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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on	Pronounced on
27.03.2019	11 .04.2019

CORAM:

THE HONOURABLE MR.JUSTICE P.N.PRAKASH
AND
THE HONOURABLE MR. JUSTICE B.PUGALENDHI

Cr1. A(MD)No.505 of 2018
and
Cr1.M.P. (MD) No.9328 of 2018

Bala @ Balasubramaniyan : Appellant/Accused No.2

Vs.

State through
The Inspector of Police
Thalamuthunagar Police Station
Thoothukudi District
in Crime No.88/2001

: Respondent/Complainant

PRAYER: Criminal Appeal is filed under Section 374 of the Code of Criminal Procedure, against the judgment dated 28.03.2003 in S.C.No.288/2002 on the file of the Additional Sessions Judge and Chief Judicial Magistrate, Thoothukudi.

For Appellants : Mr.R.Alagumani

For Respondent : Mr.S.Chandrasekar
Additional Public Prosecutor

JUDGMENT

This criminal appeal is filed against the judgment dated 28.03.2003 in S.C.No.288/2002 on the file of the Additional Sessions Judge and Chief Judicial Magistrate, Thoothukudi.

2. Totally, there are three accused in Thalamuthunagar Police Station Crime No.88/2001 and the trial Court framed three charges, as detailed below:

Charges	Penal Provisions	Accused
1	341 IPC	A1 to A3
2	302 r/w 34 IPC	A1 to A3
3	506 (II) IPC	A1 to A3

3. By Judgment dated 28.03.2003, the Trial Court convicted and sentenced the accused, as detailed below:-

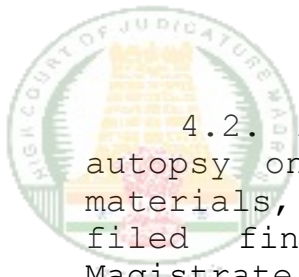
Accused	Section of Law	Sentence of imprisonment	Fine amount
A1 to A3	341 IPC	--	Rs.100/- each, in default to undergo simple imprisonment for one week.
A1 to A3	302 r/w 34 IPC	To undergo imprisonment for life	--
A1	506(II) IPC	To undergo rigorous imprisonment for two years	--

The sentences were ordered to run concurrently. Challenging the said conviction and sentence, the appellant (A2) has preferred this Criminal Appeal.

4. The facts of the case, lie within a brief compass:

On 10.03.2001, around 5.00 a.m., Sudalaimuthu [A1], Bala @ Balasubramanian [A2] and Christopher [A3] wrongfully restrained Manuvel (deceased) near Samaviyasnagar and indiscriminately attacked him resulting in his death, which was witnessed by his elder brother Swaminathan [P.W.-1], who was also criminally intimidated by the accused. On the statement [Ex.P.-1] given by Swaminathan [P.W.-1], P.W.-12 Sub-Inspector of Police registered a case in Crime No.88/2011 on 10.03.2001 at 5.30 a.m. under Sections 342, 302 and 506(II) IPC and prepared the printed FIR [Ex.P-20], which reached the jurisdictional Magistrate at 7.40 a.m., as could be seen from the endorsement thereon. In the FIR, Sudalaimuthu [A-1] has been named and the names of the other two assailants did not figure, though Swaminathan [P.W.-1] has stated that he can identify them.

4.1. The investigation of the case was taken over by Rajendran [P.W.13] Inspector of Police, who arrested Sudalaimuthu [A-1] and Bala @ Balasubramanian [A-2] on 23.03.2001 and Christopher [A-3] on 02.04.2001. The Investigating Officer went to the place of occurrence and prepared the observation mahazar [Ex.P-2] and rough sketch [Ex.P-21]. The Investigating Officer filed an application before the jurisdictional Magistrate for conduct of Test Identification Parade and accordingly, Rajavel [P.W.-7], Judicial Magistrate, Srivaikundam, conducted the Test Identification Parade on 05.04.2001, in which, Swaminathan [P.W.1] identified Bala @ Balasubramanian [A2] in two rounds. Similarly, on 13.04.2001, the Judicial Magistrate, conducted Test Identification Parade, wherein, Swaminathan [P.W.1] identified Christopher [A3].



4.2. After examining the Police Surgeon, who performed the autopsy on the body of the deceased and after collecting other materials, the Investigating Officer completed the investigation and filed final report in P.R.C.No.101/2001 before the Judicial Magistrate, No.II, Tuticorin, against three accused.

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4.3. On the appearance of the accused, the provisions of Section 207 Cr.P.C. were complied with and the case was committed to the Court of Session in S.C.No.288/2002 and was made over to the Additional District and Sessions Court, Tuticorin, for trial.

4.4. The trial Court framed charges as stated in paragraph No.2 supra. When questioned, the accused pleaded not guilty. To prove the case, the prosecution examined 14 witnesses, marked 22 exhibits and 11 material objects.

4.5. When the accused were questioned under Section 313 Cr.P.C. about the incriminating circumstances appearing against them, they denied the same. No witness was examined on behalf of the accused nor any document marked.

4.6. After considering the evidence on record, the trial Court, by judgment dated 28.03.2003 in S.C.No.288/2002 convicted and sentenced the accused [A1 to A3] as stated in Paragraph No.3 supra. Challenging the said conviction and sentence, Sudalaimuthu [A-1] filed CrI.A.No.859 of 2003 and Christopher [A-3] filed CrI.A.No.1364 of 2003, which were heard by a Division Bench of this Court and both appeals were dismissed on 06.09.2006. Thereafter, Bala @ Balasubramanian [A-2] preferred the present appeal in the year 2018 with a huge delay and the same was condoned by this Court, after which, the appeal was taken on file as CrI.A.(MD) No.505/2018.

5. Heard Mr.R.Alagumani, learned counsel for the appellant and Mr.S.Chandrasekar, learned Additional Public Prosecutor for the respondent.

6. The learned counsel for the appellant made the following submissions:

(1) Though Swaminathan [P.W.-1] has stated that prior to the incident, he [P.W.-1] had coffee with the deceased, there was no trace of coffee in the postmortem report;

(2) The lineman of the Electricity Board was not examined to show that there was street light near the place of occurrence;

(3) Swaminathan [P.W.-1] and Anthonyraj [P.W.3] are close relatives of the deceased and they are interested witnesses;

(4) Swaminathan [P.W.1] did not identify Bala @ Balasubramanian [A-2] in the first round and therefore, his subsequent identification becomes suspect;

(5) Even at the conclusion of the Test Identification Parade, Bala @ Balasubramanian [A-2] has complained to the Magistrate that his hand was broken by the police and he was shown to the witnesses.

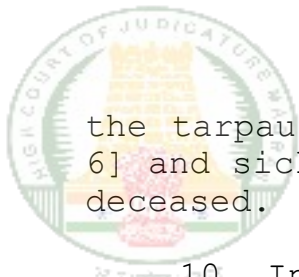


7. Per contra, the learned Additional Public Prosecutor refuted the aforesaid contentions.

8. This Court gave its anxious consideration to the rival submissions.

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9. This case is predicated on the eye-witness account of Swaminathan [P.W.-1] and Anthonyraj [P.W.3]. Swaminathan [P.W.1], in his evidence, has stated that the deceased Manuvel is his younger brother; the deceased was an agent for the distribution of Swetha Milk; the deceased and one Santhanavel were friends; at the request of Santhanavel, the deceased got acquainted with Sudalaimuthu [A-1]; at the request of Sudalaimuthu [A-1], the deceased got him [A-1] the agency for Swetha Milk distribution for Vetrivelpuram area; Sudalaimuthu [A-1] did business for about 4 to 5 months, after which, he [A-1] discontinued the business, because he [A-1] was arrested in a criminal case and was remanded to custody; he [A-1] was asking the deceased to come and meet him [A-1] in the prison, but the deceased did not oblige; the deceased took over the area allotted to Sudalaimuthu [A-1] and expanded the business there also; two or three days before the incident, Sudalaimuthu [A-1] came out from the prison and met the deceased and demanded money from him, which was refused by the deceased; the deceased informed this to his wife Kasthuri [P.W.-4] and to him [P.W.-1]; on Saturday, 10.03.2001, the deceased went to Samaviyasnagar at 4.30 a.m. for milk distribution and while he [deceased] was returning, he was intercepted by A-1 and 2 others, but he managed to give a slip to them and returned home; on returning home, he told this to him (P.W.1) and his wife (P.W.4); his wife [P.W.4] made coffee for both of them and cautioned her husband [deceased] not to go out for milk distribution; the deceased told her that if he fears these persons, he will not be able to do his business at all; so saying, he went in his bicycle for the distribution work; Kasthuri [P.W.4] requested Swaminathan [P.W.1] to go with the deceased so as to ensure that no harm befalls the deceased; accordingly, he [P.W.-1] went in a bicycle following the deceased; while the deceased was going through Samaviyasnagar, from the southern side, Sudalaimuthu [A-1] and two others fell upon the deceased and belabored him with sickle and knife; on seeing this, he [P.W.-1] shouted for help and went near his brother to rescue him; the accused brandished their weapons and criminally intimidated him [P.W.-1] by saying that he will also have the same fate; he [P.W.-1] saw Anthonyraj [P.W.-3] coming there and started hollering, after which, the accused ran away; he [P.W.-1] went back home and informed this to others and everyone came to the place of occurrence; he [P.W.-1] went with Kasthuri [P.W.4] to the police station and gave a statement around 5.30 a.m.; the statement was marked as Ex.P-1. He [P.W.-1] has further stated that on 05.04.2001, he was called to the Central Prison, Palayamkottai for identification parade, where he [P.W.-1] identified Bala @ Balasubramanian [A-2]. He [P.W.-1] has also stated that on 13.04.2001, he was once again called for the identification parade, where he identified Christopher [A-3]. He [P.W.-1] also identified



the tarpaulin bags (two series) [M.O.-5], bloodstained knife [M.O.-6] and sickle [M.O.-7], which were used by the accused to attack the deceased.

10. In the cross-examination, it was suggested to him [P.W.-1] that he was not living with the deceased and that he was living elsewhere, which suggestion, he denied. He [P.W.-1] has further stated that he saw the occurrence in the light of the street lamp. The defence was not able to make any serious dent in the testimony of Swaminathan [P.W.-1].

11. The evidence of Swaminathan [P.W.-1] stood corroborated by the evidence of Anthoniraj [P.W.-3], who has stated that he is a cook by profession and on 10.03.2001, around 5.00 a.m., he was proceeding to Sankaraperi on work and at that time, he [P.W.-3] saw the incident. He [P.W.-3] has further stated that he knows the accused and the deceased and has also referred to the presence of Swaminathan [P.W.-1] at the place of occurrence.

12. It is true that in the complaint [Ex.P-1], Swaminathan [P.W.-1] has stated that one Ashok had also seen the occurrence, but the said Ashok, who was examined as P.W.-2, turned hostile. In the complaint [Ex.P-1], which formed the basis for registration of FIR, Swaminathan [P.W.-1] has clearly stated that the deceased was attacked by Sudalaimuthu [A-1] and two others, whom he can identify.

13. We have no reasons to disbelieve the eye witness account of Swaminathan [P.W.-1] and Anthonyraj [P.W.-3]. We reject the contention of the defence that the testimony of Swaminathan [P.W.-1] and Anthonyraj [P.W.-3] should not be accepted, since they are close relatives of the deceased, by placing reliance on the following sapient passage of **Vivian Bose, J.**, in **Dalip Singh v. State of Punjab (AIR 1953 SC 364)**, which reads thus,

"(26). A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely. Ordinarily a close relation would be the last to screen the real culprit and falsely implicate an innocent person. It is true, when feelings run high & there is personal cause for enmity, that there is a tendency to drag in an innocent person against whom a witness has a grudge along with the guilty, but foundation must be laid for such a criticism and the mere fact of relationship far from being a foundation is often sure guarantee of truth. However, we are not attempting any sweeping generalisation. Each case must be judged on its own facts. Our observations are only made to combat what is so often put forward in cases before us as a general rule of prudence. There



is no such general rule. Each case must be limited to and be governed by its own facts."

14. Dr.A.A.Swamy, [P.W.-8], who performed autopsy, in his evidence as well in the postmortem certificate [Ex.P-13] has noted seven cut and stab injuries on the body of the deceased. Just because, there is no reference to the presence of coffee in the stomach of the deceased, we cannot disbelieve the version of the wife of the deceased [P.W.-4], who has stated that the deceased came after the first round of milk distribution and had coffee at home along with Swaminathan [P.W.1]. She [P.W.-4] has also stated that at that time, the deceased told her that Sudalaimuthu [A-1] and two others attempted to accost him [deceased], but, he managed to escape; she [P.W.-4] pleaded with him [deceased] not to go out, but, he brushed aside her pleas by saying that he will not be able to do any business, if he fears the accused. She [P.W.-4] has also stated that she requested Swaminathan [P.W.-1] to go with the deceased and hence, he [P.W.-1] took his bicycle and followed the deceased.

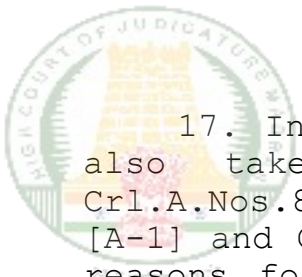
15. In this case, as stated above, the FIR has reached the jurisdictional Magistrate at the earliest point of time. Had the police wanted to foist a case on Bala @ Balasubramanian [A-2] and Christopher [A-3], they could have received the complaint from Swaminathan [P.W.-1] implicating A-2 and A-3 by their name. Bala @ Balasubramanian [A-2] was arrested on 23.03.2001 and within the first fifteen days of remand, the Test Identification Parade was conducted, in which, Swaminathan [P.W.-1] identified him [A-2]. Just because, Swaminathan [P.W.-1] had failed to identify Bala @ Balasubramanian [A-2] in the first round, that, by itself, is not enough to say that his identification in the second and third rounds stood vitiated.

16. As regards the allegations made by Bala @ Balasubramanian [A-2] to the Magistrate, who conducted the Test Identification Parade that he was shown to the witnesses, that can have no evidentiary value at all. Very recently, we have discussed, in **Saravanan v. State (2019) 1 MWN (Cr.) 307 (DB)** the effect of the statement of an accused to the Magistrate at the time of Test Identification Parade, wherein, in Paragraph No.35, we have held as follows:

"35.The learned counsel for Karthik (A8) drew the attention of this Court to the statement made by Karthik (A8) to Mr. Nagaraj (P.W.19) who conducted the TIP, saying that the police had taken photographs of Karthik (A8) and had made some persons identify him in the station. This statement of Karthik (A8) has been recorded by Mr. Nagaraj (P.W.19) in the inspection report (Ex.C.1.). Very frequently, we come across suspects making such complaints and the Magistrates dutifully recording it in the TIP report. What is the evidentiary value of such a statement? Can it be held by the Court *ipso facto* that such a statement of the suspect proves



the allegation that photos were taken and the suspect was also shown to the witnesses in the station? We find no pigeonhole in the Evidence Act to place this statement. A previous statement can be used to either contradict or corroborate the subsequent testimony in the Court. Had Karthik (A8) got into the witness box and deposed, then, his previous statement to the Magistrate could have been used to corroborate his testimony. He has given an exculpatory statement implicating the police and therefore, it cannot be relevant as an admission under Section 21 of the Evidence Act, because, a self-serving statement will not be relevant under Section 21, *ibid*, unless it falls within the exceptions thereof. This statement of Karthik (A8) does not fall within the exceptions referred to in Section 21 (1) to (3), *ibid*. The said statement cannot be treated as a complaint within Section 8 of the Evidence Act, because, the said provision deals with the conduct of a person, be it the accused or a witness in relation to a fact in issue or relevant fact. Illustrations (h), (i) and (j) under Section 8, *ibid*, will clear the cloud, if any. The allegation is essentially against the conduct of the police, which is neither a fact in issue nor a relevant fact in this case. This issue is no more *res integra* in the light of the judgment of the Supreme Court in **Deep Chand vs. State of Rajasthan, [AIR 1961 SC 1527]** which was affirmed by a Constitution Bench of the Supreme Court in **Harnath Singh vs. The State of Madhya Pradesh [AIR 1970 SC 1619]**. In the latter case, the TIP Magistrate recorded the self-incriminating statement of the accused in the TIP report and the Supreme Court refused to consider it by holding that any such statement should have been recorded under Section 164 Cr.P.C. Law cannot say that if such a statement is self-incriminatory, it should be rejected, but, if it is exculpatory, it should have to be accepted. Law knows no such distinction. If that were the law, every suspect can point his accusing finger at another during the TIP and pray for acquittal by contending that he has proved his innocence. The TIP proceedings are conducted as an aid in investigation and statements made by witnesses and accused to the Magistrate cannot be treated as substantive evidence of proof of facts stated therein. This can be viewed from yet another angle. The said statement by Karthik (A8) is a positive assertion of an alleged fact. Therefore, the burden is on Karthik (A8) to bring on record at least some evidence to prove the said allegation within the meaning of the word "proved" under Section 3 of the Evidence Act. Having failed to do so, his statement remains a mere allegation sans proof".



17. In fact, all the defences, which were taken before us were also taken before the Division Bench, which dealt with CrI.A.Nos.859/2003 and 1364/2003, which were filed by Sudalaimuthu [A-1] and Christopher [A-3] and the Division Bench has given cogent reasons for accepting the testimonies of Swaminathan [P.W.-1] and Anthonyraj [P.W.-3]. In the said judgment, the Division Bench, in Paragraph Nos.13 and 14, has held thus:

"13.It is not the fact in dispute that the deceased had an agency for distribution of milk packets. According to P.Ws.1 and 4, on the date of occurrence at about 3.30 a.m., he went outside for distribution of milk packets. He returned at about 4.30 a.m. and informed P.W.4 that all the accused waylaid him and he came fast to the house. The same was informed to P.W.1. P.W.4 advised her husband not to go there. But, he was not prepared to hear the same. Hence, P.W.1 was also sent along with him. According to P.W.1, when he accompanied the deceased and when they were nearing the occurrence place, they found all the three accused armed with deadly weapons, sprang from the south side and cut the deceased indiscriminately. When he was shouted at, he was also threatened by the accused and because of fear, he did not go nearby. The contention of the learned counsel for the appellants that if really P.W.1 has accompanied with the deceased, the natural course of conduct would be to go to the rescue immediately. In the instant case, this contention has got to be discountenanced for two reasons. Firstly, according to P.W.1, he shouted at and he was threatened by all the three accused, who were armed with deadly weapons. Secondly, in a given case like this, when there are number of witnesses available, who are the eyewitnesses to the occurrence, the mental frame of every one would not be same. In the instant case, being threatened by the three persons armed with deadly weapons, it is quite natural for P.W.1 to keep himself away and it is also pertinent to point out that P.W.1 remains unarmed at that time. Under these circumstances, any intervention by P.W.1 in a given situation would also be a reaping of the same consequences. Because of criminal intimidation by the assailants, P.W.1 could not intervene.

14.Now, it is pertinent to point out that P.W.3 has also seen the occurrence. P.W.3 was examined two days after the occurrence. P.W.3 has not spoken anything to anybody about the occurrence till that time cannot be reason to reject his testimony. It is to be pointed out that P.W.1 rushed to home naturally to inform to P.W.4 and both of them went to the police station and a complaint has been given. Had it been the real intention to include all the accused, namely A-1 to A-3, there was no impediment for P.W.1 to add the name of all the three



accused, but he has mentioned the name of A-1 only, but he has stated that two other persons. Under these circumstances, the conduct of identification parade was necessitated. Both the accused were arrested within a short span of nearly 10 or 15 days. The identification parade was conducted by the Judicial Magistrate concerned and the proceedings were brought to the notice of the Court under Ex.P8 and Ex.P11 and the procedures have been followed strictly. Both A-2 and A-3 have been identified. Under these circumstances, there is no doubt in the mind of the court."

De-hors that, we also independently appraised the evidence of Swaminathan [P.W.-1] and Anthonyraj [P.W.-3] and we too have no good reasons to reject the same.

18. As regards the non-examination of the lineman, the defence, in the cross-examination of Swaminathan [P.W.-1], has got an answer to the effect that he [P.W.-1] saw the incident in the light of the street lamp. There is reference to the street light in the observation mahazar [Ex.P-2] and rough sketch [Ex.P-21] that the number of the street light is 4706.

19. Before concluding, Mr.R.Alagumani, learned counsel for the appellant, submitted that Bala @ Balasubramanian [A-2] is already undergoing life sentence in another murder case and therefore, this Court may limit the sentence of imprisonment to a specified period, so that, he [A-2] will be entitled to remission. When we explained to him that life sentence means sentence of imprisonment for the full term of one's life and the same cannot be reduced to a specified period by us, he placed reliance on the Constitution Bench judgment of the Supreme Court in **Union of India v. Sriharan @ Murugan and others [(2016) 7 SCC 1]** and submitted that in Paragraph Nos.104 and 105, the Supreme Court has given the power to the High Court to fix the period of imprisonment.

20. To deal with this contention, it may be necessary to extract Paragraph Nos.104, 105, 177 and 178 of the aforesaid judgment:

"104.That apart, in most of such cases where death penalty or life imprisonment is the punishment imposed by the trial Court and confirmed by the Division Bench of the High Court, the convict concerned will get an opportunity to get such verdict tested by filing further appeal by way of special leave to this Court. By way of abundant caution and as per the prescribed law of the code and the criminal jurisprudence, we can assert that after the initial finding of guilt of such specified grave offences and the imposition of penalty either death or life imprisonment, when comes under the scrutiny of the Division Bench of the High Court, it is only the High Court which derives the power under the Penal Code, which prescribes the capital



and alternate punishment, to alter the said punishment with one either for the entirety of the convict's life or for any specific period of more than 14 years, say 20, 30 or so on depending upon the gravity of the crime committed and the exercise of judicial conscience befitting such offence found proved to have been committed.

105. We, therefore, reiterate that the power derived from the Penal Code for any modified punishment within the punishment provided for in the Penal Code for such specified offences can only be exercised by the High Court and in the event of further appeal only by the Supreme Court and not by any other court in this country. To put it differently, the power to impose a modified punishment providing for any specific term of incarceration or till the end of the convict's life as an alternate to death penalty, can be exercised only by the High Court and the Supreme Court and not by any other inferior Court.

...
177. Imprisonment for life in terms of Section 53 read with Section 45 of the Penal Code only means imprisonment for the rest of the life of the convict. The right to claim remission, commutation, reprieve, etc. as provided under Article 72 or Article 161 of the Constitution will always be available being constitutional remedies untouchable by the Court.

178. We hold that the ratio laid down in *Swamy Shraddhananda* that a special category of sentence; instead of death can be substituted by the punishment of imprisonment for life or for a term exceeding 14 years and put that category beyond application of remission is well founded and we answer the said question in the affirmative."

21. One of the issues before the Supreme Court in *Sriharan* (supra) was this - In ***Swamy Shraddhananda v. State of Karnataka [(2008) 13 SCC 767]***, the Supreme Court converted the death sentence to life imprisonment, but, stated that he will not be entitled to any statutory remission for a particular period. The legality of this issue, once again, surfaced before the Supreme Court in *Sriharan* (supra) and in that context, the Supreme Court held so in Paragraph Nos. 104, 105, 177 and 178 extracted above.

22. The issue raised by Mr. R. Alagumani is no more *res integra* in the light of the authoritative pronouncement of the Supreme Court in ***Gopal Vinayak Godse v. Union of India [AIR 1961 SC 600]***, wherein, the Supreme Court has held that imprisonment for life means imprisonment for the whole of the remaining period of the convicted person's natural life.



23. As regards the eligibility for remission, it is for the appellant [A-2] to work out before the authorities in accordance with the extant Rules and we cannot issue an omnibus direction to the Government in this regard.

24. In the result, this criminal appeal fails and hence, the same stands dismissed. Consequently CrI.M.P.(MD) No.9328/2018 stands closed.

Sd/-

Assistant Registrar(CS-II)

// True Copy //

Sub Assistant Registrar(CS)

To

- 1.The Additional Sessions Judge and
Chief Judicial Magistrate,
Thoothukudi
- 2.The Inspector of Police
Thalamuthunagar Police Station
Thoothukudi District
- 3.The Superintendent,
Central Prison,
Palayamkottai.
- 4.The Additional Public Prosecutor
Madurai Bench of Madras High Court,
Madurai.
- 5.The Record Keeper,
Criminal Records Section,
Madurai Bench of Madras High Court,
Madurai. (2 copies)

+1 CC to M/s.R.ALAGUMANI, Advocate in SR-60922

CrI.A.(MD)No.505 of 2018
11.04.2019

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