

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment reserved on	:	18.12.2019
Judgment pronounced on	:	07.02.2020

CORAM

THE HONOURABLE MR.JUSTICE R.SUBBIAH
and
THE HONOURABLE MR.JUSTICE R.PONGIAPPAN

Criminal Appeal No.177 of 2018

Rajam @ Sivan @ Simban
S/o.Kalan ... Appellant

Versus

State represented by
Inspector of Police,
Coodalur Police Station,
Udagamandalam District.
Crime No.70 of 2014 ... Respondent

Criminal Appeal filed u/s.374(2) of Code of Criminal
Procedure against the judgment dated 02.12.2015 passed in
S.C.No.32/2014 by Mahalir Sessions (Fast Track) Court,
Udhagamandalam and set aside the same.

For Appellant : Mr. C. Sivakumar
For Respondent : Ms.M.Prabhavathi
Additional Public Prosecutor

J U D G M E N T

R.SUBBIAH, J

Challenging the judgment dated 02.12.2015 passed in
S.C.No.32/2014 by Mahalir Sessions (Fast Track) Court,
Udhagamandalam, convicting appellant/accused for offence under
Section 302 (2 counts) IPC and sentencing to life imprisonment
for each count, this appeal is filed by the appellant.

2. The case of the prosecution is as follows:

(i)Appellant/accused and PW-1 viz., Chikki @ Radha
were living together as husband and wife at Elumaram.
They have two female children, viz., Kaveri, aged
about 5 years and Rathna, aged about 2 years. PW-1
was already married to one Rajan and has a female
child viz., Santha, aged about 12 years.
Appellant/accused is also a married person.

Appellant/accused was a coolie and was unable to run the family with his wages. Appellant/accused, who is a drunkard, suspected the fidelity of PW-1 and used to beat her frequently by saying that the deceased children were not born to him and he would murder PW-1 and children. Unable to bear the frequent threat of appellant/accused, PW-1 along with her children, went to her uncle's (PW7) house at Kudamalai and was staying there. While so, on 22.02.2014, appellant/accused went to PW-7's house under the influence of alcohol, quarrelled with PW-1 and also beat her. When he asked for food, PW-1 stated that she did not have food to provide him. The appellant/accused therefore beat her and also threatened that he would kill her and the deceased children. On the next day morning, i.e. 23.02.2014 at 08.00 a.m., he forcibly took the deceased children even though it was resisted by PW-7 and 3 others. Notwithstanding such resistance, accused took the deceased children saying that he was taking them to his house at Elumaram. Thereafter, on the same day at 11.00 a.m., on seeing the accused carrying a heavy sack on his head, PWs.3, 4 and 5 shouted at him and when they enquired, without giving any reply, accused dropped the sack near a tree and ran from the place. Though PWs.3, 4 and 5 chased them, they were unable to catch him. On seeing the tender legs of the children in the sack, they informed PW-1, who along with others, came there, untied the sack to only find the dead body of two minor children with injuries on the head, neck and face.

(ii) PW-1 informed PW-2, who is a local Councillor, about the occurrence. Thereafter, PW-1 proceeded to Gudalur Police Station and preferred a complaint to PW-16, Sub-Inspector of Police, who registered a case in Crime No.70 of 2014 for offence under Section 302 IPC. PW-16 forwarded the first information report to Court and copies thereof to higher officials.

(iii) PW-17, Inspector of Police, took up investigation and proceeded to the scene of occurrence at about 01.30 hours on the same day and prepared observation mahazar [Ex.P2] and rough sketch [Ex.P18] in the presence of PW-6 and another. PW-17 conducted inquest on the body of deceased child Kaveri in the presence of Panchayatdars. The inquest report is Ex.P19. After completion of the inquest, he sent the body of deceased child Kaveri through PW-12, constable, for postmortem. Thereafter, PW-17

conducted inquest on the body of deceased child Rathna in the presence of Panchayatdars. The inquest report is Ex.P20. After completion of the inquest, he sent the body of deceased through PW-13, constable, for conducting post-mortem.

(iv) The post-mortem reports [Exs.P19 and P20] read as follows:

`No:19/2014

POST-MORTEM CERTIFICATE

Regarding the body of a female aged about 5 years, named Kaveri. Requisition received at 1.00PM on 24.02.14 from the Inspector of Police of Gudalur Circle (PS) with his letter No.70/14 dated 24.02.14 Body in-charge of Police constable PC1444 Mr.Micheal Antony Reagan, WPC 1601, Mrs.Selvamalar.

Identification and caste marks:-

- 1) AWS Right Knee
- 2) AWS Left Middle Finger
- 3) AWS Left knee

The Body was first seen by the undersigned at 1.45 PM on 24.02.2014

Its condition then was Rigor Mortis present in all 4 limbs

Post-Mortem commenced at 1.45 PM on 24.02.2014.

Appearances found at the post mortem dry, PM Shed; lies on back with arms on sides, Room Temperature, moderately nourished, symmetrical, skin-pale, iris-colour-black, hair-black, external injuries:- Right eye condition - brownish colour 6 x 4 cm, Ligature mark seen in front of neck starts from 4 cm below Right ear and ends at 5 cm below Left ear, of about 11 cm x 0.5cm-multiple abrasions of varying size seen all over the face, contusion Right shoulder brownish colour 10 x 5 cm, contusion forehead - brownish colour 12 x 4 cm, abrasion back left side - 1 x 1 cm, motion not passed. RM present in all 4 limbs, eyelids - closed, mouth partially opened tongue inside the mouth-, jaws - clenched, teeth 6/6, 5/6, generative organs-normal, abdomen-uniform, thorax - No of facts of ribs, heart 100 gm, empty lungs - Right 250gm Left 200gm c/s congested, hyoid bone intact stomach contains undigested food particles of about 50 gm liver 500gm weight c/s congested, kidney - 90 gm each c/s congested small intestine - greenish white colour chyme, bladder - empty Head-depressed fracture starts from left temporal region ends at left occipital

region of about 16 cm another fracture parallel to previous, on Right of about - 15 cm, membrane - ruptured, EDH/SDH, SAH present, brain - 700 gm clots present over both hemisphere, c/s-pale PM concluded at 2.45pm on 24.02.2014.

Opinion as to cause of death

16.05.2014

01.00 P.M

a) Reserved pending report of chemical analysis of viscera.

b) The deceased would appear to have died of head injuries that leads to Brain injury and finally to hemorrhagic shock and cardiopulmonary arrest led to death, the deceased would appear to have died before 20.24 hours before PM

No.20/2014

POST-MORTEM CERTIFICATE

Regarding the body of a female aged about 2 years, named Rathna Requisition received at 1.00PM on 24.02.14 from the Inspector of Police of Gudalur Circle (PS) with his letter No.70/14 dated 24.02.14 Body in-charge of Police constable WPC 1601, Mrs.Selvamalar, PC1444 Mr.Micheal Antony Reagen, Identification and caste marks:-

1) AWS left Knee

2) AWS Right Elbow

The Body was first seen by the undersigned at 3.00 PM on 24.02.2014

Its condition then was Rigor Mortis present in all 4 limbs

Post-Mortem commenced at 3.00 PM on 24.02.2014.

Appearances found at the post mortem dry, PM Shed; lies on back with arms on sides, Room Temperature, moderately nourished, symmetrical, colour skin-pale, colour- iris, hair-black, external injuries:- left eye contusion -4 x 4 cm, abrasion right side of neck 3X 0.5 cm, left side of neck - multiple abrasions of varying size, abrasion right cheek - 2 x 1 cm, abrasions above left eye 3 x 0.5 cm, abrasion forehead - 1 x 1 cm, right side of cheek - (2), abrasion 0.5 x 0.1 cm, forehead - contusion 10 x 4 cm, brownish colour, abrasion left nostril 1 x 1 cm; RM present in all 4 limbs, eyelids - closed, mouth - opened ,tongue - inside the mouth, jaws - clenched, teeth 4/5, 3/5, generative organs-normal, abdomen-uniform, thorax - No of fracture on ribs, heart 50 gm weight, right side -

10 ml of fluid (liquid) blood, left side- empty, lungs - 140 gm each-c/s congested, fracture of hyoid bone - left greater corner stomach contains undigested 20 gm good particles, liver 400 gm, c/s.congested kidney-40gm each c/s congested, small intestine - green colour chyme, bladder - empty head-fracture starts from right frontal region and continues to parietal region and goes laterally ends at left temporal region measured 15 cm fracture on the left occipital region 7 cm, membrane - intact, brain weight - 500 gm, clots over left hemisphere c/s, mildly congested, PM concluded at 4.00PM on 24.02.2014. Final Opinion kept reserved.

Opinion as to cause of death
16.05.2014
01.10P.M

- a) Reserved pending report of chemical analysis of viscera
- b) The deceased would appear to have died of head injuries of multiple injury led to hemorrhagic shock that lead to Cardiopulmonary arrest led to death. The deceased would appear to have died before 20.24 hours before PM'

(v)PW-17, in continuation of his investigation, recovered MO-1, blood stained lungi under Ex.P8 - seizure mahazar, in the presence of witnesses. Thereafter, he examined PWs.1 to 7, 10 and 11. On 24.02.2014, he handed over the body of deceased children to relatives. PW-17 recovered MOs.2 to 5 [Skirt, Shirt, Rose colour skirt and blue colour banian] under Form-95.

(vi)PW-17 arrested the accused on 28.02.2014 at about 11.10 hours, after he was discharged from Government Hospital, Gudalur, in the presence of PW-11, Village Administrative Officer. On the basis of the confession of the accused, he prepared Ex.P23 [Rough Sketch] and recovered MO-6, burnt wooden log and MO-7, blood stained shirt. PW-17 sent the accused to Court for judicial custody and forwarded the properties recovered to Court under Form-95.

(vii)PW-17 examined PW-9, Doctor, who conducted post-mortem and other witnesses and recorded their statements. On his transfer, PW-17 handed over investigation to PW-19, Inspector of Police.

(viii)PW-19 took up further investigation on 12.03.2014 and recorded the statement of witnesses. PW-19 re-examined PW-9,

Doctor and recorded his statement. On 22.05.2014, PW-19 examined PW-15, Doctor, who treated the accused and PW-14, Forensic Expert and recorded their statements. On completion of investigation, he filed a charge sheet against the accused for offence under Section 302 IPC.

3. To substantiate its case, prosecution examined PWs.1 to 19, and marked Exs.P1 to P24 besides marking MOs.1 to 7. On questioning under Section 313 Cr.P.C., appellant/accused denied the charges. None were examined on behalf of appellant/accused and no exhibit was marked.

4. On a consideration and appreciation of the entire evidence adduced by prosecution, trial Court found appellant/accused guilty, convicted and sentenced him as stated above. Against such finding, the present appeal has been filed by the accused.

5. Heard learned counsel for appellant/accused and learned Additional Public Prosecutor appearing for respondent. Perused the materials on record, including the Judgment of the trial court.

6. Learned counsel for appellant/accused submitted that there is no eye witness to the occurrence and entire case rests on circumstantial evidence. PW-1 deposed that while she was carrying out house chores, the deceased came to the house of PW7 and took the minor children with him. When it was the evidence of PW-1 that on the previous night of the occurrence, appellant/accused threatened her by saying that he would murder her and the children, she would not have allowed appellant/accused to take the children, if she was really present there. Learned counsel further submits that though PWs.3, 4 and 5 deposed that they have seen the accused carrying a red colour sack, they did not identify the same in Court. While it was the evidence of PW-1 that she saw the body of deceased children with multiple injuries and bleeding, prosecution has not established that the blood stains found in the lungi was that of appellant/accused by subjecting the same for chemical analysis. It was the evidence of PWs. 1, 3, 4 and 5 that the blood was oozing out from the body of deceased children, when they untied the lungi. If it was so, definitely the lungi would contain blood stains. PW-17, investigating Officer, in his cross-examination, specifically deposed that he did not see any blood stains in the lungi, which falsifies the prosecution story that the bodies of deceased children were wrapped in the lungi, recovered by PW-17. It is highly improbable to believe that the accused has caused the death of deceased children using a burnt wooden log. Further, PW-15, Doctor, who treated the appellant/accused, in chief, deposed

that the appellant/accused informed him that he killed two children and consumed poison with liquor and in cross-examination, he had admitted that he informed the police about the admission of appellant/accused and he was treated as an in-patient for two days. According to prosecution, the appellant/accused was arrested only after he was discharged from the hospital. There was no explanation on the side of prosecution as to why they have not arrested appellant/accused immediately. Prosecution has not examined the person, who admitted appellant/accused in the hospital. Submitting as above, learned counsel for appellant contends that there are lot of contradictions in the evidence of prosecution witnesses and those contradictions would prove that the occurrence could not have happened in the manner put forth by the prosecution. Thus, the prosecution has failed to prove its case beyond all reasonable doubt and appellant/accused is entitled for acquittal.

7. Per contra, learned Additional Public Prosecutor appearing for the respondent submitted that Ex.P1, complaint, clearly states that the accused was not in good terms with PW-1 and hence, PW-1 went to her uncle's house with her children and stayed there. PW-7 clearly deposed that appellant/accused forcibly took the children from PW1, which was resisted by him. PW-7 also deposed that when he prevented appellant/accused, he stated that he was taking the children to his house at Elumaram. Further, the evidence of PWs.1, 2, 7, 8 and 10 collectively confirm that appellant/accused suspected the fidelity of PW-1 and it was the root cause for the occurrence. Since the appellant/accused consumed poison after the occurrence and he was in a critical stage and was under treatment, the investigating officer arrested him after he was discharged from hospital. Through the evidence of PWs.1 and 7, prosecution has clearly established the motive, presence of appellant/accused in the house of PW-7 and last seeing the deceased children alive with appellant/accused. According to the learned Additional Public Prosecutor, the non-sending of MO-1, blood stained lungi, for chemical analysis, would not affect the credibility of the prosecution case in any manner. In support of such submission, learned Additional Public Prosecutor relied on the judgment of the Calcutta High Court in Golam Sarwar & others v. The State of West Bengal [Crl.A.No.682 of 2010 dated 16.05.2014] and submitted that merely because of some defect in the investigation, lapses on the part of the investigating officer, it cannot be a ground for acquittal. Further, even if there had been negligence on the part of the investigating agency or omissions etc., it is the obligation on the part of the Court to scrutinize the prosecution evidence de hors such lapses to find out whether the said evidence is reliable or not and whether such lapses affect the object of finding out the truth. Learned Additional Public Prosecutor submitted that the prosecution has

proved its case beyond reasonable doubt and the trial Court has rightly arrived at a finding of conviction, which does not require interference by this Court.

8. This Court has considered the rival submissions and perused the materials available on record.

9. The prosecution came to be launched against appellant/accused at the instance of PW-1, who preferred Ex.P1, complaint, with regard to the death of her two minor children. In the complaint, Ex.P1, a specific reference was made to the fact that the appellant, under the influence of alcohol, engaged in frequent quarrels with her and during those quarrels, he disowned the paternity of the deceased minor children and threatened to kill them. PW1 in her cross-examination has clearly stated that there were frequent quarrels between her and the accused and during those quarrel, the accused threatened to kill her and the minor children. Even on 22.02.2014, a quarrel emanated between the accused and PW1. On 23.02.2014, when PW1 and the minor children were staying in the house of PW7, the accused came there and took both the minor children with him to Elumaram.

10. PW2 is the Ward Councillor of Ward No.17, whom PW1 has approached immediately on coming to know about the death of her two minor children. It was PW2 who accompanied PW1 to the Police Station to assist PW1 to give a complaint. PW2 also deposed that there was no cordial matrimonial life between the appellant and PW1 and there were frequent quarrels between them.

11. PW3 is a resident of Thorapalli. PW4 and PW5 are residents of Nayakkenpatti. PW3, PW4 and PW5 in unison have stated that on 23.02.2014 at about 11.00 am they saw the deceased carrying a head load wrapped in a lungi. When they asked the appellant as to what is that he is carrying on his head, the appellant dropped the head load and ran away from that place. When the head load was dropped down, PW3, PW4 and PW5 have seen two pairs of tender human legs. Immediately, they went to the house of PW1 and informed her about the head load carried by the appellant and that they have seen two pairs of tender human legs protruding thereof. On considering the evidence of PW3, PW4 and PW5, both in their chief examination as well as cross-examination, their evidence is cogent and clear as to the fact that they saw the deceased carrying a head load and on being questioned by them, the deceased had dropped the same to ground. Therefore, the fact that the deceased was carrying the dead bodies of the minor children wrapped up in a lungi stands established by the deposition of PW3, PW4 and PW5. In any event, their deposition cannot be in any manner discarded and they clearly support the case of the prosecution.

12. PW7 is the uncle of PW1. PW7 deposed that due to a matrimonial dispute between PW1 and the appellant, PW1 came to his house two months before and was staying there in his house. PW7 also deposed that he had advised the appellant to lead a normal life, but he has not acceded to such advise. PW7 clearly deposed that on the fateful day, the accused came to his house and took the two minor children with him.

13. PW8 is the neighbour of PW7. PW7 deposed about the frequent quarrels the appellant had made with the PW1 under the influence of alcohol. PW8 also referred to the fact that during such quarrels, the appellant disowned the paternity of the two minor children and threatened to kill PW1 and the two minor children. PW8 further stated that PW1 appeased her to advise her husband to lead a normal life. In fact, PW8 also once requested the appellant not to frequently quarrel with her, for which, the accused retorted by saying that she should not interfere in his family dispute.

14. Thus, the prosecution, by examining PWS1 to 5, PW7 and PW8 have clearly established one thing viz., frequent quarrels erupted between the appellant and PW1 and that the appellant is a drunkard addicted to alcoholic drinks. He was having suspicion with regard to the paternity of the children. It is also established that on the fateful day, it was the deceased who had taken the two minor children with him. Therefore, the prosecution has clearly proved the last seen theory of the minor children being alive when the appellant had taken them to his house at Elumaram.

15. The learned counsel for the appellant vehemently argued that the presence of PW-1 in the house of PW-7 at the time when the appellant came there and had taken the deceased minor children was doubtful. This submission has been advanced by the learned counsel for the appellant on the ground that had PW1 was really present at the time of occurrence, she could have prevented the accused from taking the children with him. On appreciation of the deposition of PW1, it is noticed that PW1 was in fact not present when the accused took the minor children with him and at that time, only PW7 was present. On hearing from PW7 about the appellant taking the minor children with him, PW1 only apprehended as to what fate would be met by the minor children, especially when the appellant had repeatedly threatened to kill the minor children. Therefore, the absence of PW1 in the scene of occurrence, will not in any manner affect the credibility of the case of the prosecution.

16. It is true that the entire case rests on circumstantial evidence. What is now to be examined is that whether there were

any contradictions in the evidence of the prosecution witnesses with respect to the last seen theory and if so, whether such contradictions would have the effect of mitigating the credibility of the case of the prosecution case in any manner.

17. Section 106 of the Indian Evidence Act requires the appellant/accused to explain how he came to be in possession of the sack, in which the dead bodies of the minor children were wrapped up. When the appellant assails the Judgment of the trial court and attempts to feign innocence about the occurrence, it is his duty to prove the facts which are exclusively within his knowledge and to get a clean chit as regards his innocence. In any event, In the present case, for the reasons best known, the accused did not examine himself or produced any evidence to disprove the case of the prosecution. In fact, soon after the occurrence, the appellant consumed poison purportedly to take away his own life and he was admitted in the hospital. This gives rise to a suspicion that the appellant, feeling guilty for having killed his own minor children, must have consumed poison to avoid any further retaliation from any one or apprehending arrest by the police for such act. In fact, in connection with the attempt on the part of the accused to commit suicide by consuming poison, PW17 has stated in his cross-examination that a case in Crime No. 75 of 2014 was also registered against him.

18. The learned counsel for the appellant vehemently contended that there is no explanation forthcoming from the prosecution as to why MO1 lungi was not subjected to chemical examination to prove that the blood stains contained therein contains the blood of the appellant or the deceased minor children. On a bare perusal of the cross-examination of PW-17, one could easily find that he deposed to the effect that he could not see any blood stains in the Lungi, since it was evening. However, based on such a deposition of PW17, it cannot be construed that there were no blood stains in the lungi at all. Of course, PW17 did not send the Lungi, MO-1 for chemical analysis. PW17 ought to have sent the Lungi - MO1 for chemical examination, but he failed to do so. At the same time, the fact that MO1 was not subjected to chemical analysis will not by itself vitiate the case of the prosecution in any manner. It may be a defect, however, such defect does not have the tendency of affecting the credibility of the case of the prosecution in any manner. In any given case, there may be certain lapses or minor contradictions. But it is the duty of the Court to examine as to whether such lapses or contradictions go to the root of the case of the prosecution and it has the tendency of affecting the foundation of the case. If this test is applied in this case, we are of the view that merely because MO1 was not subjected to chemical examination, that by itself will not

vitiate the case of the prosecution.

19. Next it is contended by the learned counsel for appellant/accused that it was impossible to cause the death of the two minor children by using a burnt wooden log given the tender age of the deceased children and the injuries found in their bodies. In the Post-mortem Certificates, it was observed that there was ligature mark and nail impressions around the neck of the deceased, which would lead to the inference that there is every possibility of the deceased children having been done to death by strangulation. Though there are some flaws in the investigation, the circumstances put forth by prosecution form a cohesive chain and unerringly point to the guilt of appellant/accused. The prosecution witnesses have also cogently made reference to one fact viz., the appellant indulged in frequent quarrel under the influence of alcohol and during such quarrel, he harped upon the paternity of the minor children. Therefore, we are of the view that it was the appellant who had caused the death of the deceased and none else. The appellant/accused has failed to probablise his case satisfactorily since certain facts are exclusively within his knowledge. Even when the accused was examined under Section 313 of the Code of Criminal Procedure, he merely denied the allegations but has not come forward with any explanation with regard to the incriminating circumstances appearing against him. On the above reasoning, this Court finds that the trial Court arrived at a well justified finding of conviction against the appellant, which warrants no interference by this Court.

20. In the result, the Criminal Appeal is dismissed, confirming the judgment dated 02.12.2015 passed in S.C.No.32/2014 by Mahalir Sessions (Fast Track) Court, Udhagamandalam.

Sd/-

Assistant Registrar

// True Copy//

Sub Assistant Registrar

rsh

To

1.The Mahalir Sessions (Fast Track) Court,
Udhagamandalam.

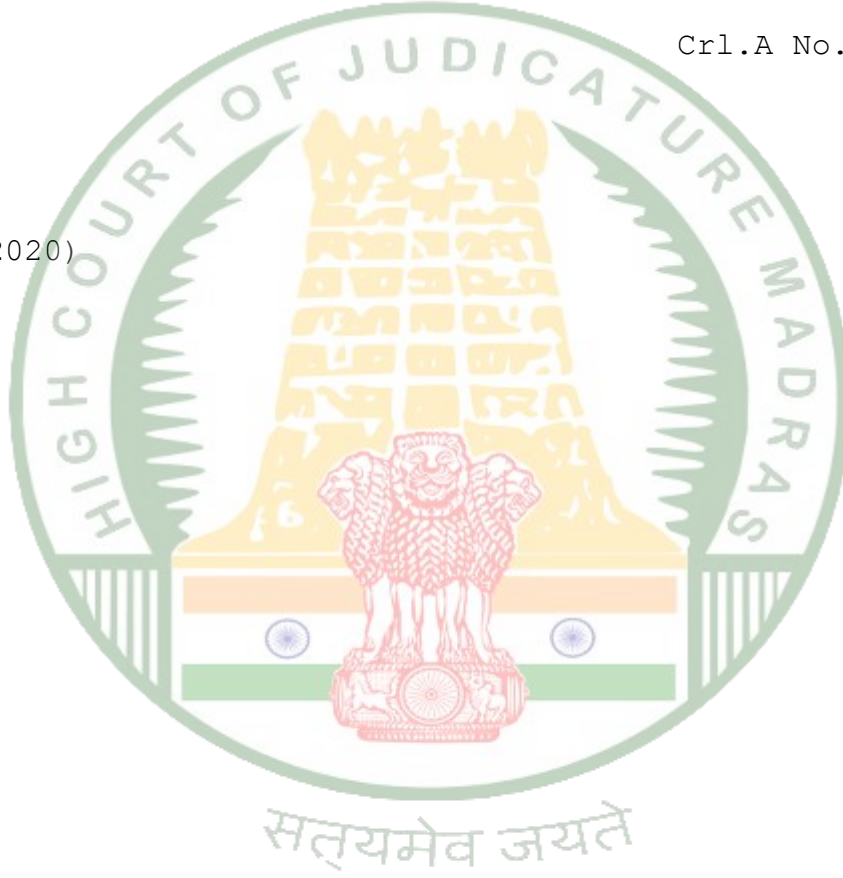
2.The Inspector of Police,
Coodalur Police Station,
Udagamandalam District.

3.The Additional Public Prosecutor,
High Court, Madras.

+1cc to M/s C.Sivakumar,Advocate, sr 10799

Cr1.A No.177 of 2018

RR (CO)
GS (21/05/2020)



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