



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Orders Reserved on	18.01.2018
Orders Pronounced on	01.02.2018

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CORAM:

THE HONOURABLE DR.JUSTICE S.VIMALA
AND
THE HONOURABLE MRS.JUSTICE T.KRISHNAVALLI

Crl.A.(MD) No.164 of 2015

Arumugam

... Appellant/PW1

-vs-

1. Rajini
2. Honest @ Honest Raj
3. Rajkumar
4. Ponnusamy
5. Murugesan
6. Raja
7. Manikandan
8. Ananthaprabu
9. Suresh ... Respondents/A1-4 & 6-10
- 10.The State through Inspector of Police,
Vallam Police Station,
Thanjavur.
(Crime No.130/2011) ... Respondent/Complainant

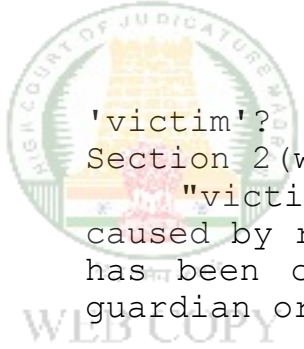
Prayer: Appeal filed under Section 372 of the Code of Criminal Procedure praying to set aside the impugned judgment of the I Additional District and Sessions Judge (PCR), Thanjavur, made in S.C.No.293 of 2012 dated 15.06.2015 acquitting all the accused / respondents 1 - 9 herein and allow this appeal.

For Appellant : Mr.M.Suri
For Mr.C.Padmaraj
For R1 to R9 : Mr.A.Thiruvadikumar
For R10 : Mr.K.S.Duraipandian
Addl. Public Prosecutor

J U D G M E N T

S.VIMALA, J.

The locus standi of the brother of the deceased to file an appeal, challenging the acquittal of the accused is the issue raised in this appeal.



'victim'? Under what circumstances, a person becomes the victim? Section 2(wa) of Cr.P.C. defines the term 'victim'

"victim" means a person who has suffered any loss or injury caused by reason of the act or omission for which the accused person has been charged and the expression "victim" includes his or her guardian or legal heir."

2.1. What is the meaning of the word 'injury'? Whether it refers only the physical injury or mental injury. Whether it refers to injury to material objects or injury to reputation.

2.2. What is the nature of interpretation, when the words 'victim / guardian / legal heir' find a place in the proviso and not in the main section to which the proviso is appended.

2.3. The proviso to Section 372 of Cr.P.C. was amended by Act No.5 of 2009. The said proviso confers a statutory right upon the victim, as defined under Section 2(wa) of Cr.P.C. to prefer an appeal against an order passed by the trial court either acquitting the accused or convicting him/her for a lesser offence or imposing inadequate compensation.

2.4. The scope of the proviso to the substantive provision of Section and the rules of its interpretation has been elaborately examined in the case of S.Sundaram Pillai vs. V.Pattabiraman, reported in AIR 1985 SC 582 as under:

(a) When one finds a proviso to a section the natural presumption is that, but for the proviso, the enacting part of the section would have included the subject-matter of the proviso.

(b) A proviso must be construed with reference to the preceding parts of the clause to which it is appended.

(c) Where the proviso is directly repugnant to a section, the proviso shall stand and be held a repeal of the section as the proviso speaks the latter intention of the makers.

(d) Where the section is doubtful, a proviso may be used as a guide to its interpretation: but when it is clear, a proviso cannot imply the existence of words of which there is no trace in the section.

(e) The proviso is subordinate to the main section.

(f) A proviso does not enlarge an enactment except for compelling reasons.

(g) Sometimes an unnecessary proviso is inserted by way of abundant caution.

(h) A construction placed upon a proviso which brings it into general harmony with the terms of section should prevail.

(i) When a proviso is repugnant to the enacting part, the proviso will not prevail over the absolute terms of a later Act directed to be read as supplemental to the earlier one.

(j) A proviso may sometimes contain a substantive provision."

2.5. It is well established that the proviso of the statute must be given an interpretation limited to the subject matter of the enacting provision. It is relevant to quote Four Judge Bench in Dwarka Prasad vs. Dwarka Das Saraf, reported in 1975 AIR 1758.

"18. ... A proviso must be limited to the subject-matter of the enacting clause. It is a settled rule of construction that a proviso must prima facie be read and considered in relation to the principal matter to which it is a proviso. It is not a separate or independent enactment. "Words are dependent on the principal enacting words to which they are tacked as a proviso. They cannot be read as divorced from their context" (Thompson v. Dibdin, 1912 AC 533). If the rule of construction is that prima facie a proviso should be limited in its operation to the subject-matter of the enacting clause, the stand we have taken is sound. To expand the enacting clause, inflated by the proviso, sins against the fundamental rule of construction that a proviso must be considered in relation to the principal matter to which it stands as a proviso. A proviso ordinarily is but a proviso, although the golden rule is to read the whole section, inclusive of the proviso, in such manner that they mutually throw light on each other and result in a harmonious construction."

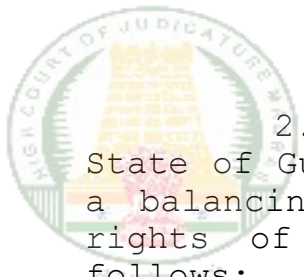
2.6. The Delhi High Court, in the case of Ram Phal vs. State and others, have elaborately considered the conflicting views of various High Courts and analyzed the four possible approaches to the question of victim's locus standi to maintain an appeal under the proviso to Section 372 and it reads as under:

"(a) A narrow reading of the word "victim" (limiting it to direct and proximate physical harm), and a narrow reading of the term "legal heir" (limiting it to lines of succession under personal law). This is the approach of the Division Bench of this Court in Chattar Singh (supra) and of the Andhra Pradesh High Court.

(b) A broad reading of the word "victim" (expanding it to emotional harm caused by the direct harm to someone that one is close to), and a narrow reading of the term "legal heir" (limiting it to lines of succession under personal law). This is the approach of the Patna High Court. The Guwahati High Court has also favoured a broad reading of the word "victim", while returning no finding on the meaning of "legal heir".

(c) A narrow reading of the word "victim" and a broad reading of the term "legal heir".

(d) A broad reading of the term "victim" and of the term "legal heir": This appears to be the view of the Punjab & Haryana High Court. The Gujarat High Court favours a broad reading of "legal heir", although it does not appear to have returned a conclusive finding on the reading of the word "victim"."



2.7. The decision of the Supreme Court in N.H.R.C. vs. State of Gujarat, 2004 (8) SCC 610 was relied upon, where there was a balancing approach between the rights of the accused and the rights of the victim. The relevant paragraph is extracted as follows:

"...It needs to be emphasized that the rights of the accused have to be protected. At the same time the rights of the victims have to be protected and the rights of the victims cannot be marginalized. Accused persons are entitled to a fair trial where their guilt or innocence can be determined. But from the victims' perception the perpetrator of a crime should be punished. They stand poised equally in the scales of justice." (emphasis supplied).

The Court holds that developing a case-by-case proximity test for the meaning of "victim", and an understanding of "legal heirs" that tracks the relevant personal law, but is not limited to only those legal heirs entitled to succeed to property, achieves an adequate balance between the two interests. So long as the existence of a legal relationship is established between the (deceased) victim and the one who seeks to appeal under proviso to Section 372, sufficient locus standi has to be conceded."

2.8. While summarizing the conclusions, the Delhi High Court held as under:

(i) "victim" in Section 2(wa), by virtue of being defined as "a person who has suffered any loss or injury" must include a person who has suffered „harm caused to the mind", given that Section 2(y) of the Code of Criminal Procedure incorporates the definition of "injury" in Section 44 of the IPC into the Code.

(ii) The "means X and includes Y" clause in Section 2 (wa) cannot be interpreted so as to result in the included meaning Y excluding the actual meaning X of the term being defined; thus "legal heirs" who are included within the definition of the term „victim" cannot exclude those who actually fall within the definition of „victim" by virtue of emotional harm suffered, such as the father or siblings of a deceased victim or other categories of persons (based on proximity) noted previously.

(iii) The laws of inheritance, which decide one's "legal heirs", are not intended to be solely determinative of the entitlement to exercise the rights of the victim, in the criminal trial/appeal, on his/her death, application of Heydon's mischief rule, given that the object of the 2008 Amendment Act was to ensure the involvement of the victim, who has a presumably personal interest in the fair and efficient prosecution of the trial/appeal. Resultantly, it is impermissible for an appellate court to shut out an appeal by a "legal heir" based only on her/his not being an immediate heir, or being lower down in hierarchy vis-à-vis entitlement to the crime victim's estate."



2.9. This Court is in perfect agreement with the views expressed by the Delhi High Court, which is in consonance with the object of the amendment. Thus, this Court holds that the brother is entitled to file the appeal as legal heir of the deceased as well as the victim of the occurrence.

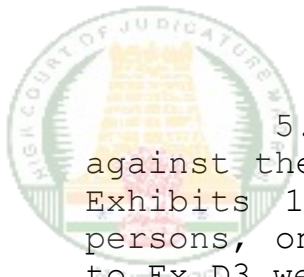
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2.10. It is seen that as per the dictum laid down in the case of Sathya Paul Singh, the petitioner has already obtained the leave of this Court to file this appeal as ordered in CrI.M.P.(MD) No.1893 of 2017 in CrI.A.(MD) No.164 of 2015 dated 20.04.2017. Hence, this Court holds that this appeal is maintainable.

3. By the judgment dated 15.06.2015 rendered in S.C.No.293 of 2012, the I Additional District and Sessions Judge (PCR), Thanjavur had acquitted the accused 1 to 4 & 6 to 10 / R1 to R9 herein of the charges framed under Sections 147, 148, 506, 307 and 302 IPC and A5 died pending trial. Challenging the acquittal, PW1 / defacto complainant / brother of the deceased has filed this appeal under Section 372 Cr.P.C.

4. The case of the prosecution is that there was a land dispute between the family of A6 / Murugesan and the appellant Arumugam / defacto complainant and on 13.04.2011 at about 1:00pm, A1 and A2, who belong to DMK party restrained one Ravichandran / brother of the Appellant, who was also the booth agent of AIADMK party and attacked him as well as one Kamaraj with Aruval.

4.1. It is the further case of the prosecution that on the same day, ie. on 13.04.2011 at about 03.30pm, while the Appellant/Arumugam along with his brother Karuppan @ Karuppaian / the deceased and one Vetrivel had proceeded to water their sugar cane field and while they were passing through the dry land of one Elilas Udaiyar situated at the West of Minnathur Muniyandavar Temple, the accused persons had come from the Eastern side of the sugarcane field and A1 & A2 were armed with Aruval and other Accused (R.S.Pathy) with wooden logs. Thereafter, there was exchange of words and infuriated by the anger, A1 and A2 had cut on the forehead of the deceased, followed by the assault with wooden logs by the other Accused. In addition to that, A2 had caused cut injury on Vetrivel / PW4 and A6 & A9 assaulted PW-4 with wooden logs. It is alleged that when the Appellant and the other eye witnesses, viz., Pws.2 & 5 had shouted, they were threatened and apprehending danger to his life, he had fled away into the sugar cane field and on his return, it was found that the deceased had already been dead and PW-4 had been struggling for life. On due intimation, the relatives of the appellant had arrived and PW-4 was taken to hospital and based on the complaint lodged by the Appellant, a case in Crime No.130 of 2011 was registered for offences under Sections 147, 148, 323, 307, 324, 302 and 506(ii) IPC



5. The prosecution, in order to substantiate the offences against the accused, has relied upon the evidences of P.Ws.1 to 18, Exhibits 1 to 39 and M.Os.1 to 15. On the side of the accused persons, one witness / DW1 was examined and three exhibits in Ex.D1 to Ex.D3 were marked.

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6. The Trial Court, after considering the oral and documentary evidence adduced by the prosecution and not convinced of the evidence, has chosen to acquit the accused on the following reasonings:

i) There was a delay in preferring the complaint and one Velusamy, who had attested the complaint, was not examined;

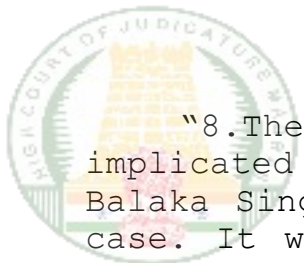
ii) The names of A6 to A10 did not find place in the complaint (Ex.P1);

iii) The medical evidence did not corroborate the case of the prosecution and also there was a doubt with regard to recovery of material objects.

The said acquittal given by the Trial Court is under challenge in this appeal.

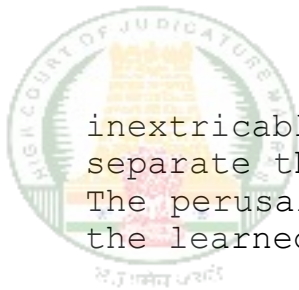
7. The Trial Court had stated that one Velusamy, an attester to the complaint had not been examined, which had gone fatal to the case of the prosecution. In the complaint / Ex.P1, apart from the signature of PW1, there was one more signature found in it and no explanation was forthcoming as to whom the said signature belongs to and there was no investigation conducted in this aspect as admitted by PW17 / Inspector of Police. However, PW16 / SSI admitted in the deposition that the signature belongs to one Velusamy, who accompanied the defacto complainant at the time of lodging the complaint. Though PWs. 1 to 18 were examined on the side of the prosecution during trial, it is quite strange as to why the said Velusamy has not been examined before the Trial Court, who is construed as the main witness, who has spoken about the incident along with the appellant at the relevant point of time before the Station House Officer. The non examination of material witness with no explanation for the same creates doubt about the case of the prosecution.

8. The next contention is that when the First Information Report contained only names of few accused and when there had been an embellishment in respect of adding five more accused persons, the prosecution case is not credit worthy and it cannot be believed. Reliance is placed upon the decisions of the Hon'ble Supreme Court in the case of Balaka Singh and others vs. The State of Punjab, reported in 1975 SCC (Cri) 601, in which it has been held that if the case against some of the accused fails, then the entire prosecution will have to be discarded and it is not possible for the Court to make out a new case to convict the accused persons. The relevant observation made in the said judgment reads as under:



"8. The suggestion of the appellants is that they were falsely implicated because the prosecution could not succeed in convicting Balaka Singh for the murder of Gurnam Singh in the previous murder case. It was to wreck fresh vengeance on the accused that they had been falsely implicated in the present case. It is true that there are as many as eight witnesses who are alleged to have seen the occurrence and they have given a parrot-like version of the entire case regarding the assault on the deceased by the various accused persons. All these witnesses have with one voice and with complete unanimity implicated even the four accused persons, acquitted by the High Court, equally with the appellants making absolutely no distribution between one and the other. A perusal of the evidence of the prosecution witnesses would show that the prosecution case against the appellants and the four accused is so inextricably mixed up that it is not possible to sever one from the other. It is true that, as laid down by this Court in *Zwinglee Arivel v. State of Madhya Pradesh* and other cases which have followed that case, the Court must make an attempt to separate grain from the chaff, the truth from the falsehood, yet this could only be possible when the truth is separable from the falsehood. Where the grain cannot be separated from the chaff because the grain and the chaff are so inextricably mixed up that in the process of separation the Court would have to reconstruct an absolutely new case for the prosecution by divorcing the essential details presented by the prosecution completely from the context and the background against which they are made, then this principle will not apply. We are satisfied that in the facts of the present case, having regard to the partisan and interested evidence of the prosecution witnesses who can implicate the appellants and the four accused equally with regard to the assault on the deceased it is not possible to reject the prosecution case with respect to the four accused and accept it with respect to the other five appellants. If all the witnesses could in one breath implicate the four accused who appear to be innocent, then one cannot vouchsafe for the fact that even the acts attributed to Balaka Singh, Joginder Singh, Pritam Singh, Darbara Singh and Jamail Singh may have been conveniently made to suit the needs of the prosecution, case having regard to the animus which the witnesses as also Banta Singh bore against the appellants. In these circumstances, therefore, we are satisfied that in view of the finding of the High Court that the F.I.R. was a belated document having come into existence much later than the time it is said to have been recorded and which adds the names of the four accused against whom the prosecution case is absolutely identical with the appellants, the case of the appellants cannot at all be distinguished from that of the four accused in any respect. If the case against the four accused fails, then the entire prosecution will have to be discarded and it will not be possible for this Court to make out a new case to convict the appellants as has been done by the High Court."

9. So far as this case is concerned, it is contended by the learned counsel for the accused that the truth and falsehood are



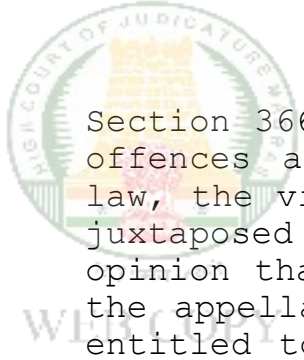
inextricably mixed upon and therefore, it is not possible to separate the case of named accused from that of the unnamed accused. The perusal of the materials only go to show that the contention of the learned counsel for the accused is right.

10. In addition to the above, it is pertinent to mention here that while considering the judgment of acquittal by the Trial Court, this Court has to see whether the error committed by the Trial Court is gross enough to warrant interference. The Hon'ble Supreme Court in the case of Raja and others vs. State of Karnataka, reported in (2017) 1 SCC (Cri) 158 has been pleased to hold as under:

"35. Vis-a-vis the scope of interference with a judgment of acquittal, this Court in Sunil Kumar Shabukumar Gupta (Dr.) (supra) echoed the hallowed proposition that if two views are possible, the appellate court should not ordinarily interfere therewith though its view may appear to be the more probable one. While emphasizing that the trial court has the benefit of watching the demeanour of the witnesses and is thus the best judge of their credibility, it was held that every accused is presumed to be innocent unless his guilt is proved and that his presumption of innocence gets reinforced with his acquittal by the trial court's verdict. It was reiterated that only in exceptionable cases and under compelling circumstances, where the judgement of acquittal is found to be perverse i.e. if the findings have been arrived at by ignoring or excluding relevant materials or by taking into consideration irrelevant/inadmissible material and are against the weight of evidence or are so outrageously in defiance of logic so as to suffer from the vice of irrationality, that interference by the appellate court would be called for.

36. That the appellate court is under an obligation to consider and identify the error in the decision of the trial court and then to decide whether the error is gross enough to warrant interference was underlined by this Court in Shyamal Saha (supra). It was emphasized that the appellate court is not expected to merely substitute its opinion for that of the trial court and that it has to exercise its discretion very cautiously to correct an error of law or fact, if any and significant enough to warrant reversal of the verdict of the trial court.

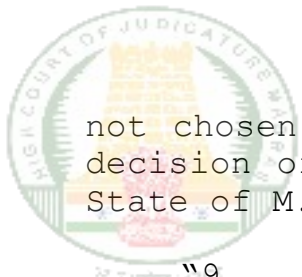
37. The prosecution case, when judged on the touchstone of totality of the facts and circumstances, does not generate the unqualified and unreserved satisfaction indispensably required to enter a finding of guilt against the appellants. Having regard to the evidence on record as a whole, it is not possible for this Court to unhesitatingly hold that the charge levelled against the appellants has been proved beyond reasonable doubt. In our estimate, the view taken by the Trial Court is the overwhelmingly possible one. In contrast, the findings of the High Court are decipherably strained in favour of the prosecution by overlooking many inconsistencies, anomalies and omissions rendering the prosecution case unworthy of credit. Noticeably, the High Court has exonerated the appellants of the charge of abduction under



Section 366 IPC, which is an inseverable component of the string of offences alleged against them. Judged by the known parameters of law, the view adopted by the High Court is not a plausible one when juxtaposed to that of the Trial Court. We are of the unhesitant opinion that the prosecution has failed to prove the charge against the appellants to the hilt as obligated in law and thus, they are entitled to the benefit of doubt. The appeal thus succeeds and is allowed. The impugned judgement and order is set-aside. The appellants are on bail. Their bail bonds are discharged."

11. There was also delay in preferring the complaint. It is alleged that the occurrence had happened on 13.04.2011 at about 3.30pm, but the complaint was lodged at 6.00pm on the same day, though the distance between the place of occurrence and the Police station is stated to have been only 6 kms. Finally, the FIR reached the Court at 10.00pm and in the deposition, PW16 / Sub Inspector of Police deposed that one could have reached the Court within half an hour from the Police Station. There is no concrete reason adduced on the side of the prosecution for such delay. The delay in preference of FIR and forwarding it to the Court created a doubt as regards the veracity of the prosecution case. PW1 deposed that he gave the complaint to the Vallam Police Station at 6:00pm, however, PW2 in his chief examination stated that PW1 and Velusamy went to the Police Station only at 10:00pm, thus it is clear that there are too many contradictions and there was a delay of about 6½ hours. It was established on the side of the defence that the distance between the place of occurrence and the Police Station is only 6kms and the said distance can be reached within half an hour, as the occurrence happened in the day time at about 3:00pm. Though normally delay alone cannot be the criteria to throw away the prosecution case, yet considering the delay along with other circumstances available in this case, it can be presumed that such delay would have been utilized to concoct the case against the accused persons.

12. The next issue to be decided is, whether inclusion of names of A6 to A10 at a later point of time is justified or not, as in the complaint given by PW1, the names of A6 to A10 did not find place. They were mainly implicated on the basis of the statement of PW2 and PW5, which was confirmed by PW1, while giving statement under Section 164 Cr.P.C / Ex.P2. In the complaint, PW1 had clearly stated that A1 to A5 came with aruval and wooden log, attacked brutally and caused the death of the deceased and there was neither any mention about the involvement of A6 to A10 nor about the presence of PW2 and PW5 in the scene of occurrence. It is trite law that FIR is not an encyclopedia, which must contain all the information, but however, when the complaint itself was lodged by an eyewitness (not in a hasty manner, but belatedly), the details must be brief enough as to the manner of the occurrence and the involvement of persons, as it is not the case of PW1 that the assailants were unknown to him and it was admitted by him in the cross examination that he knew A3 to A10 before the incident. Therefore, such omission in the complaint / FIR cannot be taken lightly and it must be viewed seriously, when the prosecution has



not chosen to explain such omission. This view is supported by the decision of the Hon'ble Supreme Court in the case of R.K.Pande vs. State of M.P., reported in AIR 1975 SC 102, which reads as follows:

"9.....No doubt an FIR is a previous statement which can, strictly speaking, be only used to corroborate or contradict the maker of it. But, in this case, it had been made by the father of the murdered boy to whom all the important facts of the occurrence, so far as they were known upto 9.15pm on 23.03.1970, were bound to have been communicated. If his daughters had been the appellant inflicting a blow on Harbinder Singh, the father would certainly have mentioned it in the FIR. We think that omissions of such important facts, affecting the probabilities of the case are relevant under Section 11 of the Evidence Act in judging the veracity of the prosecution case."

13. Yet another issue raised by the defence is that, the Trial Court is right in acquitting the accused persons and this finding has been rendered only after coming to the conclusion that the evidence of PW1 is unreliable and he did not speak about the presence of PW3 in the place of occurrence, when the fact remains that it is only PW3, who took PW4 to the hospital for treatment.

14. The main flaw in the case of the prosecution is that PW4 / Vetrivel / the injured eyewitness has been treated as hostile. It is pointed out that under Ex.P1 / complaint, there is no mention that PW2 and PW5 were witnessing the occurrence. The presence of PW2 and PW5 in the place of occurrence has been doubted by the Trial Court. PW1 has stated in the 161 statement that PW2 and PW5 had informed their presence at the place of occurrence to PW1, while he was returning from the Police Station. Thus, it is clear that the presence of Pws2 & 5 in the place of occurrence is doubtful, as rightly found by the Trial Court

15. When the prosecution case is unreliable, because of the omission in the FIR regarding the presence and participation of known persons, infirmities, omissions and material contradictions in the evidence of PW1, the hostile evidence of PW4 and inherently improbable prosecution case and circumstances in the case of the prosecution, then the only option open to the Court is to reject the case of the prosecution. Rightly, the Trial Court has declined to accept the case of the prosecution and has chosen to acquit the accused persons.

16. In the result, the Criminal Appeal is dismissed, confirming the judgment dated 15.06.2015 passed in S.C.No.293 of 2012 by the learned I Additional District and Sessions Judge (PCR), Thanjavur, acquitting the accused persons.

Sd/-

Assistant Registrar (C.O)

/True Copy/



To:

1.The Judicial Magistrate No.II, Thanjavur

2.The Chief Judicial Magistrate, Thanjavur at Kumbakonam

3. The I Additional District and Sessions Judge (PCR),
Thanjavur.

4. The Inspector of Police,
Vallam Police Station,
Thanjavur.

5.The Superintendent of Police, Thanjavur

6.The Director General of Police, Mylapore, Chennai-600 004

7.The Additional Public Prosecutor,
Madurai Bench of Madras High Court,
Madurai.

+One cc to Mr.C.Padmaraj, Advocate, SR.No.45533

+One cc to Mr.A.Thiruvadikuamr, Advocate, SR.No.45635

Copy to:-

The Section Officer, Criminal Section, (2 copies)
Madurai Bench of Madras High Court, Madurai

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ORDER IN
Crl.A.(MD) No.164 of 2015

01.02.2018