

Bail Slip

The Appellant/Accused Viz., Manickam was released on bail dated 17.8.2015 in M.P.No.1 of 2015 in CrI.A.No.166 of 2015.

THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 01..07..2016
CORAM

THE HONOURABLE MR . JUSTICE S.NAGAMUTHU
AND
THE HONOURABLE MR. JUSTICE V.BHARATHIDASAN

Criminal Appeal No.166 of 2015

Manickam

... Appellant/Accused

-Versus-

State Rep. by
The Inspector of Police,
Valappadi Police Station,
Salem District.
[Crime No.422 of 2012]

... Respondent/Complainant

Criminal Appeal filed under Section 374(2) of Cr.P.C. challenging the conviction and sentence imposed on the appellant by the learned Additional Sessions Judge, Salem, in S.C.No.56 of 2014 dated 02.03.2015.

For Appellant : Mr.M.Devaraj

For Respondent : Mr.M.Maharaja, APP

JUDGEMENT

(Judgement of the Court was delivered by S.NAGAMUTHU, J.)

The appellant stands convicted and sentenced to undergo imprisonment for life and to pay a fine of Rs.1,000/- in default to suffer simple imprisonment for a further period of six months for offence under Section 302 of IPC by the judgement dated 02.03.2015 in S.C.No.56 of 2014 on the file of the learned I Additional Sessions Judge, Salem. Challenging the same, he has come up with this criminal appeal.

2. The case of the prosecution in brief is as follows:- The deceased in this case was one Mrs.Chinnammal.

The accused is her husband. They were residing in their own tiled house at Mariamman Temple Street, Chandirapillaivalasu Village. According to the case, the accused used to consume liquor. This was objected to by the deceased. Enraged over the same, it is alleged that at 04.00 a.m. on 18.08.2012, when the accused and the deceased alone were there in their house, the accused, with the intention to do away with the deceased, stabbed her with a soori knife on the right side of the chest, left hand and left side of the abdomen. In the same occurrence, it is alleged that at the hands of the deceased, the accused had also sustained three stab injuries. The deceased died on the spot. According to the case, the accused was found lying unconscious struggling for life. Since the occurrence was inside the locked house of the accused, nobody had seen the occurrence. P.W.1 is the son of the deceased. He was an auto driver by profession. According to him, on receiving a phone call that his mother was no more, he rushed to his house. At that time, the doors of the house were found bolted from inside. P.W.1, therefore, climbed atop the roof, removed a few tiles, peeped through and found his mother lying dead. On seeing the gory incident he immediately fainted.

3. According to the further case of the prosecution, at 05.15 a.m. on 18.08.2012, P.W.1 went to the police station and made a complaint. P.W.12, the then Inspector of Police, Valapadi Police Station, on receipt of the said complaint under Ex.P.1, registered a case in Crime No.422 of 2012 under Section 302 of IPC. Ex.P.18 is the FIR. Then, P.W.12, forwarded both the complaint [Ex.P.17] and the FIR [Ex.P.18] to the court which were received by the learned Magistrate at 01.00 p.m. on 18.08.2012.

4. P.W.12, the Inspector of Police, arrived at the scene of occurrence at 06.00 a.m. They broke open the doors and went into the house where they found the deceased lying dead and the accused struggling for life. Then, the police made arrangements to forward the accused to Mohan Kumaramangalam Medical College Hospital, Salem. P.W.10, Dr.Saravanan, examined the accused at the said hospital at 07.45 a.m. on 18.08.2012. The accused was then conscious. He told the doctor that at 04.30 a.m. at his house, he was stabbed by his wife [the deceased] with a knife. P.W.10, the doctor, found stab injuries on the person of the accused. He made entry in the accident register [Ex.P.14]. Then, he sent an intimation [Ex.P.15] from the hospital to the police.

5. P.W.12, after having forwarded the accused to the hospital for treatment, at 06.15 a.m. prepared an observation mahazar (Ex.P.2) and a rough sketch (Ex.P.19) in the presence of P.W.6 and another witness. Then, he recovered a soori knife [M.O.1-bigger in size]; another soori knife [M.O.2-smaller in size]; pieces of cement/plaster flooring with blood stains [M.O.3]; sample pieces of cement/plaster flooring without any

blood stains [M.O.4] from the place where deceased was found lying dead; pieces of cement/plaster flooring with blood stains [M.O.5]; sample pieces of cement/plaster flooring without any blood stains [M.O.6] from the place where the accused was found lying struggling for life; and a piece of mat with blood stains [M.O.7] in the presence of the same witnesses under a mahazar (Ex.P.3). Then, he conducted inquest on the body of the deceased and prepared an inquest report (Ex.P.20). He, thereafter, forwarded the body of the deceased to the hospital for post-mortem.

6. P.W.8, Dr.Kesavalingham, conducted autopsy on the body of the deceased at 02.20 p.m. on 18.08.2012. He found the following injuries:-

"Antemortem Findings:-

Stab injury over right infra clavicular region of chest measuring 5x3xcavity deep in which upper lobe of right lung protruded out. Stab injury over aspect of left arm measuring M-4x2xbone deep linear abrasion over left side of abdomen measuring 9x0.25cms.

Other findings:

O/D Head: Scalp-contusion over left tempero parietal region measuring 6x4 cms dural membranes and cranial vault-intact, brain- C/S pale. Base of skull - Intact.

O/D Thorax: Thoracic cavity contains 1000 gms of blood clot and 700 ml of fluid blood contusion over right side of chest and pectoralis muscle contused. M- 10 x 5 cms with cut fracture of sternal end of the 2nd and 3rd ribs. Heart-Normal in size. Stab injury over right atrium measuring M-2 x 1 x cavity deep. Lung-Laceration over upper pole measuring 3x2x thro' from right side to left side. Lung C/S Pale.

O/D Abdomen : Stomach :- Contains 30 ml of light yellow colour fluid with No specific odour. Mucosa C/S - Pale, Liver, Spleen and Kidneys - C/S Pale. Capsule intact. Bladder-Empty Genitalia-No other injuries made out. Pelvis and Spinal Column-Intact."

Ex.P.11 is the post-mortem certificate and Ex.P.12 is his final opinion regarding the cause of death. According to P.W.8, the Doctor, the injuries found on the deceased could have been caused by a weapon like M.O.1. He further opined that the death was due to shock and haemorrhage as a result of stab injuries.

7. When the accused was in the hospital, P.W.11, the Judicial Magistrate, recorded the statement of the accused on 18.08.2012 at 09.50 a.m. This statement was recorded as a dying declaration. In the said statement, the accused had stated that on 18.08.2012 at 04.00 a.m., there was a quarrel at his house between himself and his wife and in that quarrel, he stabbed his wife [the deceased] with a soori knife. The said statement has been marked under Ex.P.16.

8. The accused who was undergoing treatment was unconscious on 19.08.2012 and 20.08.2012. Therefore, P.W.12 could not examine him. On 21.12.2012, the accused regained consciousness. P.W.12, thereafter, examined him and then arrested him at 11.30 a.m. at the hospital itself. Then, on the request made by P.W.12, the jurisdictional Magistrate came to the hospital and remanded the accused to judicial custody. The investigation was, thereafter, taken over by P.W.13, who succeeded P.W.12. The material objects were sent for chemical analysis. The analysis revealed that human blood was found in the piece of mat [M.O.7] which were of "A" and "B" group. In the saree [M.O.8] and in-skirt [M.O.9] recovered from the body of the deceased, "B" group of human blood was found. Further, on both the knives [M.Os.1 and 2] also human blood was found out, but, the grouping was inconclusive. On completing the investigation, P.W.13 laid charge sheet against the accused.

9. Based on the above materials, the trial court framed a lone charge under Section 302 of IPC. The accused denied the same. In order to prove the case, on the side of the prosecution, as many as 13 witnesses were examined, 25 documents and 10 material objects were marked.

10. Out of the said witnesses, P.W.1 is the son of the deceased. He has stated that when he was elsewhere, he received a phone call that his mother was no more. Immediately, he rushed to the house. He found a huge crowd of people in front of his house. But, the doors of the house were bolted from inside. He climbed atop the roof, removed a few tiles and then peeped through and found the deceased lying dead. Then, he fainted. Thereafter, he did not know as to what had happened. He has disowned the complaint. He has admitted only the signature in the complaint-Ex.P.17. P.W.2 is a neighbour of the deceased. He has stated that at about 04.00 - 04.30 a.m. on the day of occurrence, he had seen a huge crowd of people in front of the house of the accused. He has not stated anything incriminating against the accused.

11. P.W.3 is also a neighbour of the deceased. He has also stated that there was a huge crowd of people in front of the house of the accused. P.W.4 is yet another neighbour. He has

also stated so. These four witnesses have been treated hostile by the prosecution. During the examination by the learned Public Prosecutor nothing was elicited in favour of the prosecution. P.W.5 is the daughter-in-law of the deceased. She has stated that around 08.30 a.m. P.W.1 took her to the house of the deceased on getting information that her mother-in-law [the deceased] was no more. When they reached the house, there was a huge crowd of people in front of the house. The house was bolted from inside. Her husband [P.W.1] climbed atop the roof, removed few tiles and jumped inside the house where on seeing his mother lying dead, he fainted. The police came and broke open the doors. She has also been treated as hostile and during cross examination, nothing has been elicited from her in favour of the prosecution.

12. P.W.6 is the vital witness for the prosecution. She was the Village Administrative Officer of Pelur Village during the relevant time. According to her, on 18.08.2012, at 06.00 a.m. the police came to the place of occurrence, broke open the doors of the house of the accused in her presence. Thereafter, when they entered into the house, they found the deceased lying dead in a pool of blood. The accused was also lying near the dead body of the deceased with injuries. The accused also had sustained injuries and was struggling for life. She has further stated about the recovery of material objects from the place of occurrence.

13. P.W.7 is a Forensic Expert who had examined the material objects sent to him for examination. He has stated that in the mat [M.O.7] recovered from the place of occurrence, there were human blood stains which were of both "A" and "B" group. On the other material objects also human blood stains were detected, but the grouping was inconclusive. P.W.8, the Doctor, has spoken about the autopsy conducted by him and his final opinion regarding the cause of death.

14. P.W.9, the Sub Inspector of Police, has stated that he took the dead body of the deceased from the place of occurrence to the hospital and identified the same to the doctor for post-mortem. P.W.10 has stated that on 18.08.2012 at 07.45 a.m. the accused was brought before him for treatment. At that time, the accused told him that around 04.30 a.m. at his house, his wife stabbed him with a knife. He found stab injuries on the person of the accused. Ex.P.14 is the accident register. P.W.11, the Judicial Magistrate, has stated about the statement of the accused recorded by him on 18.08.2012 at 09.50 a.m. at the hospital purportedly as a dying declaration. P.W.12 has spoken about the registration of the case and the investigation done by him. P.W.13 has spoken about the further investigation done by him and the filing of charge sheet against the accused.

15. When the above incriminating materials were put to the accused under Section 313 of Cr.P.C. he denied the same as false. However, he did not choose to examine any witness nor did he mark any document on his side. His defence was a total denial.

16. Having considered all the above, the trial court convicted the appellant/accused as detailed in the first paragraph of this judgement. Challenging the above said conviction and sentence, the accused is now before this Court with the present criminal appeal.

17. We have heard the learned counsel appearing for the appellant/accused and the learned Additional Public Prosecutor appearing for the respondent/State and we have also perused the records carefully.

18. As we have already pointed out, P.W.1 to 5 have turned hostile and they have not supported the case of the prosecution in any manner. From their evidences, what could be culled out is that on 18.08.2012 at 04.00 a.m. the doors of the house of the accused were found bolted from inside. P.W.1 climbed atop the roof, removed few tiles, peeped through and then he fainted. P.W.6, the Village Administrative Officer has stated that at 06.00 a.m. the police arrived at the scene of occurrence. P.W.12, the Inspector of Police has also stated that after registering the case at 05.15 a.m. on 18.08.2012 on the complaint made by P.W.1, he visited the place of occurrence. Thus, from the evidences of P.Ws.1 to 5 and that of the evidences of P.Ws.6 and 12, it has been established that at 06.00 a.m. the police arrived at the scene of occurrence and at that time, the house of the accused was still found bolted from inside.

19. After the arrival of the police, in the presence of P.W.6, the police broke open the doors of the house and when they entered into the house, the deceased was found lying dead in a pool of blood with stab injuries. Similarly, the accused was also lying with stab injuries struggling for life. At that time, there were two knives lying by their side. The analyst's report has proved that both knives were stained with human blood, but the grouping of the blood was inconclusive. From this circumstance, it could be presumed that the accused and the deceased had sustained injuries inside the house but, at the same time, it cannot be presumed that they had sustained injuries, at or about the same time, and in the same transaction. From out of the fact that two knives were lying

stained with blood, it could be presumed that they could have been used to cause injuries both on the deceased and on the accused. But, it cannot be conclusively presumed that the injuries found on the deceased were caused by the accused and the injuries found on the accused were caused by the deceased.

20. When the deceased was taken to the hospital, he had told that the stab injuries on his person were caused by his wife [the deceased] at his house at 04.00 a.m. on 18.08.2012. This being the earliest statement of the accused, weightage could be given to the same. Though this statement of the accused has got no evidential value, this can be taken as the earliest explanation offered by the accused. From this, to some extent, it can be assumed that the injuries on the accused were caused by the deceased as this possibility has not been ruled out.

21. When the accused was in the hospital, P.W.11, the learned Judicial Magistrate, recorded his statement at 09.50 a.m. on 18.08.2012 purportedly as a dying declaration. It was recorded by the learned Magistrate by following the procedure established by law for recording dying declaration after having ascertained the mental fitness of the accused. In that statement, the accused had stated that when he was alone with the deceased, there arose a quarrel between himself and the deceased in the wee hours on 17.08.2012 and at the end of the quarrel, he took out a soori knife and stabbed the deceased and the deceased, in turn, took out a knife and stabbed him. This statement has been admitted in evidence by the trial court. But, the trial court rightly rejected the same when it appreciated the said document at the time of judgement. It is the common knowledge that dying declaration is a statement made by a person regarding the cause of death or relating to any of the circumstances resulting in the cause of death and when the cause of death is in question before the court. Here, in the instant case, since the accused, who is the maker of the statement is alive, certainly, the said statement is not a dying declaration. The said statement of the accused cannot be admitted and considered even as a confession of the accused as the procedure contemplated for recording confession under Section 164 of Cr.P.C. has not been followed. Thus, the trial court was perfectly correct in keeping Ex.P.16 out of consideration for any purpose.

22. A perusal of the judgement of the trial court would go to show that the trial court gave weightage for the analyst's reports [Ex.P.4 to P.7]. The expert who examined the material object namely M.O.7-mat recovered from the place of occurrence, had found human blood of both "A" as well as "B" group on the same. Based on this evidence, the trial court has held that both the accused and the deceased had sustained injuries in one and

the same occurrence. But, it is in evidence that the accused and the deceased were found lying side by side and, therefore, there is nothing strange in having found blood traces of the blood of both the accused as well as the deceased on the mat [M.O.7]. Making a reference to this circumstance, the trial court has remarked that the accused had failed to discharge his burden as required under Section 106 of the Evidence Act as to how he sustained injuries and as to how the deceased had sustained injuries. It is on that premise the trial court has found the accused guilty. But, we find it difficult to agree with the said conclusion arrived at by the trial court for more than one reason as follows.

23. From the totality of circumstances, which we have pointed out hereinabove, it can only be concluded that the accused and the deceased sustained injuries inside the house. Whether the accused sustained injuries first at the hands of the deceased or the deceased sustained injuries first at the hands of the accused, is a matter to be deeply considered. In this regard, more than one view is possible. One is that the accused would have first stabbed the deceased and then, in retaliation, the deceased would have stabbed him. The other possible view is that the deceased would have stabbed the accused first and then, the accused would have, in retaliation, stabbed the deceased. The third view, though remote, is that there would have been exchange of stabbing simultaneously. In view of these three possibilities, now, it is to be seen as to who was the aggressor. In this regard, of course, the accused had not pleaded the right of private defence explicitly. It is the settled law that it is not necessary for the accused to plead right of private defence explicitly and if the court, on its own, on appreciating the various circumstances proved by means of evidence is able to cull-out that the accused had exercised his right of private defence, then, he would be entitled for the benefit of the exception. In this regard, we may refer to the judgement in James Martin v. State of Kerala, 2004 (2) SCC 203, wherein, in para 13, the Hon'ble Supreme Court has held as follows:-

"13.
... ..
...

Section 96 of IPC provides that nothing is an offence which is done in the exercise of the right of private defence. The Section does not define the expression 'right of private defence'. It merely indicates that nothing is an offence which is done in the exercise of such right. Whether in a particular set of circumstances, a person legitimately acted in the exercise of the right of private defence is a question of fact to be determined on the

facts and circumstances of each case. No test in the abstract for determining such a question can be laid down. In determining this question of fact, the Court must consider all the surrounding circumstances. It is not necessary for the accused to plead in so many words that he acted in self-defence. If the circumstances show that the right of private defence was legitimately exercised, it is open to the Court to consider such a plea. In a given case the Court can consider it even if the accused has not taken it, if the same is available to be considered from the material on record. Under Section 105 of the Indian Evidence Act, 1872 (in short 'the Evidence Act'), the burden of proof is on the accused, who sets up the plea of self-defence, and, in the absence of proof, it is not possible for the Court to presume the truth of the plea of self-defence. The Court shall presume the absence of such circumstances. It is for the accused to place necessary material on record either by himself adducing positive evidence or by eliciting necessary facts from the witnesses examined for the prosecution. An accused taking the plea of the right of private defence is not necessarily required to call evidence; he can establish his plea by reference to circumstances transpiring from the prosecution evidence itself. The question in such a case would be a question of assessing the true effect of the prosecution evidence, and not a question of the accused discharging any burden. Where the right of private defence is pleaded, the defence must be a reasonable and probable version satisfying the Court that the harm caused by the accused was necessary for either warding off the attack or for forestalling the further reasonable apprehension from the side of the accused. The burden of establishing the plea of self-defence is on the accused and the burden stands discharged by showing preponderance of probabilities in favour of that plea on the basis of the material on record."

In the instant case, though the accused had not explicitly pleaded the right of private defence, since the prosecution has not explained the injuries on the accused [it may not be possible for the prosecution, since the occurrence had taken place inside the locked house], the possibility of the accused having exercised his right of private defence cannot be ruled out.

24. In the adversarial system of trial, which we have adopted, when there is a doubt as to who was the aggressor, when both parties had sustained serious injuries and also when the possibility of the deceased being the aggressor cannot be ruled out, naturally, the possible view in favour of the accused that the deceased was the aggressor is to be adopted and the benefit arising out of the same should be given in favour of the accused and so he should be acquitted of the charge of murder. It has been consistently held so by the Hon'ble Supreme Court in Bhagwan Singh and others v. State of M.P., 2002 (4) SCC 85, in para 7, the court has reiterated the aid legal position in the following words:-

"7.
... .. The golden thread which runs through the web of administration of justice in criminal case is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. Such is not a jurisdiction limitation on the appellate court but a Judge made guidelines for circumspection. The paramount consideration of the court is to ensure that miscarriage of justice is avoided. A miscarriage of justice which may arise from the acquittal of guilty is no less than from the conviction of an innocent."

But, the trial court has not applied the above settled principle of law, instead, the trial court has shifted the onus of proof on the accused under Section 106 of the Evidence Act and held that since the accused had not either explained or let in any evidence as to how the occurrence had taken place, it shall be presumed that the accused had committed murder of the deceased. This stand of the trial court, in our considered view, is not in tune with the settled principle of law which we have hereinbefore dealt with elaborately. It is needless to point out that the initial burden of the prosecution to prove the guilt of the accused will never get discharged by the failure of the accused to explain as to how the deceased sustained injuries. It is only after the prosecution has proved that the accused was the aggressor, either by means of direct evidence or circumstantial evidence or by means of legal presumption, the onus of proof can be shifted on the accused under Section 106 of the Evidence Act to disprove the case of the prosecution. In the instant case, as we have already pointed out, the possibility of the legal presumption that the deceased would have stabbed the

accused first and the accused would have then stabbed the deceased in exercise of right of his private defence has not been rebutted by any evidence. So long as this legal presumption remains unrebutted, there is no onus of proof shifted on the accused as per Section 106 of the Evidence Act. So, we find it difficult to concur with the finding of the trial court that the non-explanation by the accused as to how he as well as the deceased had sustained injuries would amount to failure on his part to discharge his onus of proof as required under Section 106 of the Evidence Act. Thus, we hold that in the light of the proved facts, in the instant case, the onus of proof had never shifted on the accused under Section 106 of the Evidence Act.

25. Article 21 of the Constitution of India mandates as a fundamental right that the personal liberty and life of an individual can be deprived of only by following the procedure established by law. The procedure as enshrined in Article 21 of the Constitution of India includes proof of guilt. In other words, the court cannot afford to convict a person on mere surmise or suspicion. The suspicion, however, strong it may be, shall not take the place of proof. Any conviction recorded on mere surmise or assumption or out of suspicion is illegal. In the instant case, as we have already concluded, the prosecution has miserably failed to prove the guilt of the accused beyond all reasonable doubt and therefore, the appellant/accused is entitled for acquittal.

26. In the result, this criminal appeal is allowed. The conviction and sentence imposed on the appellant/accused by the trial court are set aside and he is acquitted of the charge under Section 302 of IPC. Fine amount paid already, if any, shall be refunded to him. The bail bond executed by the appellant/accused shall stand terminated.

Sd/-

Assistant Registrar(CS VII)

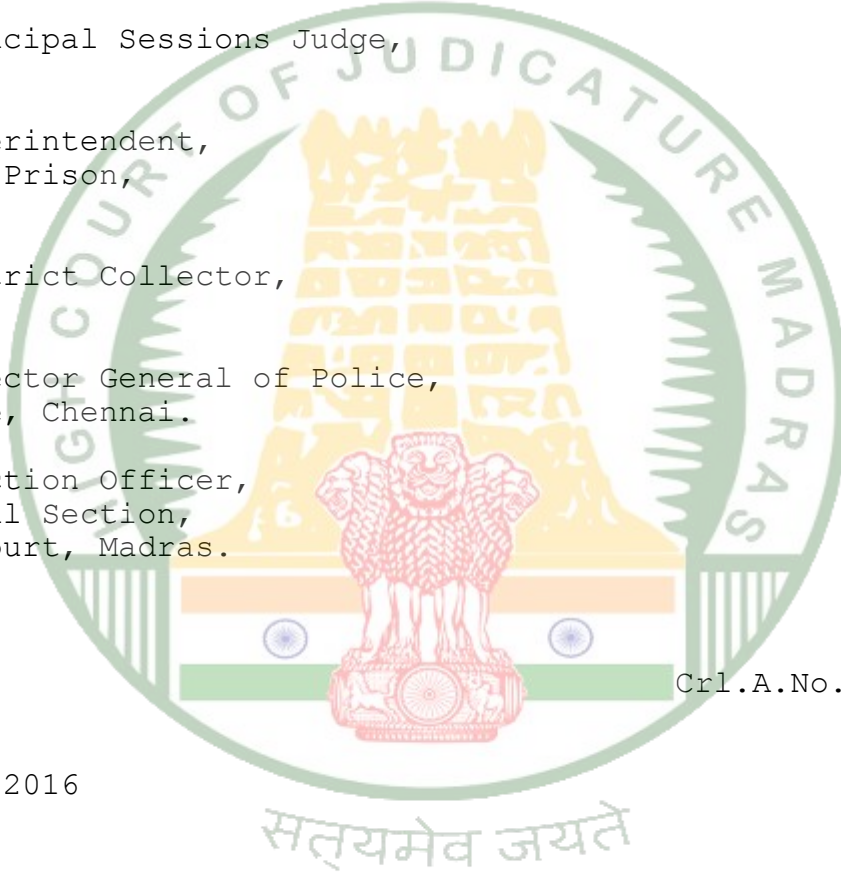
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Sub Assistant Registrar

To

1.The I Additional Sessions Judge,
Salem,
Salem District.

- 2.The Inspector of Police,
Valappadi Police Station,
Salem District.
- 3.The Public Prosecutor,
High Court, Chennai.
- 4.The Judicial Magistrate No.VI,
Salem.
- 5.The Chief Judicial Magistrate,
Salem(For Information)
- 6.The Principal Sessions Judge,
Salem.
- 7.The Superintendent,
Central Prison,
Salem.
- 8.The District Collector,
Salem
- 9.The Director General of Police,
Mylapore, Chennai.
- 10.The Section Officer,
Criminal Section,
High Court, Madras.



CrI.A.No.166 of 2015

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