examined any witnesses, nor marked any documents.



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(viii) On appreciation of oral and documentary evidence, the trial Court found that the prosecution had established its case beyond reasonable doubt and held the appellants/A1 to A3 guilty of offences charged against them. The appellants/A1 to A3 were convicted and sentenced as follows:

<i>Accused No.</i>	<i>Offence under Section</i>	<i>Sentence imposed</i>
A1	302 r/w 34 of IPC	To undergo life imprisonment and to pay a fine of Rs.10,000/- in default to undergo rigorous imprisonment for one year
	25(1-B) (a) r/w 3 of Arms Act	To undergo imprisonment for one year and to pay a fine of Rs. 1000/- in default to undergo rigorous imprisonment for three months.
	506 (2) of IPC	To undergo rigorous imprisonment for one year.

<i>Accused No.</i>	<i>Offence under Section</i>	<i>Sentence imposed</i>
A2	302 r/w 34 of IPC	To undergo life imprisonment and to pay a fine of Rs.10,000/- in default to undergo rigorous imprisonment for one year
	25(1-B) (a) r/w 3 of Arms Act	To undergo imprisonment for one year and to pay a fine of Rs. 1000/- in default to undergo rigorous imprisonment for three months.
	506 (2) r/w 34 IPC	To undergo rigorous imprisonment for one year.

<i>Accused No.</i>	<i>Offence under Section</i>	<i>Sentence imposed</i>
A3	302 r/w 34 of IPC	To undergo life imprisonment and to pay a fine of Rs.10,000/- in default to undergo rigorous imprisonment for one year
	506 (2) of IPC	To undergo rigorous imprisonment for one year.

The above sentences were ordered to run concurrently. Hence, the accused/appellants have preferred the appeal challenging the said conviction



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and sentences.

3. Heard, Mr.V.Parthiban, learned counsel appearing for the appellants/accused, and Mr.A.Gokulakrishnan, learned Additional Public Prosecutor appearing for the respondent/State.

4.(i) Mr.V.Parthiban, the learned counsel for the appellants, submitted that A3/third appellant, is no more and has produced the death certificate, which reveals that the third accused/Mr.Nagaraj, son of Raji died on 29.10.2019. However, we find in the death certificate that the father's name of the accused does not match the father's name mentioned in the charge.

(ii) The learned Additional Public Prosecutor, however, on instructions submitted that the person mentioned in the death certificate produced by the learned counsel for the appellants, is A3 and produced a copy of the Aadhar Card and the certificate issued by the Village Administrative Officer, in support of the same. ***Hence, this appeal in so far as the 3rd appellant/A3 viz., Nagaraj is concerned, stands dismissed as***



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5 (i) The learned counsel for the appellants/A1 & A2 primarily contended that the version of the witnesses as projected during the investigation was completely changed during their deposition in Court; that initially, it was stated that all three accused were armed with guns and an unknown fourth person armed with a bill hook attacked the deceased.

(ii) The learned counsel further submitted that there is an unexplained delay in the FIR reaching the Court which suggests that the FIR was not registered immediately.

6. The learned Additional Public Prosecutor submitted that the eyewitnesses PW1 to PW5 have corroborated each other's version and the defence was unable to shake their credibility; the non-examination of independent witnesses by itself would not make their version unreliable; that the motive has been established by the prosecution; and that the other



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circumstances of the recovery of material objections on the confession of the accused strengthen the ocular evidence let in by the prosecution.

7. We have carefully considered the rival submissions and perused all the relevant materials available on record.

8. PW1 is the wife of the deceased and an eyewitness to the occurrence. She also speaks about the motive. PW2 and PW4 are the daughters of the deceased; PW3 is the daughter-in-law of the deceased and PW5 is the son of the deceased. PW2 to PW5 are also eyewitnesses to the occurrence; PW6 is another relative who speaks about the motive for the occurrence; PW7 is the sister of the deceased and a hearsay witness; PW8 is the daughter-in-law of the deceased and sister of A2 and A3, turned hostile. PW9 is an Assistant working in the Revenue Divisional Office and is a witness to the observation mahazar [Ex.P3] and seizure mahazar [Ex.P4]; PW10 is the Assistant to the District Collector, who speaks about the sanction accorded for prosecution of the accused under the Arms Act; PW11



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is the Assistant Director of the Forensic Science Department, who issued the reports [Ex.P16 to Ex.P18], after examining the bullets that were seized from the scene of the occurrence and the country made guns, seized from the accused; PW12 is the Doctor, who conducted a postmortem and issued a postmortem certificate [Ex.P19]. PW13 is the Sub Inspector of Police, who assisted the investigating officer; PW14 is the Inspector of Police, who registered the FIR and conducted the investigation; PW15 is the other investigating officer, who continued the investigation; and PW16, is the investigating officer, who filed the final report.

9. PW12 is the postmortem Doctor who issued the postmortem certificate (Ex.P19) and he found the following external injuries on the deceased:

- (1) lacerated wound 1.5x2x bone depth over parietal area mid line;
- (2) Incised wound 10x2x bone depth across right ear;
- (3) Incised wound 14x3x5 cm over posterior aspect of upper neck;
- (4) Abrasion 3x2 cm across back of chest;
- (5) Incised wound 20x3x4 cm, back of right middle thigh;
- (6) Incised wound 10x2x2 cm, below chin;
- (7) Black coloured entry wounds present in



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- (a) right side lower face (8 in number)
- (b) around right elbow (4 in number)
- (c) back of right shoulder (17 in number)
- (d) over right knee (2 in number)

During the examination in chief he had opined that the death was caused due to shock and haemorrhage, on account of injuries on the vital parts of the deceased. He had also stated that the external injuries sustained by the deceased could be caused by the weapons viz., country made Guns [M.O.1 series] and Billhook [M.O.2]. The defence have not disputed the evidence of the doctor relating to cause of death. Therefore, we are of the view that the prosecution has established that the deceased died due to homicidal violence.

10. The next question would be as to whether the accused were responsible for the said homicidal violence. PW1 to PW5 have been examined by the prosecution as eyewitnesses. PW1 lodged the complaint at about 10.00 a.m., on 12.04.2011. However, strangely we find that the said complaint and the printed FIR [Ex.P19] reached the Magistrate only on 13.04.2011 at about 08.00 a.m. The question is whether this delay would affect the prosecution case and the credibility of the eyewitnesses.



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11. In the complaint, PW1 had stated that while the deceased was tying the rope [மூக்கனான் கயிறு] around the cows, A2, A3 and A1 armed with guns along with an unidentified person armed with Billhook (Machete) came there and that A1, A2 and A3 shot the deceased with the guns; that the deceased ran towards the house and at that time, A1 shot the deceased; that the deceased was chased by the unidentified male and was cut indiscriminately with Billhook Machete on the neck, on the ear and thereafter, A2 took the same Billhook Machete and attacked on the head, thighs and other parts of the body; that the daughters of the deceased viz., PW2 and PW4, sons of the deceased viz., Rajeshkumar (PW5), Thangamani and daughter-in-law of the deceased viz., Chinthamani (PW3) witnessed the occurrence.

12. However, in their deposition before the Court, all the witnesses had stated that only three persons were involved in the offence and that A1 and A2 were armed with guns and A3 was armed with a Billhook Machete. The *overt acts* attributed to each of the accused also differ. A3, is now



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attributed with an *overt act* of causing the injuries with Billhook Machete and A2 is said to have taken Billhook Machete from A3 and caused further injuries. None of the witnesses have spoken about the presence of an unknown person armed with Billhook Machete at the time of the occurrence. The evidence of all five witnesses is parrot-like in nature.

13. PW1 in her cross examination confirmed that she informed the police about the 4th person involved in the occurrence, who was aged about 25 years. The relevant portion of her evidence reads as follows:

“போலீசில் 4வது நபர் கையில் அறுவாள் வைத்திருந்ததாக நான் சொன்னேன். அறுவாள் வைத்திருந்ததாக சொல்லும் நபருக்கு என்ன வயது இருக்கும் என்றால் சுமார் 25 வயதிருக்கும்.”

14. The prosecution re-examined PW1 and asked her as to whom she had referred as unknown person. She stated that she referred to A3 as the unknown person. The relevant portion of the evidence of PW1 in the re-examination reads as follows:

“நான் கொடுத்த புகாரை போலீசார் எழுதிக் கொண்டு



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என்னிடம் படித்துக் காட்டினார்கள். அதன் பின்னர் தான் அதில் நான் ரேகை வைத்தேன். நான் குறுக்க விசாரணையில் 25 வயது நபர் அரிவாள் வைத்திருந்ததாக கூறியிருப்பது எதரி நாகராஜை சொல்கிறேன்.”

This re-examination makes it worse for the prosecution. A3 is closely related to PW1. Hence, there was no necessity for her to refer to him as an unknown person. The explanation in the re-examination exposes the falsity of the version. The above improvement in the evidence clearly reveals that the truth has been suppressed by the prosecution. If four people were involved in the offence, there was no necessity for the witnesses to reduce it to three and change the *overt acts* of all the accused to suit the prosecution case.

15. PW14 the first investigating officer stated that besides PW1 all the other eyewitnesses had stated before him during the investigation that there were four persons along with A1 to A3; that the 4th person was armed with a Billhook Machete and the others were armed with guns. The relevant portions of PW14's deposition in the cross-examination read as follows:

“....புகார் வாக்குமூலத்தில் இரண்டாவது பக்கத்தில்



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என் அண்ணன் மகன்கள் வெங்கடாசலம், நாகராஜ், முகன் மணிகண்டன் மூவரும் கையில் ஆளக்கொரு துப்பாக்கியுடனும், மற்றும் அடையாளம் தெரியாத ஒரு ஆள் கையில் நீளமான அருவாள் உடனும் வந்தாங்க என்ற குறிப்பிடப்பட்டுள்ளதா? என்றால் குறிப்பிடப்பட்டுள்ளது. நான்கு பேரும் ஆயுதங்களுடன் ஓடி விட்டார்கள் என்று புகார் வாக்குமூலத்தில் கண்டுள்ளது என்றால் சரிதான்.....

....

.....அடையாளம் தெரியாத நபர் கையில் வைத்திருந்த நீளமான அருவாளால் எனது அப்பாவின் பின் பக்க கழுத்து, பின் பக்க காது அருகில் வெட்டி ரத்தக் காயம் ஏற்படுத்தினார் என்று சொல்லப்பட்டுள்ளதா? என்றால் அ.சா.2 அந்த வாக்குமூலத்தில் சொல்லியிருக்கிறார். ஆனால் எனது புலன் விசாரணையில் அந்த அடையாளம் தெரியாத நபரிடமிருந்து எதிரி வெங்கடாசலம் வாங்கி எனது அப்பாவின் நடு மண்டை, மேல் தொடை, கீழ் தொடை, நடு முதுகு ஆகிய இடங்களில் மாறி மாறி வெட்டியதாக அ.சா.2 வாக்குமூலத்தில் கூறியிருக்கிறார். அ.சா.3 என்பவர் அ.சா.1ன் மருமகன், அ.சா.3 வாக்குமூலமானது அ.சா.2 வாக்குமூலத்தையே அனுசரித்து சொல்லியிருக்கிறார்.....”

16. Further, the FIR on PW1's complaint was registered at 10.00 a.m., on 12.04.2011. It was sent to the Magistrate only on 13.04.2011 at



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8.00a.m. It is also seen from the evidence of PW1 that the deceased was taken to the Namakkal General Hospital immediately after the occurrence. The prosecution has not produced the entries made in the hospital records at the earliest point in time, when the deceased was taken to the hospital.

17. PW15 the other investigating officer in his cross-examination had stated as follows:

“19.07.2013ம் தேதி வரை வழக்குக் கோப்புகள் புலன் விசாரணைக்கு என்னிடம் இருந்தது. மேற்படி தேதிவரை நான்காவது எதிரி பற்றி உறுதியாக என்னுடைய புலன் விசாரணையை புலங்கவில்லை.”

Thus, PW15 also could not ascertain the identity of the 4th person involved in the occurrence.

18. PW16, the investigating officer, who filed the final report, when specifically asked about the version in the complaint that 4 persons were involved, would state that though the witnesses informed the earlier investigating officer about the involvement of four persons, in their further



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statement given to him, they had stated that only three accused were involved. The relevant portion reads as follows:

“பட்டியல் சாட்சிகள் ஒன்று முதல் பத்து வரையிலான நபர்கள் சம்பவத்தில் நான்கு பேர்கள் ஈடுபட்டதாக எனக்கு முன்னால் இருந்த புலனாய்வு அலுவலரிடம் சொல்லி உள்ளார்கள். ஆனால் அவர்கள் என்னுடைய விசாரணையில் மறு வாக்குமூலத்தில் இறந்துபோன நபரை ஆஜர் எதரிகள்தான் தாக்கியதாக கூறியுள்ளனர்.”

19. As stated earlier, PW1 in her cross examination had stated that she told the police about the involvement of the 4th person. However PW16 would state that PW1 and others had given a further statement that only three accused were involved in the occurrence. The above exaggerated depositions of the witnesses and the investigating officers would show that the witnesses and the prosecution have changed the version to suit them.

20. That apart, there is another admission of PW16 in the cross examination that his investigation revealed that the witnesses had given an exaggerated version that the banana/plantain trees were damaged by the



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accused and that the said version is false. The relevant portion reads as follows:

“எனது புலன் விசாரணையில் சொல்ல
ஜெயராஜ் தோட்டத்தில் சம்பவத்தின்போது
மதிப்புள்ள பொருட்கள் எதுவும் சேதம்
ஏற்பட்டதாக தெரியவில்லை. எனக்கு முன்னர்
புலன் விசாரணை செய்த புலனாய்வு அலுவலரிடம்
பொருட்கள் சேதம் ஏற்பட்டதாக சாட்சிகள்
கூறியுள்ளனர் என்றால் சரிதான். நான் பதிவு
செய்த மறு வாக்குமூலத்தில் ஒன்று முதல் பத்து
வரையிலான பட்டியல் சாட்சிகள் வழக்கை
மிகைப்படுத்துவதற்காக வாழைமரங்களை
எதிரிகள் வெட்டி சாய்த்ததாக வாக்குமூலம்
கூறியுள்ளனர் என்றால் சரிதான்.”

21. All the witnesses who had allegedly witnessed the occurrence had uniformly stated before the investigating officer that four persons were involved and the 4th unknown person had attacked the deceased with a Machete. Similarly, all the eyewitnesses have in a parrot-like manner deposed in Court that only three persons were involved and A3 had used the Machete. The *overt acts* have also been changed to suit the new story projected. Therefore, the credibility of the witnesses becomes highly



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doubtful. It is very difficult to separate the chaff from the grain and ascertain which part of their deposition is true to hold the accused guilty. As stated earlier, the investigating officer-PW16 had also admitted that the witnesses had given an exaggerated version to the previous investigating officer regarding the damage to the banana/plantain trees.

22. That apart, we may note another aspect that would support the defence case that the FIR itself was registered after deliberation. Though, FIR was registered at 10.00a.m., on 12.04.2011, the FIR reached the Magistrate only at 8.00 a.m., on 13.04.2011. There is no explanation by the prosecution, as to why the FIR reached the Magistrate only at 8.00 am., on 13.04.2011.

23. For all the above reasons, we are of the view that it is highly unsafe to rely upon the parrot-like evidence of the eyewitnesses, who have uniformly made the same type of improvement in their depositions before the Court. That apart, the investigating officers have not given any plausible explanation for concluding that only three persons were involved in the



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occurrence, except for stating that a further statement was given by the witnesses, which also confirms the fact that the investigation has not been conducted fairly. Therefore, in the facts of this case, the non-examination of independent witnesses would also be a relevant factor in appreciating the evidence.

24. In the light of the above discussion, we are of the view that the evidence adduced by the prosecution is hardly sufficient to hold that the accused A1 and A2 are guilty of the offence under Sections 302 r/w 34 and 506 (2) of the IPC. Hence, ***A1 and A2 are acquitted of the offences under Sections 302 r/w 34 and 506 (2) of the IPC.*** However, we find that A1 and A2 were found in possession of country made guns as could be seen from the recoveries made from them. The possession of country made guns is in contravention of Section 3 of the Arms Act. The recovery of the country made guns has not been disputed by the accused. The prosecution has obtained the required sanction for prosecution of A1 and A2 under Section 25(1-B)(a), for possessing fire arms in contravention of Section 3 of the Arms Act, as could be seen from the Sanction Order [Ex.P15]. Therefore,



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A1 and A2 are found guilty of the offence under Section 25(1-B)(a) r/w 3 of the Arms Act and the sentence imposed by the trial Court on A1 and A2 to undergo one year imprisonment and to pay a fine of Rs.1000/- in default to undergo 3 months rigorous imprisonment, for the said offence, is confirmed.

25. The Criminal Appeal is partly allowed. The judgment of conviction and sentence imposed upon A1 and A2 made in S.C.No.41 of 2016 dated 26.10.2018 on the file of the learned Additional Sessions Judge, Namakkal, is modified as stated supra.

26. Vide order dated 04.01.2019 made in Crl.M.P.Nos.16646 of 2018 in Crl.A.No.804 of 2018, this Court suspended the sentence imposed upon A1 and A2 pending appeal. Therefore, the trial Court is directed to secure A1 and A2 and commit them to prison, to undergo the remaining period of their sentence, if any. It is directed that the period of sentence already undergone by A1 and A2, shall be set off under Section 428 Cr.P.C.

(M.S.R.,J.) (S.M.,J.)
18.03.2024



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Index : yes/no

Neutral citation : yes/no

Speaking/Non-speaking order
dk/ars

Copy to:

- 1.The Additional Sessions Judge,
Namakkal,
Namakkal District.
- 2.The Inspector of Police Circle,
Vazhavanthi Nadu Police Station,
Namakkal District.
- 3.The Public Prosecutor
High Court of Madras,
Chennai – 600 101.



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CrL.A.No.804 of 2018

M.S.RAMESH,J.

AND

SUNDER MOHAN,J.

ars

Pre-delivery Judgment in
CrL.A.No.804 of 2018



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18.03.2024