



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 18.11.2019

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CORAM:

**THE HON'BLE MR.JUSTICE S.VAIDYANATHAN
AND
THE HON'BLE MR.JUSTICE N.ANAND VENKATESH**

Crl.A. (MD) No.364 of 2017

Antony

... Appellant/P.W.3

-vs-

1. State Represented by
The Inspector of Police,
Kottar Police Station,
Asaripallam Police Station,
Kanyakumari District.
[Crime No.288 of 2007]

... Respondent / Complainant

2. Maria Viyanni
3. Madhavadiyan @ Charles
4. Rubesh @ Sahaya George Rubesh
5. Sahaya Anand
6. Antony Arokiya Jagan

... Respondents 2 to 6 / A1 to A5

PRAYER: Appeal is filed under Section 372 of the Code of Criminal Procedure to call for the entire records and set aside the order of acquittal judgment passed in S.C.No.58 of 2008 by the Sessions Court, Kanyakumari District at Nagercoil dated 02.05.2017.

For Appellant : Mr.L.George Paul Anto
For R1 : Mr.S.Chandrasekar
Addl. Public Prosecutor
For R2 to R6 : Mr.N.Dilip Kumar
For Mr.G.Ramanathan

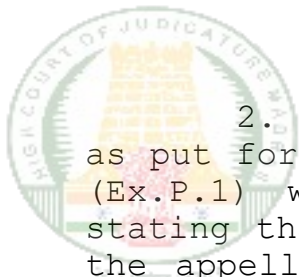
J U D G M E N T

S.VAIDYANATHAN,J.

AND

N.ANAND VENKATESH,J.

The Appellant / P.W.3, who is the father of the deceased, has filed this Criminal Appeal against the judgment of the learned Sessions Judge, Kanyakumari District at Nagercoil made in S.C.No.58 of 2008 dated 02.05.2017, by which all the accused persons, who are Respondents 2 to 6 herein, were acquitted from all charges.



2. The allegations leading to filing of an FIR in this case, as put forth by the prosecution are that on 12.08.2007, a complaint (Ex.P.1) was preferred by the brother (P.W.1) of the deceased, stating that the accused persons 1 to 5 attacked him, his father / the appellant herein, his brother and sister in connection with a dispute regarding letting out sewage water in the lane, thereby abutting the house of one Rabel / father-in-law of the complainant. It was further alleged that A1 and A2 are brothers, A3 and A5 are sons of A1 and A4 is the son-in-law of A1 and they all attacked the complainant and his relatives with iron pipe by using unparliamentary words, as a result of which, they all sustained severe injuries and his deceased brother succumbed to death in the hospital. On the basis of the complaint lodged by the complainant / P.W.1, a case in Crime No.288 of 2007 (Ex.P.21) initially came to be registered against the accused persons for offences under Sections 294(b), 341, 323, 324 and 307 IPC and after the death of the deceased, the case was altered to Sections 294(b), 341, 323 and 302 IPC by way of an Alteration Report (Ex.P.25).

3. After a detailed investigation by the Inspector of Police (P.W.17) , a charge sheet was laid before the Judicial Magistrate No.I, Nagercoil in P.R.C.No.1 of 2008 and was subsequently, committed to the Court of Sessions as per Section 209 Cr.P.C. for trial. Upon consideration of the records, the Trial Court had framed the following charges against the accused persons:

A1	Sections 148, 294(b), 341 and 302 IPC
A2	Sections 148, 294(b), 341 and 302 r/w 149 and 324 IPC
A3	Sections 148, 294(b), 341m 302 r/w 149, 323, 324 (2 counts) of IPC
A4	Sections 147, 294(b), 341, 302 r/w 149 IPC
A5	Sections 147, 294(b), 341, 302 r/w 149 IPC

4. The prosecution, in order to substantiate the offences against the accused persons, had examined 17 witnesses, marked 27 documents and exhibited 3 Material Objects and on the side of the accused, neither any witness was examined nor documents marked. The Trial Court, after analyzing the evidence let in by the prosecution, found all the accused persons not guilty of the offences and thereby, acquitted them from all charges. Aggrieved by such acquittal, the father of the deceased, who is a Prosecution Witness No.3, is before this Court. During pendency of the appeal, A1 has expired on 29.10.2018 and a death certificate dated 22.11.2018 has been produced in proof thereof.



5. The learned counsel appearing on behalf of the appellant has strenuously submitted that even though there were eyewitnesses to the injuries sustained by the deceased and other persons, the Trial Court had not taken into consideration those aspects, while acquitting the accused persons. The 1st accused also sustained injury, which itself is a clear evidence that there was an attack between the accused persons and the complainant parties. Despite production of relevant materials to prove the guilt of the accused persons, they were let off by the Trial Court without taking into account those materials.

5.1. It was the case put forth by the learned counsel for the appellant that the Postmortem Certificate (Ex.P.12) clearly points out that deceased had sustained severe injuries on the head, which could not have been caused without any aggressive fight and it was evident that on the fateful day, there was a heated argument between the deceased and the accused persons. Therefore, it is clear beyond doubts that it was the accused persons, who were responsible for the murder of the deceased.

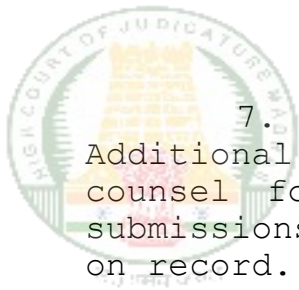
5.2. It was further argued on the side of the Appellant / P.W.3 that the Trial Court had not considered the medical evidences at length, which corroborated the version of P.Ws.1 to 4, who are the direct eye witnesses to the occurrence and the Trial Court had rejected those evidences merely on the ground of contradictions. Since there are sufficient grounds made out and the guilt of the accused persons were duly established, the judgment of acquittal needs to be reversed and the accused persons are liable to be punished for commission of the offences.

6. Per contra, the learned counsel for the respondent nos. 2 to 6 has contended that after going through the entire material documents and finding no proof against accused persons, the Trial Court had rightly acquitted the accused persons. The prosecution had not proved any motive for the alleged occurrence against the respondent nos. 2 to 6 and there were a lot of contradictions in seizure of material objects.

6.1. It was further contended that the presence of P.W.4, who is stated to be an eyewitness is highly doubtful, as she had deposed that she has been residing in Tuticorin and as such, it is unbelievable that she was present in the scene of occurrence. The prosecution had failed to seize the weapon used for attacking the complainant and his associates and from the Postmortem Certificate, it could be seen that there was indication of attack with bricks. Therefore, an inference can be drawn that the prosecution had falsely foisted a case against the respondent nos. 2 to 6, thereby roped the accused persons into the crime. The Trial Court, after analyzing the entire documents available on record, had acquitted the respondent nos. 2 to 6, which does not warrant any interference.

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and prays for the dismissal of this appeal.



7. Heard the learned counsel for the Appellant, the learned Additional Public Prosecutor appearing for R1 and the learned counsel for R2 to R6. This Court has carefully considered the submissions made on either side and perused the materials available on record.

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8. In this case, the Appellant has questioned the order of acquittal of R2 to R6 passed by the Sessions Judge, Kanyakumari District at Nagercoil. At the first blush, this Court has to prima facie satisfy itself whether there are valid grounds to interfere with the judgment of acquittal passed by the Trial Court. The Hon'ble Supreme Court in the case of **Sampat Babso Kale and another vs. State of Maharashtra**, reported in **(2019) 4 SCC 739** has elaborately dealt with the powers of an appellate Court to interfere with the order of acquittal. The relevant portion of the judgment is extracted hereunder:

"7. With regard to the powers of an appellate court in an appeal against acquittal, the law is well established that the presumption of innocence which is attached to every Accused person gets strengthened when such an Accused is acquitted by the trial court and the High Court should not lightly interfere with the decision of the trial court which has recorded the evidence and observed the demeanour of witnesses. This Court in the case of Chandrappa and Ors. v. State of Karnataka MANU/SC/7108/2007MANU/SC/7108/2007 : (2007) 4 SCC 415, laid down the following principles:

42. From the above decisions, in our considered view, the following general principles regarding powers of the appellate court while dealing with an appeal against an order of acquittal emerge:

(1) An appellate court has full power to review, reappraise and reconsider the evidence upon which the order of acquittal is founded.

(2) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate court on the evidence before it may reach its own conclusion, both on questions of fact and of law.

(3) Various expressions, such as, "substantial and compelling reasons", "good and sufficient grounds", "very strong circumstances", "distorted conclusions", "glaring mistakes", etc. are not intended to curtail extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of "flourishes of language" to emphasise the reluctance of an appellate court to interfere



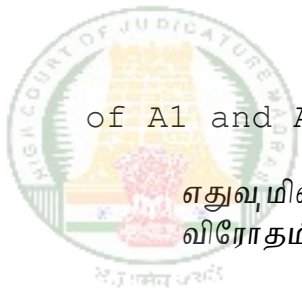
circumstances of each case. In the case on hand, we have to examine the rationale behind the conclusion of the High Court in convicting the accused and the compelling reasons to deviate from the order of acquittal passed by the Trial Court."

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10. Thus, it is obvious from the above judgments that while dealing with a case of appeal against acquittal, it is obligatory on the part of this Court to bear in mind that there is a double presumption in favour of the accused, as the presumption of innocence is available to him and therefore, unless or until valid and sufficient grounds are made out against such order of acquittal, the basic genesis of the order of the Trial Court should not be disturbed, even if two reasonable views are possible on the basis of the evidence on record. Hence, this Court has to analyze the present case on hand in the light of the dictum laid down by the Hon'ble Supreme Court in the afore-stated judgment. The legal proposition is very clear that when there are two views possible and the Trial Court has drawn a particular conclusion based on the facts and circumstances of the case on appreciation of the facts and evidence, merely because there is another view possible on the same set of facts and evidence, the High Court should not replace the views of the Trial Court in a mechanical manner. If that concept is accepted, there is a possibility of the Apex Court in its wisdom, altering the views of the High Court and in that process, justice would be delayed. Therefore, unless or otherwise there was an error apparent on the face of record, the High Court cannot interfere with the findings of the Trial Court blindly on the ground that there is another view possible.

11. In a case of this nature, the foremost aspect to be looked into is, whether there is any motive behind the murder of the deceased and if the motive is proved, then the case of prosecution becomes more easier to connect accused to the alleged incident. At the same time, motive is not *sine qua non*, where the ocular evidence is very clear and convincing and the role of the accused person in the crime stands clearly established as held by the Hon'ble Supreme Court in the case of **Yunis alias Kariya vs. State of Madhya Pradesh**, reported in **AIR 2003 SC 539**. Further, it is well settled that where the direct evidence regarding the assault / murder is worthy of the credence and can be believed, the question of motive becomes less important.

12. The prosecution in the present case on hand had failed to prove the motive and its failure to prove motive for crime has diluted the entire case of the prosecution. In this case, admittedly, P.Ws.1 to 4 are stated to be eyewitnesses to the occurrence, but a glance at the cross examination of P.W.1 indicates the fact that there was no previous enmity existed between the accused persons and P.W.1. When P.W.1 was cross examined in respect



of A1 and A4, he had deposed as under:

“....1, 4 எதிரிகளுக்கும் எனக்கும் இடையில் தனிப்பட்ட விரோதம் எதுவுமில்லை. அதே போல் என் தம்பி மீதும் அவர்களுக்கு தனிப்பட்ட விரோதம் இல்லை....”

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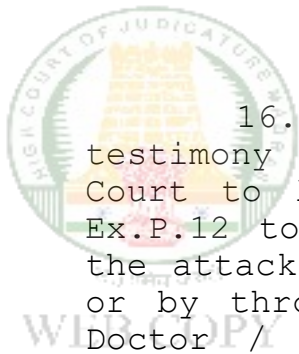
13. The above deposition appears to be given by a hostile witness, as the said statement made by P.W.1 had spoiled the entire case on the account of the reason that he, having lodged a complaint against accused persons, had deposed in favour of the accused persons, more particularly, against A1 and when the motive against A1 is not clearly established by the prosecution, then in our view, the entire case will definitely fall into a pit.

14. The next point to be analyzed is with regard to the recovery of weapons used for causing the death of the accused. It was the admitted case of the witnesses that iron pipe and bricks were used for attacking the deceased and his relatives, but the evidence of Duty Doctor (P.W.5) is otherwise and she had in her cross deposed that there is a possibility of sustenance of cut injuries by using a sharp edged weapon like knife or aruval. The said portion of cross examination of P.W.5 reads as follows:

“....அ.சா.ஆ.2ல் பிராங்கோவுக்கு இருந்த காயம் சாதாரண காயம் என்று குறிப்பிட்டிருக்கிறேன். இந்த காயம் அருவாள் போன்ற கூர்மையான ஆயுதத்தால் ஏற்பட வாய்ப்பு, உள்ளதா என்றால், வாய்ப்பு, உள்ளது....”

15. However, P.W.1 had explicitly stated in his cross examination that no Aruval was used on the fateful day, which runs contrary to the deposition of P.W.5. At this juncture, it is worthwhile to refer to a judgment of the Hon'ble Supreme Court in the case of **Ganesh Datt vs. State of Uttarakhand**, reported in **AIR 2014 SC 2521**, wherein it was held as follows:

“15. As per the ocular testimony the weapons used in the occurrence are country made pistol, gun, axe and lathis. In his testimony PW7 Sub-Inspector Surender Singh has stated that he went to the occurrence place during investigation and seized 10 bullets of 12 bore from the spot out of which 4 were empty and 6 were live, under Exh. A-16 Memo. Initial investigation was done by PW7 Sub-Inspector Surender Singh and thereafter it was continued and concluded by PW5 Inspector Vijender Kumar Bhardwaj. They have not taken any steps to recover the weapons alleged to have been used in the occurrence. No scientific method of investigation was pressed into service. We did not find any explanation in the testimonies of the Investigating Officers in this regard. The lethargic attitude of the officers conducting investigation is deplorable.”



16. This Court has its primary duty to compare the ocular testimony with that of medical evidence. It is necessary for this Court to look at the Postmortem Certificate, which is marked as Ex.P.12 to ascertain whether the death had occurred on account of the attack with a sharp edged weapon like aruval or by an iron rod or by throwing stones at the deceased. Dr.Rajesh, the Postmortem Doctor / P.W.7, who had performed autopsy on the body of the deceased on 13.08.2007 between 2.30pm and 3.30pm, had noted the following features in his Post Mortem Certificate:

- " 1) 1 x ½ cm scalp thick laceration seen over the left side of back of head. It is 5 cm above the occipital protuberance.
 - 2) 1 x ¼ cm abrasion seen 1 cm below the previous injury.
 - 3) 3 x 1cm abrasion over the right side of forehead. It is 4 cm above the right eyebrow.
 - 4) 3 cm irregular sutured lacerated wound seen over the left side of head. It is 4 cm above the upper and of left ear.
 - 5) 1 ½ x 1 x ½ cm incised wound noted over the left side of upper chest, just below the left collar bone.
- All the above injuries are reddish brown colour.

O/D Scalp skull dura:

Sub scalpal bruising noted over the left temporo parietal region measuring 10 x 8 cm. Sub scalpal bruising noted over the right frontal region measuring 5 x 4 cm. Depressed fracture noted over the left temporo parietal region, measuring 3 x 2 ½ cm. Diffused sub dural and sub arachnoid haemorrhage noted over both cerebral hemispheres more over the left parietal region. Intra cerebral haemorrhage noted over the left cerebral hemisphere.

Other findings Noted:

Heart: Normal coronaries patent.

Lungs: Normal C/S Pale

Hyoid bone: Intact

Stomach: 100gms of identifiable cooked rice particles. Nil specific smell. Mucosa pale.

Liver: Spleen & kidneys : Normal C/S/ congested

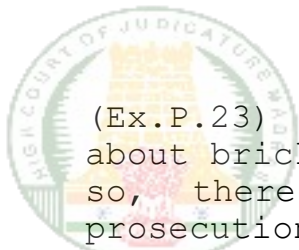
Small intestine: Nil specific

Bladder: Empty

Brain: Injuries already described

Viscera: Preserved"

17. In the final opinion, it has been specifically stated that the deceased would appear to have died of head injuries. Though the Postmortem Doctor had indicated that there is a possibility of sustaining head injuries due to hit with bricks, the Duty Doctor / P.W.5, who had initially treated the deceased prior to his death had stated that the death could have been caused on account of stabs with a sharp edged weapon. Moreover, on a perusal of the Rough Sketch



(Ex.P.23) and Observation Mahazar (Ex.P22), there was no mention about bricks used for attacking the deceased and his relatives. More so, there is a contradiction between the witnesses and the prosecution had not taken any steps to clear the suspicion over the said contradiction. The Hon'ble Supreme Court in the case of **Kapildeo Mandal and Others vs. State of Bihar**, reported in **(2008) 2 MLJ (Crl.) 699 (SC)** observed that in case of variance between the medical evidence and ocular evidence, benefit of doubt should be extended to the accused and the conviction, if any imposed, should be set aside. For the purpose of clarity, the observation made by the Hon'ble Supreme Court to that effect is extracted hereunder:

"11. It is now well settled by series of decisions of this Court that while appreciating variance between medical evidence and ocular evidence, oral evidence of eye-witness has to get primacy as medical evidence is basically opinionative. [See *Mange v. State of Haryana* MANU/SC/0165/1979 MANU/SC/0165/1979 : 1979CriLJ939 (conviction based on sole testimony of eye-witness); *State of U.P. v. Krishna Gopal and Anr.* MANU/SC/0506/1988 MANU/SC/0506/1988 : 1989CriLJ288 ; and *Ramanand Yadav v. Prabhu Nath Jha and Ors.* MANU/SC/0854/2003 MANU/SC/0854/2003 : 2004CriLJ640]. But when the court finds inconsistency in the evidence given by the eye-witnesses which is totally inconsistent to that given by the medical experts, then evidence is appreciated in different perspective by the courts. In *Mohinder Singh v. The State* MANU/SC/0017/1950 MANU/SC/0017/1950 : [1950] 1SCR821 , this Court said:

...In a case where death is due to injuries or wounds caused by a lethal weapon, it has always been considered to be the duty of the prosecution to prove by expert evidence that it was likely or at least possible for the injuries to have been caused with the weapon with which and in the manner in which they are alleged to have been caused. It is elementary that where the prosecution has a definite or positive case, it must prove the whole of that case. In the present case, it is doubtful whether the injuries which are attributed to the appellant were caused by a gun or by a rifle. Indeed, it seems more likely that they were caused by a rifle than by a gun, and yet the case for the prosecution is that the appellant was armed with a gun and, in his examination, it was definitely put to him that he was armed with the gun P.16. It is only by the evidence of a duly qualified expert that it could have been ascertained whether the injuries attributed to the appellant were caused by a gun or by a rifle and such evidence alone could settle the controversy as to whether they could possibly have been caused by a firearm being used at such a close range as is suggested in the



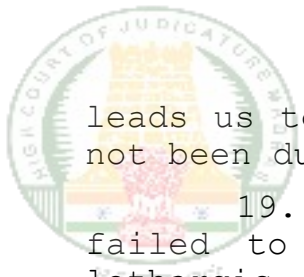
In Mani Ram and Ors. v. State of U.P. MANU/SC/1020/1994 MANU/SC/1020/1994 : 1994CriLJ3848 (in para 9), this Court held:

...It is well settled by long series of decisions of this Court that where the direct evidence is not supported by the expert evidence then the evidence is wanting in the most material part of the prosecution case and, therefore, it would be difficult to convict the accused on the basis of such evidence. If the evidence of the prosecution witnesses is totally inconsistent with the medical evidence this is a most fundamental defect in the prosecution case and unless this inconsistency is reasonably explained it is sufficient not only to discredit the evidence but the entire case....

In another case of Thaman Kumar v. State of Union Territory of Chandigarh MANU / SC / 0386 / 2003 MANU / SC / 0386 / 2003 : 2003CriLJ3070, this Court held:

The conflict between oral testimony and medical evidence can be of varied dimensions and shapes. There may be a case where there is total absence of injuries which are normally caused by a particular weapon. There is another category where though the injuries found on the victim are of the type which are possible by the weapon of assault, but the size and dimension of the injuries do not exactly tally with the size and dimension of the weapon. The third category can be where the injuries found on the victim are such which are normally caused by the weapon of assault but they are not found on that portion of the body where they are deposed to have been caused by the eye-witnesses. The same kind of inference cannot be drawn in the three categories of apparent conflict in oral and medical evidence enumerated above. In the first category it may legitimately be inferred that the oral evidence regarding assault having been made from a particular weapon is not truthful. However, in the second and third category no such inference can straightaway be drawn. The manner and method of assault, the position of the victim, the resistance offered by him, the opportunity available to the witnesses to see the occurrence like their distance, presence of light and many other similar factors will have to be taken into consideration in judging the reliability of ocular testimony."

18. From the above judgment, it is clear that in case of dissimilarity between the ocular testimony and the medical evidence, the oral evidence of the eyewitness has to be given much importance. In this case, as rightly observed by the Trial Court, as per the different versions of P.Ws.1 to 4, even the place of occurrence is highly doubtful, as each one had indicated different places of incident. Thus, there was no corroboration in their evidences, which

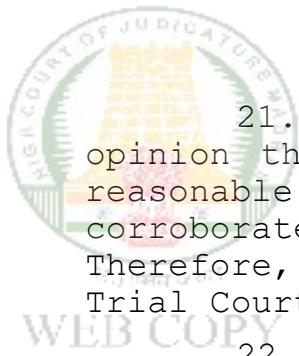


leads us to come to a conclusion that the guilt of the accused had not been duly established.

19. This case is a classic example, where the Police had failed to prove the guilt of the accused on account of their lethargic attitude and they had investigated the case in a slight manner, as if it is a case of minor offences. The Prosecution had shown P.Ws.1 to 4 as eyewitness to the occurrence and among them, P.W.4 / sister of the deceased had deposed in her cross that she has been living with her husband in Tuticorin since her marriage and her deposition that she was present at the time of attack by the accused persons, is pinching and pricking us to differ with the view of the Trial Court. It is no doubt true that the deceased was murdered by way of indiscriminate attack either by Aruval or Iron Road or bricks, but there is no iota of evidence to establish that it was the accused persons, who had caused his murder and the prosecution had not proved its case beyond reasonable doubts as to whether the accused persons were really responsible for the death of the deceased.

20. Insofar as the delay aspect is concerned, the occurrence is stated to have happened on 12.08.2007 at 02.30pm, but the FIR (Ex.P.21) had reached the Court of Judicial Magistrate No.I, Nagercoil only at 11:30pm with a delay of about nine hours. Though there is not much delay in the FIR reaching the Court, the absence of explanation on the side of the prosecution for the delay in reporting and reaching the Court, is fatal to the case of the prosecution. The Hon'ble Supreme Court in the case of **State of A.P vs. M.Madhusudhan Rao**, reported in **(2008) 15 SCC 582**, while dealing with the issue of delay held as follows:

"18.Having gone through the depositions of PW-1 and PW-3, to which our attention was invited by learned counsel for the State, we are convinced that in the light of the overall evidence, analysed by the High Court, the order of acquittal of the respondent is well merited and does not call for interference, particularly when the First Information Report was lodged by the complainant more than one month after the alleged incident of forcible poisoning. Time and again, the object and importance of prompt lodging of the First Information Report has been highlighted. Delay in lodging the First Information Report, more often than not, results in embellishment and exaggeration, which is a creature of an afterthought. A delayed report not only gets bereft of the advantage of spontaneity, the danger of the introduction of coloured version, exaggerated account of the incident or a concocted story as a result of deliberations and consultations, also creeps in, casting a serious doubt on its veracity. Therefore, it is essential that the delay in lodging the report should be satisfactorily explained."



21. In view of the above discussion, we are of the considered opinion that the prosecution has failed to prove the case beyond reasonable doubts. The evidence of P.Ws.1 to 4 has not been corroborated by other evidence that is available on record. Therefore, it will not be safe to set aside the judgment of the Trial Court with the available evidence.

22. In the result, the judgment dated 02.05.2017 made in S.C.No.58 of 2008 by the Sessions Judge, Kanyakumari District at Nagercoil is hereby confirmed. Accordingly, this Criminal Appeal is dismissed.

Sd/-

Assistant Registrar (crl.side)

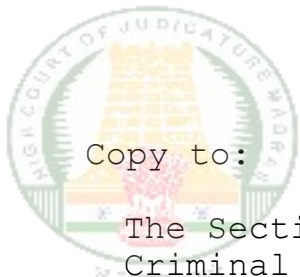
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Sub Assistant Registrar(CS)

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To

1. The Sessions Judge,
Kanyakumari District at Nagercoil.
2. The Principal District Judge,
Kanyakumari District at Nagercoil.
3. The Judicial Magistrate,
Kanyakumari District at Nagercoil.
4. The Chief Judicial Magistrate,
Kanyakumari District at Nagercoil.
5. The District Collector,
Kanyakumari District at Nagercoil.
6. The Director General of Police,
Mylapore, Chennai 4
7. The Superintendent of Police,
Kanyakumari District at Nagercoil.
8. The Inspector of Police,
Kottar Police Station,
Asaripallam Police Station,
Kanyakumari District.
9. The Additional Public Prosecutor,
Madurai Bench of Madras High Court,
Madurai.



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Criminal Records(2 Copies),
Madurai Bench of Madras High Court,
Madurai.

+1 CC to Mr.L.GEORGE PAUL ANTO, Advocate (SR-99325[F] dated 19/11/2019)

+1 CC to Mr.G.RAMANATHAN, Advocate (SR-99329[F] dated 19/11/2019)

+1 CC to Mr.N.DILIPKUMAR, Advocate (SR-99381[F] dated 19/11/2019)

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