

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 27.03.2018

CORAM

THE HONOURABLE MR.JUSTICE C.T. SELVAM

AND

THE HONOURABLE MR. JUSTICE N.SATHISH KUMAR

Cr1.A.No.12 of 2018

1. Kaliyappan

2. Ravi

3. Mohanavel

4. Tamilselvi

.. Appellants/Accused 1,2,4 and 5

Vs.

State represented by
The Inspector of Police,
Jolarpettai Circle,
Jolarpettai Police Station,
Vellore District.
Crime No.314 of 2012

.. Respondent /complainant

Criminal Appeal filed under Section 374(2) of the Criminal Procedure Code against the judgment dated 11.12.2017 passed in SC.No.5/2016 on the file of the III Additional District and Sessions Judge, Tiruppattur, Vellore District.

For Appellants : Mr.M.G.Udayashankar

For Respondent : Mrs.M.Prabavathi
Additional Public Prosecutor

JUDGMENT

[Judgment of the Court was delivered by N.SATHISH KUMAR, J.]

Appellants are the accused in the case tried in SC.No.5/2016 on the file of the III Additional District and Sessions Judge, Tirupattur for offences under sections 147, 148 and 302 IPC. The Trial Court, under impugned Judgment dated 11.12.2017, found the accused guilty and convicted and sentenced them as follows:

Appellant/Accused	Conviction under section	Sentence Awarded
A1	302 IPC	sentenced to undergo Life Imprisonment and a fine of Rs.5,000/-, with a default sentence of three months simple imprisonment.
A1	148 IPC	Fine of Rs.1,000/- , with a default sentence of one month simple imprisonment.
A2 to A5	147 IPC	Fine of Rs.500/- each, with a default sentence of one month simple imprisonment each.

The period of sentence already undergone by the first accused shall be set off under section 428 of Cr.P.C. Aggrieved over the said conviction and sentence, present appeal came to be filed by the appellants/ accused 1,2,4 and 5.

2. The brief facts of the prosecution case, are as follows:-

2.(a) A5 one Tamilselvi is wife of P.W.1. The deceased Govindasamy is the father of P.W.1 and P.W.2. P.Ws.1 and 2 were residing in Palnankuppam village. A1 and A4 are brothers of A5 and the other accused are relatives of A1, A4 and A5. There was strained relationship between P.W.1 and A5 in their matrimony. On 17.06.2012, all the accused assembled in front of P.W.1's house and engaged in quarrel. On hearing the sound from P.W.1's house P.W.2 the brother of P.W.1 and P.W.3 who is the cousin of P.W.2, P.W.5 another cousin of P.W.2, P.W.6 the relative of P.Ws.1 and 2 and deceased, and P.W.8 another relative rushed to the spot and thus witnessed the occurrence. A1 with the iron rod M.O.1 beat the deceased Govindasamy on his head. Other accused were also present there. A2 beat P.W.3 with iron rod. A3 fistfist P.W.3 and P.W.2 and A1 sustained head injury and he was taken to the hospital. P.W.1 the husband of A.5 signed the complaint. His signature in the complaint is Ex.P.1. P.W.11 Assistant Surgeon attached to Thirupattur Government Hospital admitted P.W.3 on 17.06.2012 at about 9.30 p.m. and he has stated that he was attacked by six men and six women with sticks. P.W.11 has noted 2 x 1 x 1 c.m. laceration on the right side head of P.W.3. Thereafter he was discharged on 18.06.2012. P.W.11 issued Ex.P.3 Wound Certificate. Similarly she has also admitted one Mr. Umapathy and found tenderness and treated him as outpatient. She issued wound certificate Ex.P.4. P.W.1 also got admitted on the same day complained of tenderness and he was treated as outpatient. Ex.P.5 is a A.R.Copy. Injured Govindasamy also brought to the hospital and P.W.11 has noted 2 x 1 x 1 cm laceration on the left forehead. She issued Ex.P.6 wound

certificate and referred him to the Government Hospital Vellore, from there referred to Government Hospital, Chennai. In respect of injuries she issued Ex.P.6 would certificate.

2.(b) P.W.13 the Sub-Inspector of Police, on intimation from the Government Hospital, Tirupattur, on 00.30 hours on 18.06.2012 went to the hospital and recorded statement from P.W.1. The statement of P.W.1 is Ex.P.26 and based on that, he registered a case in Cr.No.314 of 2012 under Section 294(b), 323, 324, 506(ii) I.P.C. under Ex.P.7 F.I.R. Thereafter, he commenced investigation at 6.00 a.m. on 19.06.2012 and went to the scene of occurrence, prepared observation mahazar Ex.P.8 and Rough Sketch Ex.P.9 in the presence of P.W.7 and one Mr.Devendran and arrested the accused 1 to 4 and recorded confession statement of A1 in the presence of P.W.16 and one Mr.Arumugam. The admitted portion of confession statement of A1 is Ex.P.11. In pursuant to the same P.W.13 seized Iron Rod (M.O.1), and blood stained shirt (M.O.2) from the haystack under Ex.P.18 Mahazar. P.W.18 investigating officer after receipt of death intimation of the deceased Govindasamy from the Government Medical College Hospital Chennai, on 16.06.2012 altered the offences from 294(b), 323, 324, 506(ii) I.P.C. to 294(b), 323, 324, 302 and 506(ii) I.P.C under Ex.P.23. Thereafter, he went to the hospital and conducted Inquest over the dead body and prepared Ex.P.19 Inquest Report. He forwarded requisition to the Medical Officer to conduct Post Mortem. P.W.15 conducted autopsy over the dead body and found the following Injuries :

"1. Irregular reddish brown abrasions (a) 1 x 1 cm on the inner aspect of the upper third of the right forearm, 3.5 cm below the level of the medial epicondyle of the right humerus;

2. Oblique sutured lacerated wound with surrounding irregular reddish brown abrasion 4.3 x 1.1 - 0.3 cm x scalp deep on the left parietal region of the scalp; on removal of sutures, the margins were irregular and gaping; on reflection of the scalp, diffuse scalp deep dark red bruising on the both right and left parieto-temporal regions of the scalp; diffuse dark red bruising of both the temporalis muscles; on removal of the calvarium, oblique horizontal fissured fracture 23 cm on the both the parietal and both the temporal bones of the calvarium; the underlying dura mater was intact; dark red hematoma 45 gm on the temporal region of the right cerebral hemisphere of the brain; sulci of the brain narrowed and gyri flattened and brain was edematous; base of the skull was intact."

He issued Ex.P.15 Post Mortem Certificate and opined that the deceased would appear to have died due to effects of head injuries. He sent viscera for chemical examination.

2.(c) P.W.14 Assistant Director of Forensic Science Laboratory has examined the material objects and issued Biological Report Ex.P.12 and received Serology Report Ex.P.13 from the laboratory and stated that the blood group found in the report is 'AB' human blood group. P.W.20 conducted further investigation. He also gave requisition to the Judicial Magistrate, to record the Statement of witnesses. P.W.17 the Judicial Magistrate recorded statement of witnesses under 164 Cr.P.C. on 16.08.2012. In continuation of his investigation P.W.20 arrested A5. Thereafter, he examined the Medical Officer and after completion of the investigation, finally laid charge sheet against all the accused before the Court.

3.The accused was put on trial. In order to establish the case, the prosecution examined P.Ws.1 to 20 and marked Exs.P.1 to 26 and M.Os.1 to 7. After the examination of prosecution witnesses the accused were questioned under Section 313 Cr.P.C. with regard to the incriminating circumstances for which they denied the complicity. No witness was examined and no documentary evidence was marked on the side of the appellants/accused. The Trial Court, after analyzing the evidence on record, convicted the first accused under sections 302 and 148 IPC and sentenced him for life imprisonment and a fine of Rs.5,000/-, in default, 3 months simple imprisonment for the offence under section 302 of IPC; imposed fine of Rs.1000/- in default to undergo one month simple imprisonment for the offence under section 148 IPC; and the accused 2 to 5 are found guilty under section 147 of IPC and imposed fine of Rs.500/- each in default to undergo one month simple imprisonment each. Aggrieved over the same the present appeal came to be filed. The prosecution has not filed any appeal challenging the finding of the trial court not convicting A2 to A5 with aid of Section 149 I.P.C.

4. It is the contention of the learned counsel for the appellants that P.W.1 turned hostile and there are serious contradictions in the evidence of other eye witnesses. Therefore the appellants are entitled for the benefit of doubt. It is also the contention of the learned counsel that the prosecution is not able to succeed in proving the guilt of A1 under Section 302 I.P.C. The offence under Section 304(2) I.P.C. alone will be attracted considering the nature of the quarrel between the family members. A1 did not take any undue advantage and in a quarrel, he caused single blow on the head of the deceased who

died on 18.06.2012 and the accused have no intention to cause death of the deceased. Only in a family dispute and quarrel, he caused a single blow. Therefore offence under Section 302 I.P.C. would not be attracted in this case.

5. Learned Additional Public Prosecutor submitted that P.Ws.2,3,5,6 and 8 have clearly spoken about the role of A1. Their evidence against A1 causing injuries to the deceased has been proved beyond all reasonable doubt and the trial court has correctly sentenced A1 under Section 302 I.P.C. and 148 I.P.C. and other accused A2 to A5 u/s 147 I.P.C. However, left the matter for the appreciation of the Court.

6. We have perused the entire materials and evidence on record.

7. In the light of the above submissions, we have to analyse whether the prosecution was able to bring home the guilt of the appellants/accused beyond all reasonable doubt.

8. The relationship between the parties is not in dispute. In fact A5 Tamilselvi is the wife of P.W.1 and A1 and A4 are the brothers of A5 and other accused are relatives of A1, A2 and A5. P.W.1 is the husband of A5 in whose instance the law was set in motion. However, during examination he was declared as hostile. The factual aspects found place in Ex.P.26 complaint, has not been spoken by P.W.1. Admittedly, his wife A5 was facing trial. Therefore, P.W.1 resiling from his statement is normal in support of his wife and relatives. Therefore, merely because the person who sets the law into motion turned hostile will not affect the prosecution when the other witnesses have supported the prosecution case. The deceased Govindasamy is none other than the father of P.Ws.1 and 2 and brother of P.W.9. It is the case of the prosecution that there were strained relationship between P.W.1 and his wife (A5) in their family matters. Therefore, A5 with the support of A1, had enmity against P.W.1 and his family. On 17.06.2012 at 8.30 p.m. all the accused unlawfully assembled in front of P.W.1's house, A1 and A2 carrying iron rods and all of them squabbled and beat P.W.1 and when others intervened they were also beaten by the accused party. Though P.W.1 did not support the prosecution, the fact remains that he was also admitted and treated as outpatient on the date of occurrence. Ex.P.5 issued by Medical Officer shows that P.W.1 in fact was admitted in the hospital on 18.06.2012 having complained of tenderness and he was treated as an outpatient. P.W.3 the cousin of P.Ws.1 and 2 also sustained injuries in the above occurrence. The same has been proved by the evidence of P.W.11 Medical Officer and his Wound Certificate Ex.P.3. P.W.11 evidence clearly establishes the fact that P.W.3 has sustained head injury measuring 2 x 1 x 1 cm laceration on

the right side head. Similarly the deceased was also admitted in the hospital on the same day and P.W.11 has noted the injuries measuring 2 x 1 x 1 cm laceration on the left forehead in respect of which Ex.P.6 was issued by the Medical Officer.

9. In the above back ground, the evidence of P.Ws.2, 3, 5,6 and 8 and other witnesses when carefully perused, it is the evidence of P.W.2 that on hearing the sound from P.W.1's house, he rushed to P.W.1's house, at that time accused were present. There were quarrel in the house. A3 beat him and A1 beat his father/deceased and immediately, the deceased was taken to the hospital. Similarly P.W.3 also in his evidence stated that A1 beat the deceased with iron rod and A2 beat P.W.3 with the said weapon. Sustaining of head injury by P.W.3 has been clearly spoken by P.W.11 Medical Officer and P.W.3 has also stated in his evidence. P.W.3 evidence also shows that there was matrimonial dispute between P.W.1 and A5 which lead to the quarrel on 17.06.2012. P.W.4 also rushed to the spot and had seen the quarrel in the house of P.W.1 at the relevant time and he also seen the injuries on P.W.2, P.W.3 and the deceased. He has also seen the deceased lying down. P.W.5 is another relative of the deceased who also rushed to the spot and witnessed A1 beating the deceased with iron rod. P.W.6 also in his evidence stated that all the accused were present and A1 beat the deceased on the head with iron rod. P.W.8 also supported the version of the prosecution. He had also seen the deceased having beaten by A1 and P.W.3 also injured by A2. A3 punched P.W.2 on his chest.

10. Though there are minor contradictions between the above witnesses with regard to witnessing the occurrence, such minor contradictions did not affect the core of the prosecution case. Admittedly, the occurrence took place in P.W.1's house as per the observation mahazar and rough sketch. The witnesses evidence also shows that they all rushed to P.W.1's house on hearing the quarrel sound between the relatives. Though there are some minor discrepancies found in their evidence, it is to be noted that the witnesses cannot be expected to give a minute details consistently. The observation of one witness as to the occurrence may be different than the other. The reaction of each witness differs from person to person. Therefore, merely because the witnesses have not given exact version, it cannot be said that their evidence is doubtful. From their evidence it is clearly established that the accused in fact assembled in P.W.1's house and A1 and A2 carried iron rod with them. P.Ws.2 and 3 evidence also show that there were some family dispute between P.W.1 and A.5. From the above facts it could be easily inferred that all the accused came to P.W.1's house only due to such dispute. Where unfortunate father of P.Ws.1 and 2 met ill-fated violence and succumbed to injuries on the next day at

Chennai Government Hospital.

11. Originally the crime has been registered for the offences under Sections 294(b), 323, 324 and 506(ii) I.P.C., and after the death of the deceased in the hospital, the crime has been altered into 302 I.P.C. Before the death of the deceased P.W.13 Sub-Inspector of Police commenced investigation for the offence under Section 294(b), 323, 324 and 506(2) I.P.C. and arrested A1 on 17.06.2012 at 8.30 p.m. and recorded his confession statement. In pursuant to the admitted portion of confession statement of A1, he seized M.O.1 iron rod and bloodstained shirt (M.O.3) as produced by, which was hidden in the haystack. It is to be noted that these material objects were sent to the Court on 18.06.2012 itself and it was also subjected to scientific examination in the Forensic Laboratory. Similarly the shirt and banians seized from the dead body after post mortem were also subjected to the Serology test. Ex.P.13 Serology Report shows that the blood found on the shirt is that of human blood, containing 'AB' group. In fact this scientific evidence coupled with the eye witnesses version, we have no difficulty in holding that only A1 caused injury on the head of the deceased. P.W.11 has noted laceration on the left forehead of the deceased and he was referred to further treatment. The Post Mortem Certificate Ex.P.15 and the evidence of P.W.11 Medical Officer clearly show that the deceased died due to the effect of the injuries. This fact clearly established the homicidal death of the deceased. From the above medical evidence coupled with eye-witnesses version, we have no difficulty to hold that the deceased was died only due to the injury caused by A1. F.I.R also registered on the same day after intimation from the hospital. In fact witnesses and injured were admitted in the hospital on 17.06.2012 at night hours, thereafter on the early morning itself, F.I.R. has been registered and the F.I.R. has been sent to the court on the same day. Therefore, we do not find any fabrication in the FIR. From the eye witnesses version it is clearly established that A1 has caused head injury on the deceased which resulted in his death and A2 to A5 were also very much present at the place of occurrence. Medical Officer's evidence also clearly shows that the deceased died due to the effect of the head injuries.

12. Now it has to be seen whether the act of A1 fall under Section 300 I.P.C. Admittedly there was a matrimonial dispute between P.W.1 and A5. Other accused are family members of A5. They went to P.W.1's house on the same day. The relatives assembling P.W.1's house to solve the matrimonial dispute between the husband and wife is quite normal. Though the witnesses have spoken about the specific overt act as A1 causing injury on deceased, A1 and A2 causing injury on P.W.3. None of the witnesses seen, these accused carrying the deadly weapon to

the house of P.W.1. All the witnesses on hearing the screaming noise and quarrel sound from P.W.1's house rushed to the spot and at that time they saw A1 and A2 holding iron rods. Their evidence shows that there were quarrel between the parties. Therefore possibility of picking up a rod like weapon (M.O.1) in the place of occurrence that too from the house of P.W.1 due to sudden quarrel at the time of attack also cannot be ruled out. In the absence of evidence to show the accused carried weapons to P.W.1's house, the possibility of picking up an object like M.O.1 from P.W.1's house cannot be ruled out.

13. Admittedly, there is no motive whatsoever by the accused party on the deceased in this case. The entire occurrence as per the version of the prosecution, as a result of quarrel between two families and evidence of P.W.3 in the cross examination shows that after the occurrence, iron rod was very much found in the place of occurrence. Similarly P.W.2 has also admitted that the iron rod was very much found in the place of occurrence and the police collected the same. Similarly P.W.6 in his evidence also stated that M.O.1 was picked from the place of occurrence. Therefore, possibility of using such rod from P.W.1's house cannot be ruled out. Admittedly, there was a quarrel between the parties. Merely because the accused came to P.W.1's house it cannot be construed that they have formed unlawful assembly. It is normal for the family members to assemble in order to solve the matrimonial dispute of their kith and kin. There was no motive whatsoever to exterminate or eliminate the life of the deceased. Only in the quarrel among the family members, the deceased, who intervened, sustained head injury and the entire occurrence appears to be committed without any premeditation in a sudden fight. Except one injury on the head, neither A1 nor other accused who were very much present, have taken any undue advantage or acted in a cruel or unusual manner. Therefore, we are of the view that though the homicidal death has been established, the act of A1 would fall under the category of culpable homicide not amounting to murder and not under the category of murder, since the entire occurrence has taken place in a quarrel among the family members. We are also conscious of the fact that single blow in cases would fall under the category of culpable homicide not amounting to murder. Even though it is a single injury, since we could not find any other materials that the accused had intention to cause death, A1 could be punished only under Section 304(2) I.P.C.

14. It is also to be noted that the deceased died next day in the hospital and he was given first aid at Tirupattur hospital and the lacerated wound on the head was sutured, thereafter he died. All these facts also show that the death of the deceased was not due to the direct cause of the head injury alone but also due to other complications. Considering these

aspects and the nature of the injuries, the occurrence took place in a quarrel in the family without any premeditation, the accused has not taken any undue advantage we hold that the act of the accused causing death of the deceased, would certainly fall under Section 304 Part II I.P.C. Accordingly the conviction imposed by the trial Court to A1 under Section 302 I.P.C. is altered to 304 Part II I.P.C. and taking into consideration of the nature of the dispute we deem it fit to award a sentence of seven years rigorous imprisonment with fine of Rs.5,000/- in default to undergo simple imprisonment for three months.

15. Though the evidence of other witnesses also shows that the other accused also very much present in the occurrence, the trial Court found that A2 to A5 guilty under Section 147 I.P.C. alone. Probably the trial Court would have felt that they are not actual perpetrators and imposed fine alone. The trial Court while taking such decision, ought to have taken into consideration of settled legal principle. When the trial Court finding guilty of other accused for unlawful assembly, the necessary corollary would be that they are also liable to be punished with the aid of Section 149 I.P.C. for the major offence. The trial Court, however, not gone into the entire materials. As we have discussed earlier without any intention to commit an offence, family members have assembled in P.W.1's house, who is none other than the husband of A5, to solve the matrimonial dispute. At that time the assembly was not unlawful at all. Though any assembly which was not unlawful, may subsequently become an unlawful assembly. When there was sudden unpremeditated quarrel among the family members, it cannot be said that all the members of the family present there said to have formed into an unlawful assembly. Hence, we are of the view that the conviction recorded by the trial Court as against A1 under Section 148 I.P.C. and A2 to A5 under Section 147 I.P.C. are hereby set aside.

16. In fact, while appreciating the evidence, the trial court has not taken into consideration of the evidence of P.W.3 the injured. His evidence shows that A2 caused head injury. Medical evidence also proved the above fact. But the trial court has not imposed any punishment for A2 for the charge under Section 324 I.P.C. In fact there are materials to prove the charge against A2, the trial court has not awarded any punishment under Section 324 I.P.C. The prosecution has also not filed any appeal. Hence, we have no other option except to hold that we cannot impose punishment for A2 under Section 324 I.P.C. Further as we have discussed the sentence imposed under Section 147 IPC is liable to be interfered with and accordingly it is set aside.

17. The trial court while awarding punishment should also

take into consideration the nature of the charges. Once the trial Court found that the accused are members of an unlawful assembly and it is established that if an offence is committed by any member of the unlawful assembly in prosecution of the common object of that assembly every member of the same assembly is guilty of that offence. Therefore, the trial Court ought to have understood the provision of law properly while dealing with the charges like 147, 148 and 149 I.P.C. Section 149 I.P.C creates a vicarious liability for the unlawful acts committed pursuant to the common object by any other member of that assembly. The basis of such constructive liability is mere membership of such assembly with a requisite common object or knowledge. Therefore, once the Court holds that certain accused persons formed an unlawful assembly and an offence is committed by any member of that assembly in prosecution of the common object of that assembly or such as the members of that assembly knew that they are likely to be committed in prosecution of that object, every member of that unlawful assembly is to be held guilty of that offence. Once the court arrives at a finding that there is an unlawful assembly it would not be open to the trial Court to see as to who actually committed the offence and he only imposed punishment. Such approach of the trial Court in this case cannot be appreciated. The trial Court should be very cautious in these matters.

18. We have also noted that the trial court in para 9 of its judgment has relied upon 164 Cr.P.C. Statement of the witnesses P.W.1 to P.W.3 marked as Exs.P.19, 20 and 21. The trial Court in fact relied upon 164 Cr.P.C. statements to certain extent. Such approach of the trial Court is also against the rudimentary principles of Evidence Act. The statements under Section 164 Cr.P.C. are not substantive piece of evidence. Those statements can be used only either for corroboration or contradiction under Sections 145 and 157 of the Evidence Act. Therefore, the trial Court relying upon the statements of the witnesses recorded under Section 164 Cr.P.C. as a substantive piece of evidence is not valid in law. Further, we have also noted that when the witnesses were examined before the Court and they gave evidence which is substantive in nature, again exhibiting 164 Cr.P.C. Statements and examining the Magistrate as witness not at all necessary, whereas the same has been done in this case. This observation made by us only for future reference and shall not be considered as remarks as against the trial judge.

19. In the result, the criminal appeal with regard to appellant/1st accused is partly allowed and the conviction and sentence imposed on the appellant/1st accused for offence u/s.302 IPC made in SC.No.5/2016 by the learned III Additional District and Sessions Judge, Tirupattur, in the impugned judgment dated

11.12.2017 are hereby set aside. Instead, the appellant/1st accused is convicted for the offence u/s.304 [Part II] IPC and sentenced to undergo seven years rigorous imprisonment. Fine amount imposed by the Trial Court, remains unchanged. The sentence imposed against the appellant / 1st accused under Section 148 I.P.C. is set aside and he is acquitted from that charge. The fine amount paid by the appellant/1st accused u/s 148 I.P.C. shall be refunded to him. The sentence imposed against the appellants/accused 2,4 and 5 under Section 147 I.P.C. is set aside and they are acquitted from the charge. The fine amount paid by the appellants/accused 2, 4 and 5 is ordered to be refunded to them. Though the 3rd accused has not preferred any appeal, he is also entitled to get the same benefit of other accused and acquitted from the charge under section 147 I.P.C. The fine amount, if any, paid by 3rd accused shall be refunded to him. CrI.M.P.No.2475 of 2018 is closed.

20. It is reported that the appellant/1st accused is in jail. Hence, it is directed that the appellant/accused is to undergo the modified sentence now awarded by this Court. The period of incarceration already undergone by him, shall be given set off u/s.428 Cr.P.C.

Sd/-
Assistant Registrar (CS III)

//True copy//

Sub Assistant Registrar

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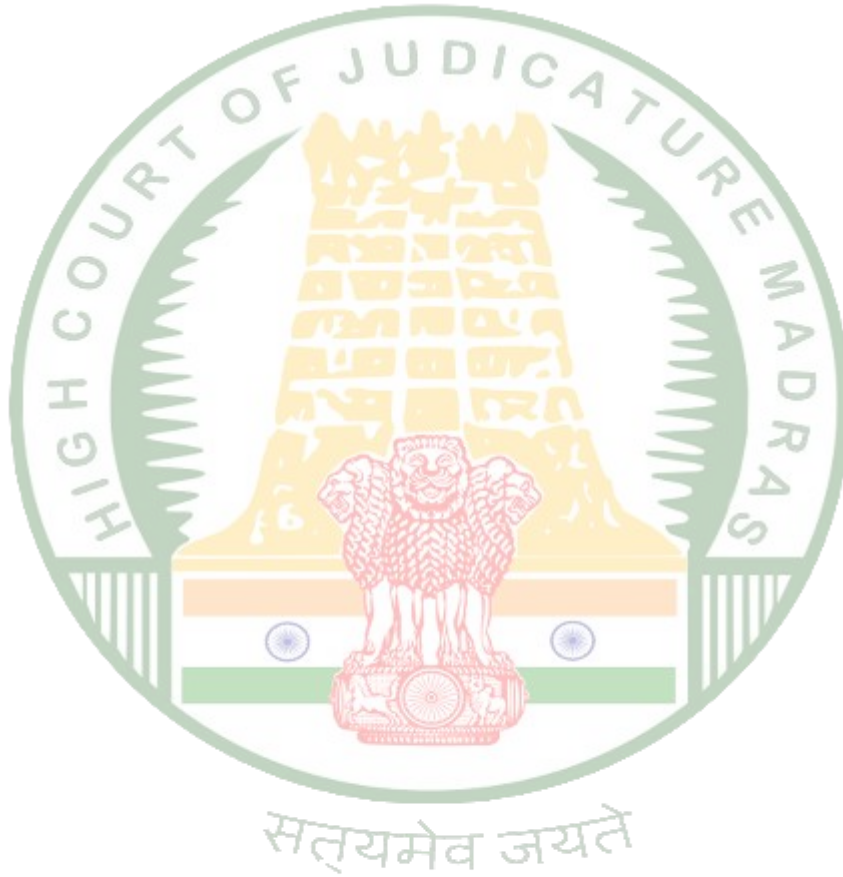
1. The III Additional District and Sessions Judge,
Tirupattur, Vellore District.
2. The Superintendent, Central Prison,
Vellore.
3. The Judicial Magistrate No.1,
Tirupattur.
4. The Inspector of Police,
Jolarpettai Police Station,
Vellore District.

5. The Public Prosecutor,
High Court, Madras.

+lcc to Mr.G.Punniyakoti, Advocate SR.No.23271

Crl.A.No.12 of 2018

CNR (CO)
GN (23/04/2018)



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