



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT
DATED : 31.03.2016

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CORAM
THE HONOURABLE MR. JUSTICE A.SELVAM
and
THE HONOURABLE MR. JUSTICE G.CHOCKALINGAM

Cr1.A.(MD)No.37 of 2016
and
C.M.P.(MD)No.1099 of 2016

1.Alagar
2.Ramar

: Appellants/Accused 1 and 3
Vs.

State by
The Inspector of Police,
B4 Keeraithurai Station,
Madurai District.
Crime No.366/2008.

: Respondent/Complainant

Criminal Appeal has been filed under Section 374(2) of Cr.P.C. against the conviction and sentence, dated 08.01.2016 passed in Sessions Case in S.C.No.285 of 2011 by the IV Additional Sessions Judge, Madurai.

For Appellants : Mr.N.Ananthapadmanabhan

For Respondent : Mr.T.Mohan
Additional Public Prosecutor

JUDGEMENT RESERVED DT: 18.03.2016

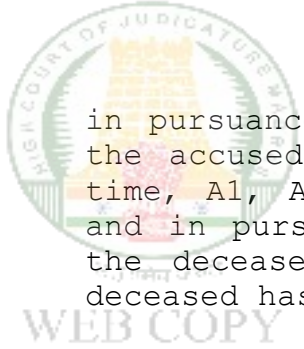
JUDGEMENT DELIVERED DT: 31 .03.2016

JUDGMENT

(Judgment of the Court was made by **G.CHOCKALINGAM, J.**)

The present appeal is directed against the conviction and sentence passed in Sessions Case No.285 of 2011 by the IV Additional Sessions Judge, Madurai holding the appellants/Accused 1 and 3 guilty of the offences under Section 302 r/w 149 of Indian Penal Code and awarding sentence of life imprisonment and also to pay a fine of Rs.5,000/- each, in default, to undergo simple imprisonment for 3 months and under Section 148 of the Indian Penal Code, awarding sentence of two years of simple imprisonment and also to pay a fine of Rs.1,000/- each, in default to undergo two months of simple imprisonment.

2.Brief case of the prosecution is that on 05.07.2008 at about 1.30 p.m., a tussle has arisen in between the accused 1 and 4 and deceased Ariunan with regard to disbursing of stolen money and due to that on 08.07.2008 at about 08.00 p.m., near 40 feet road another tussle has arisen in between the deceased and the 4th accused and his friends and



in pursuance of previous animosity in the house of the 3rd accused, all the accused have hatched conspiracy to murder the deceased and at that time, A1, A3 and A2, A4, A5 and three others armed with deadly weapons and in pursuance of their conspiracy, the accused 1 to 8 have attacked the deceased by using deadly weapons and due to their overtacts, the deceased has passed away.

3.Thiru.Sankaran (PW1) has stated that when he was working as Station Master of Thirumangalam Railway station, on 09.07.2009 at about 06.00 a.m, he got an information through the Gate Keeper Ravi (PW4) about the lying of a dead body in the Madurai-Silaiman Railway line and he has preferred a complaint before the Railway Police under Ex.P1.

4.On the basis of the complaint Ex.P1, PW3 Kamali, Sub Inspector of Police, attached to Railway Police station has registered FIR (Ex.P2) in Railway Crime No.288 of 2008 and sent a copy of the FIR to the concerned Magistrate and the higher officials.

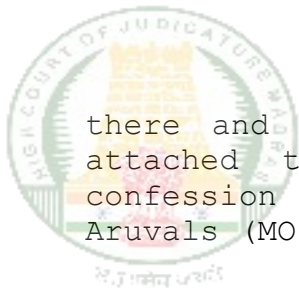
5.Thiru.Ramakrishnan (PW2) is a Gr.I Police Constable working in the Railway Police station, at the time of the alleged occurrence and he has handed over the dead body to the Government Rajaji Hospital at Madurai and after postmortem, he handed over the body to the relatives of the deceased and recovered the blood stained clothes of the deceased viz., MO1 to MO3 and handed over the same to the Inspector of Police.

6.PW5 is the Care Man of Railway Department and he has stated that he has seen the dead body in the presence of the police officials.

7.PW6 Mrs.Uma is a Doctor and she has stated that A4 came for treatment one day before the alleged occurrence by saying that while handling the bureau, which was fall on him and he sustained injury.

8.PW7 Mrs.Kasthuri has stated in her evidence that three years back, from the date of the alleged occurrence, when she was sleeping in her house, at about 9.10 p.m., she heard some noise and subsequently, she came to know that one dead body was lying on the railway track on the next day.

9.Thiru.Muruganadam (PW10) is the Village Administrative Officer has stated that when he was working as Keeraithurai Village Administrative Officer, on hearing the information, he went to the scene of occurrence and on enquiry, he has identified the body of the deceased person by name Arjunan. He and his father were also signed as witness in the observation magazar prepared by the police and recovered a Knife from the body of the deceased by Athachi (Ex.P4) and thereafter, on information from the police station, on 18.07.2008 he went to the Keeraithurai Police station and subsequently, went to the Fire Station, where the police enquired the accused Siva and Selvam and recorded their confession statements, in which he has signed as witness. The admitted portion of the confession statements were marked as Exs.P5 and P6. Based on the statement of the accused Selvam and Siva, Knives (MO5 and MO6) were recovered under the cover of a seizure mahazars (Exs.P.7 and P8). Thereafter, on the information, on 22.07.2008 he went to the Keeraithurai police station, where the Inspector of Police had recorded the statement of the accused Karthikeyan @ Bill Karthik and Ramar. The admitted portion of the confession statements were marked as Exs.P9 and P10 and recovered two knives (MO7 and MO8) by Athachi (Exs.P11 and P12). Subsequently, on the request of the Inspector of Police, Keeraithurai, he went to the police station on 30.07.2008 and at that time, Alagar and Nageswaran are



there and their statements were recorded by the Inspector of Police, attached to Keeraithurai Police Station. The admitted portion of confession statements were marked as Exs.P13 and P14 and recovered Aruvals (MO9 and MO10) through Athachi (Exs.P15 and P16).

10.PW11 Rajesh is an official from Forensic Department, on examination of the items 1 to 10, which were sent for chemical examination, has found that except item Nos.5, 6 and 7, found blood stain in all other items. The Biological report was marked as Ex.P17. Thereafter, PW11 sent all the items for serology test and deposed that blood found in items 2, 3, 4, 8, 9 belonging to human blood group 'O' Positive and he was not able to find out the blood group in items 1 and 10. The Serological report has been marked as Ex.P18.

11.PW12 Dr.G.Natarajan has conducted postmortem on the body of the deceased and found the following injuries:-

"1.An oblique cut injury 23 cms x 2 cms x brain deep noted on the left tempero occipital region, On dissection, the would found cutting the underlying left tempero occipital bone measuring 20 x 0.5 cms x through and through, underlying dura and brain measuring 20 cms x 0.5 cms x 3 cms.

2.An oblique cut injury 13 x 0.5 cms x brain deep noted on the left parieto occipital region, 2 cms above the injury No.1.

On dissection, the would found cutting the underlying left parieto occipital bone 11 x 0.5 cms x through and through, underlying dura and brain measuring 11 cms x 0.5 cms x 2 cms.

3.An oblique stab injury 3 x 1 cms x Pleural Cavity deep noted on left axilla.

On dissection, the would passes obliquely downwards and medically piercing the underlying muscles, vessels, nerves in the III intercostal space, piercing the underlying pleura and upper lobe of Left Lung measuring 2 x 1 x 1 cms and ends as a point. Left pleural cavity contains 300 ml of fluid blood with clots. Right Pleural Cavity empty.

4.An oblique cut injury 8 x 3 cms x bone deep noted on the back of middle of left forearm.

5.An oblique cut injury 7 x 2 cms x bone deep noted on the inner aspect of left wrist.

6.An oblique cut injury 9 x 2 cms x bone deep noted on left palm.

7.An oblique cut injury 3 x 1 x 2 cms along the muscle place noted on the back of middle of the chest.



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8. An oblique stab injury 2 x 1 x 2 cms along the muscle plan noted on the back of middle chest.

Note:

1. All cut injuries are having regular margins.
2. All the stab injuries are having regular margins, One end is pointed and other end is curved.

The following postmortem injuries are noted on the body:

1. Left leg found crushed and separated at the level of knee.

2. Crushed type of lacerated injury 12 x 5 x bone deep noted on the right ankle joint.

3. Crushed type of lacerated injury 7 x 4 cms x bone deep noted on the right hand."

12. The postmortem certificate is marked as Ex.P19.

13. In continuation of investigation, PW23 to PW25 took up further investigation and made investigations in the presence of the witnesses and obtained statements from the accused and also examined the witnesses.

14. Finally, Thiru. Nelson (PW26), the Inspector of Police, attached to Keeraithurai Police Station, after completing the investigation has altered the Sections into 147, 148, 302 r/w 34 and 109 of IPC and laid a final report on the file of the Judicial Magistrate No.4, Madurai and the same has been taken on file in PRC No.67 of 2009.

15. In the interregnum, the accused Siva reported dead and the Death Certificate was filed. Hence, the charges against the above said Siva had abated and the rank of the accused persons was also rearranged. Therefore, totally 8 accused persons were tried.

16. The Judicial Magistrate No.4, Madurai, after considering the fact that the offences alleged to have been committed by the accused are triable by the Sessions Court, has committed the case to the 4th Additional Sessions Court, Madurai and the same has been taken on file in Sessions Case No.284 of 2011.

17. The trial court, after hearing both sides and upon perusing relevant records, has framed charge against the accused 1 to 5 for the offence under Section 148 of the Indian Penal Code, against A6 and A7 under Section 147 of the Indian Penal Code, against A6 to A8 under Section 109 of Indian Penal Code and against A1 to A5 under Section 302 of the Indian Penal Code and the same had been read over and explained to them. The accused denied the charges and claimed to be tried.



18.To prove the charges against the accused, on the side of the prosecution, PW1 to PW26 have been examined and Exs.P1 to P23 and M.Os.1 to 13 have been marked. After examining the prosecution witnesses, the accused had been questioned under Section 313 of the Code of Criminal Procedure, 1973 in respect of the incriminating materials available in evidence against them, they denied their complicity in the crime. No oral and documentary evidence have been let in on the side of the accused.

19.The trial Court after perpending the available evidence on record has found that the accused 1 to 5 guilty and sentenced them to undergo imprisonment of life under Section 302 of the Indian Penal Code and to pay a fine of Rs.5,000/- each, in default to undergo three months of simple imprisonment and under Section 148 of Indian Penal Code found guilty and sentenced to undergo two years of Rigorous imprisonment and to pay a fine of Rs.1,000/- in default to under go two months of Simple Imprisonment. The accused 6 to 8 were acquitted under Section 235(1) Cr.P.C for the charges framed against them.

20.It is manifested from the records that the accused 1 to 5 had preferred a Criminal Appeal in Crl.A.(MD)No.326 of 2014 before this court and on consideration of the submission made on either side and after perusing the materials available on record, this court has allowed the appeal, by setting aside the conviction and sentence passed by the 4th Additional District and Sessions Court, Madurai and remitted the matter to the file of the trial court for framing necessary charges against the all the accused and also directed to dispose of the Sessions Case No.285 of 2011 before the end of July, 2015.

21.As per the direction of this court, the learned 4th Additional District and Sessions Judge, Madurai has taken up the matter afresh and framed necessary charges as per the direction of this court and after considering the entire evidences and materials available on record, has given a finding that the accused 1 and 3 found guilty and passed conviction and sentence against them under Sections 148 IPC and 302 r/w 149 IPC. The learned trial Judge has found that the remaining accused not guilty and acquitted from the charges framed against them.

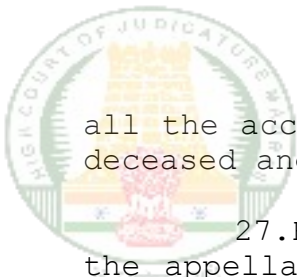
22.Challenging the order of conviction and sentence as afore-stated, the appellants/accused 1 and 3 stand before this court by way of this criminal appeal.

23.The learned Additional Public Prosecutor has submitted that the State has not preferred any appeal against the acquittal of A2, A4 and A5 and other accused.

24.Further, it is admitted by either side that no other appeal is pending against the acquittal of the other accused, preferred either by the de-facto complainant or the prosecution witnesses.

25.Before contemplating the rival submissions made on either side, this court has to look into the alleged previous motive existed in between the deceased and accused.

26.The specific case put forth on the side of the prosecution is that in pursuance of previous animosity, in the house of third accused,

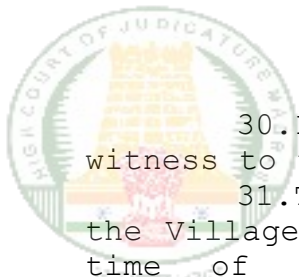


all the accused have joined together and contrived themselves to slay the deceased and at that time, accused 1 to 5 are armed with deadly weapons.

27. Heard Mr.N.Ananthapadmanabhan, learned counsel appearing for the appellants/accused 1 and 3 and Mr.T.Mohan, learned Additional Public Prosecutor appearing for the State/respondent and also perused the materials available on record.

28. The learned counsel appearing for the appellants/A1 and A3 has contended that the trial court has failed to appreciate the fact that the prosecution has not brought out any legally admissible evidence as against the appellants/A1 and A3 and that the trial court has failed to prove the theory of conspiracy and also failed to consider the charges against the other accused regarding Sections 147, 148 and 149 of IPC are not proved and that even though, the trial court has come to the conclusion that the charges for the other offences under Sections 147, 148 and 120(B) IPC are not proved, come to a wrong conclusion in convicting the appellants/A1 and A3 against the charges under Sections 148 and 302 r/w 149 IPC and that the trial court has failed to see the evidence of the Village Administrative Officer (PW10) that he was available with the police from the moment the news about a dead body lying on the railway track and his evidence is not reliable and trustworthy and that the trial court has failed to consider the fact that the evidence of PW10 is not reliable and trustworthy, since PW10 is assisting the police and signed as witness in all the confession statements of the accused and in all the observation mahazars and all the recoveries were also made in various dates and that the trial court has erred in coming to the conclusion that since human 'O' Group blood is found place in the alleged recovery articles, the appellants/A1 and A3 are found guilty of offences under Sections 148 and 302 of IPC r/w 149 IPC and further, there is no evidence to prove the specific overtact against the appellants/A1 and A3. The trial court has failed to consider the fact that only two persons are found guilty under Section 148 and 302 r/w 149 of IPC, which is not legally maintainable. Hence, he prayed that the conviction and sentence passed by the trial court has to be set aside and the appeal has to be allowed.

29. Per contra, the learned Additional Public Prosecutor has contended that the evidence of the Village Administrative Officer (PW10) is reliable and trustworthy and based on the admitted portion of the confession statement of the accused, the prosecution has recovered the material objects, which was also corroborated by the chemical examination report and the serological report to the effect that the material objects were contained human Blood Group 'O' positive, which tallies with the clothes recovered from the deceased, which also confirmed the evidence of PW10 and that the prosecuting agency has brought home the guilt of the appellants/accused 1 and 3 beyond all reasonable doubts with unassailable evidence and that the trial court had also, after analysing the evidences, both oral and documentary, found the appellants/accused 1 and 3 guilty and the appellants were also rightly and fairly convicted and sentenced in proportionate to intense of the offences committed by them, which do not require any disturbance and therefore, he has prayed to confirm the judgement of the trial court.



30. It is an admitted fact that in this case, there is no eye witness to the alleged occurrence.

31. The prosecution has mainly relied upon the evidence of PW10, the Village Administrative Officer, who was alleged to be present at the time of recording confession statement of the accused by the Investigating Officer and the recovery of material objects from the accused. Based on the admitted portion of the confession statement of the accused, the prosecution has recovered the material objects, which also corroborated by the Chemical examination report and Serological report. Except the above evidence, there is no evidence produced on the side of the prosecution.

32. In this case, even according to the prosecution, firstly the accused 1 to 8 were tried for the alleged offences under Sections 147, 148, 302 r/w 149 IPC, 302 r/w 34 IPC and 109 IPC and after full fledged trial, the trial court has convicted the accused 1 to 5 for life imprisonment and to pay a fine of Rs.5,000/- each, in default to undergo 3 months of Simple Imprisonment each, for the offence under Section 302 r/w 149 IPC and for the offence under Section 148 of IPC to undergo 2 years of rigorous imprisonment and to pay a fine of Rs.1,000/- each, in default to undergo 2 months of Simple Imprisonment for the offence under Section 148 IPC. Thereafter, as per the direction of this court made in Cr1.A(MD)No.326 of 2014, dated 09.03.2015, the matter was remitted back to the trial court for framing necessary charges against all the accused and the trial court has framed charges under Sections 120(B), 148, 147, 302 r/w 149 IPC and 302 r/w 109 IPC. Subsequently, the trial court has concluded that A1 and A3 found guilty under Sections 148 and 302 r/w 149 IPC and acquitted the other accused from the charges levelled against them.

33. Sections 141, 146, 147, 148 and 149 of IPC read as under:

"141. Unlawful assembly.-An assembly of five or more persons is designated an "unlawful assembly'', if the common object of the persons composing that assembly is-

First.-To overawe by criminal force, or show of criminal force, or any public servant in the exercise of the lawful power of such public servant; or

Second.-To resist the execution of any law, or of any legal process; or

Third.-To commit any mischief or criminal trespass, or other offence; or

Fourth.-By means of criminal force, or show of criminal force, to any person, to take or obtain possession of any property, or to deprive any person of the enjoyment of a right of way, or of the use of water or other incorporeal right of which he is in possession or enjoyment, or to enforce any right or supposed right

or;



Fifth.-By means of criminal force, or show of criminal force, to compel any person to do what he is not legally bound to do, or to omit to do what he is legally entitled to do.

146.Rioting.-Whenever force or violence is used by an unlawful assembly, or by any member thereof, in prosecution of the common object of such assembly, every member of such assembly is guilty of the offence of rioting.

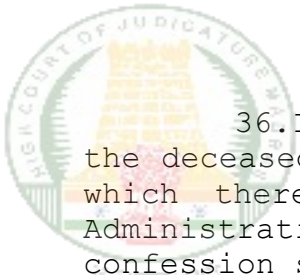
147.Punishment for rioting.-Whoever is guilty of rioting, shall be punished with imprisonment of either description for a term which may extended to two years, or with fine, or with both.

148.Rioting, armed with deadly weapon- Whoever is guilty of rioting, being armed with a deadly weapon or with anything which, used as a weapon of offence, is likely to cause death, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or within both.

149.Every member of unlawful assembly guilty of offence committed in prosecution of common object.- If an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence."

34.From the above sections, it is very clear that to level charges under Sections 148 and 149 IPC, five or more persons are necessary to form an unlawful assembly. But in this case, the trial court has charged the above Sections only against A1 and A3 alone and the other accused were acquitted of the charges under Sections 147, 148 and 302 r/w 149 IPC. Hence, the charges framed against two persons, namely the appellants/A1 and A3 under Sections 302 r/w 149 IPC and 148 IPC are not maintainable. Therefore, the conviction and sentence passed by the trial court holding that the appellants/A1 and A3 punishable under Sections 148 and 302 r/w 149 IPC are not legally maintainable. Hence, this court is of the considered view that the charges framed against the appellants/A1 and A3 under Sections 148 and 302 r/w 149 IPC are liable to be set aside.

35.In this case, it is alleged on the side of the prosecution that A1 has attacked the deceased with Aruval on his back side of the head more than one time and A3 stabbed with knife on the back side of the deceased and in this regard, A1 and A3 were charged under Section 302 r/w 149 IPC. But there is no evidence adduced on the side of the prosecution in this regard. Even according to the charges framed against A3, he stabbed the deceased on his back side.



36. In so far as the charges against A1 are concerned, A1 attacked the deceased with Aruval on the back side of his head more than once, for which there is no eye witness, except the evidence of the Village Administrative Officer (PW10), who was present at the time of giving confession statement by the accused.

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37. It is an admitted fact that except the evidence of the Village Administrative Officer (PW10), who was present at the time of giving confession statement by the accused and recovery of material objects, there is no material available on record to prove the alleged guilt against the appellants. Hence, this court has to analysis the evidence of PW10 to come to a conclusion as to whether the evidence of PW10 is reliable and trustworthy or not.

38. From the evidence of PW10, it is clear that he was assisting the prosecution from the inception itself and he alone present at the time of giving confession by all the accused before the Investigating Officer and the recovery of material objects on various dates I.e., on 09.07.2008, 18.07.2008, 22.07.2008 and 30.07.2008. He is also the witness for observation magari and Athachi prepared by the Investigating Officer on 09.07.2008.

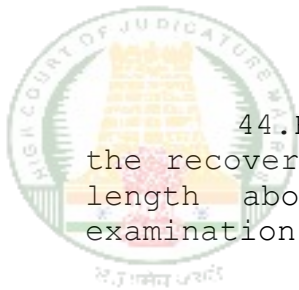
39. It is further seen from the evidence of PW10 that he alone received the information about the lying of a dead body in the railway track on 09.07.2008 at 7.30 a.m and he is the attesting witness in the observation Magazar (Ex.P3) and recovery of knife (Ex.P4) near the body of the deceased measuring 44 cms.

40. Considering the above fact that since, PW10 alone as witness for the recovery of all the material objects and seizure and he was present at the time of giving the alleged confession statement by the accused and he is only assisting the prosecution, it would create doubt about the case of the prosecution.

41. Further, PW10 has only assisted the police officials. In his chief examination, he has stated that இறந்தவர் கிடந்த இடத்திலிருந்து எடுத்த கத்தி 44 செ.மீ. அது அ.சா.பா.4 and there is no material available to the effect that the knife (MO4) was used to attack the deceased or not.

42. Further, in this case, as per the confession of A1 and A3, MO9 and MO10 were recovered in the presence of the Village Administrative Officer (PW10). But, the Village Administrative Officer (PW10) has not stated about the blood stains found in knives (MO9 and MO10), which were recovered from the accused Nageshwaran and Alagar by Athachi Exs.P15 and P16 respectively.

43. Further, it is alleged on the side of the prosecution that the knife (MO4) was recovered nearby the dead body and the knife (MO9) was recovered from the 1st accused Alagar and both the knives are at length about 44 cms. But in this case, the alleged one knife alone was sent for chemical examination and the chemical examination report revealed that knife item No.9 measuring 44 cms contains blood stains of human 'O' Group.



44.Hence, this court is of the considered view that even though the recovery of knife (MO4 and MO9) by the Investigating Officer, are at length about 44 cms and one Knife alone was sent for chemical examination, it creates doubt on the prosecution case.

45.Under these circumstances, since this court has already come to the conclusion that the evidence of the Village Administrative Officer (PW10) is not reliable and trustworthy one, the admission of the accused in the confession statement leading to recovery of MO8 and MO9 are also not proved beyond reasonable doubt. Hence, some blood stains contained in the above weapons will not conclusively prove that the accused guilty of the offence under Section 302 of IPC or any other lesser offence. Hence, the evidences adduced on the side of the prosecution are not sufficient to hold the appellants/A1 and A3 are found guilty under Section 302 IPC or any other lesser offence.

46.Keeping in view of the above facts, this Court is of the considered view that the charges levelled against the appellants/A1 and A3 are not proved by the prosecution beyond all reasonable doubt, since only two persons were convicted by the trial court under Sections 148 and 302 r/w 149 of IPC and other accused were acquitted.

47.Further, this Court is of the considered view that since the overtact attributed against the appellants/A1 and A3 in the charge sheet has not been proved beyond all reasonable doubt on the side of the prosecution, the conviction and sentence passed by the trial court are liable to be set aside.

48.Hence, this court is of the considered view that the conviction and sentence recorded by the trial court are not supported by credible evidence and the prosecution has failed to establish the guilt of the appellants/A1 and A3 beyond reasonable doubt and benefit of doubt has to be given to the appellants/A1 and A3.

49.In the result, the appeal is **allowed** and the conviction and sentence passed by the trial court are set aside and the appellants/A1 and A3 are acquitted of the charges. The fine amount, if any paid by the appellants is directed to be refunded. Consequently, connected Miscellaneous Petition is closed.

Sd/-

Assistant Registrar(CS II)

/True copy/

Sub Assistant Registrar

To

1.The IV Additional Sessions Judge, Madurai.

2.The Judicial Magistrate No.4, Madurai

<https://hcservices.ecourts.gov.in/hcservices/>

3.-do-thru The Chief Judicial Magistrate, Madurai.



4.The Commissioner of Police, Madurai

5.The Director General of Police, Mylapore, Chennai

6.The Inspector of Police,
B4 Keeraithurai Station,
Madurai District.

7.The Superintendent of Central Prison, Madurai

8.The Additional Public Prosecutor,
Madurai Bench of Madras High court, Madurai

9.The Secretary to Government
Home Department, Secretariat, Chennai-9.

10.The Inspector General of Prison, Chennai-9.

Copy to:

The Section Officer,
Record Cleark,
Criminal Section,
Madurai Bench of Madras High court, Madurai.

+1cc to M/s.N.Ananthapadmanaban, Advocate in SR.No.18154

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Judgment
made in Cr1.A(MD)No.37 of 2016
31.03.2016