

**BAIL SLIP**

ARIVALAGAN, S/O.VIJAYARAMAN, MALE, APPELLANT/SOLE ACCUSED WAS RELEASED ON BALI VIDE ORDER OF THIS COURT DATED 03.02.2014 MADE IN MP(MD)NO.1 OF 2014 IN CRL A(MD)NO.2 OF 2014

WEB COPY

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on 23.10.2019	Delivered on 23.01.2020
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CORAM

The Honourable Mr. JUSTICE B.PUGALENDHI
CRL.A. (MD)No.2 of 2014

Arivalagan, S/o.Vijayaraman

... Appellant/Sole Accused

Vs.

The State,
Rep. by the Inspector of Police,
Eriyodu Police Station,
Dindigul District.
[Crime No.163/2005]

...Respondent/Complainant

Prayer : This Criminal Appeal is filed under Section 374 (2) Cr.P.C., to call for records in S.C.No.58 of 2011, dated 19.12.2013, on the file of the Magalir Neethimandram (Fast Track Mahila Court), Dindigul, and set aside the same.

For Appellant : Mr.V.Kathirvelu
Senior Counsel
for Mr.A.Haja Mohideen

For Respondent : Mrs.S.Bharathi
Government Advocate (Criminal side)

JUDGMENT

This criminal appeal is filed as against the conviction and sentence imposed by the Trial Court in S.C.No.58 of 2011. This appellant was tried for the offences punishable under Sections 366 (A) and 376 IPC and the Trial Court viz., Magalir Neethimandram [Fast Track Mahila Court], Dindigul, by its judgment dated 19.12.2013, in S.C.No.58 of 2011, found this appellant guilty for the offences punishable under Sections 366(A) and 376 IPC, convicted and sentenced him as under:-

Section of Law	Sentence
366 (A) IPC	Convicted and sentenced to undergo rigorous imprisonment for a period of five years and to pay a fine of Rs.1,000/-, in default, to undergo two months rigorous imprisonment.



376 IPC

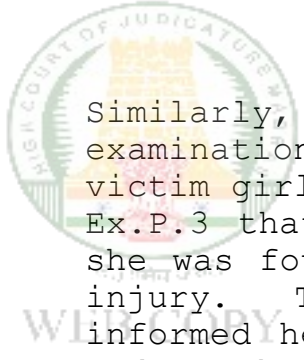
Convicted and sentenced to undergo rigorous imprisonment for a period of seven years and to pay a fine of Rs.1,000/-, in default, to undergo two months rigorous imprisonment.

Both the sentences are ordered to run concurrently.

2. The brief facts of the prosecution case in a nutshell is that, this appellant/accused kidnapped Seela @ Jeyaseela [P.W.8] on 28.09.2005 at 11 o'clock while P.W.8 was returning to Home after attending her Computer Class in the Computer Centre run by Kendisamy [P.W.5]. The appellant/accused taken her in his Car that he would drop her at her residence, taken to different town, confined her in a house and had physical relationship with her and thereafter, she was recovered on 01.03.2006 by the Eriyodu Police and produced before the Court.

2.1. A complaint [Ex.P.1] was lodged by the father of the victim girl one Jeganathan [P.W.1] on 04.10.2005 at 5.00 a.m. According to his complaint, his daughter Seela @ Jeyaseela was aged about 16 years and was studying 11th Standard at Eriyodu Government Higher Secondary School and she was also studying Computer Class and on 29.09.2005 at 11.30 p.m., she left the Home for Computer Class, but did not return even after 04.00 p.m. and on verification, they found that she did not attend the Computer Class on that date and the accused has abducted her and the parents of the accused and his friend one Savadamuthu and Arun Murugan have also assisted him for abducting his daughter. The said complaint was received by Muthukrishnan, Sub-Inspector of Police, Eriyodu Police Station [P.W.11], on 04.10.2005 and a case in Crime No.163 of 2005 was registered for the offence under Section 366(A) IPC as against this appellant and four others.

2.2. Investigation was taken over by one Gopal, Inspector of Police on 04.10.2005 and he examined the witnesses viz., P.Ws.1 to 4 and recorded their statements. He has also arrested A-2 one Vijayaraman at 02.00 p.m. on 04.10.2005. He has also examined P.Ws.5 and 7 and recorded their statements. The said Gopal, Inspector of Police, died on 24.02.2006 and therefore, further investigation was taken over by Paramasivam [P.W.12], Inspector of Police, Vedasandur Police Station. P.W.12 got an information about the whereabouts of the victim girl on 01.03.2006 and secured the accused as well as the victim girl on 02.03.2006. The victim girl [P.W.8], in her statement, has stated that the appellant/accused has taken her to Erode, solemnized a marriage and had sexual relationship with her. Therefore, P.W.12 - Paramasivam, Inspector of Police, has altered the offence by including the commission of offence under Section 376 IPC and also taken steps to arrest the accused. He also referred the accused to Dr.Sureshbabu [P.W.6] for examination and the Doctor after examining the accused on 03.03.2006 issued a Certificate in Ex.P.2 that the accused is potent and there was no external injury on his private part.



Similarly, the victim girl [P.W.8] was also sent for medical examination to Dr.Reena Prabha Gokila [P.W.9] and she examined the victim girl on 03.03.2006 and issued a certificate of examination in Ex.P.3 that the victim girl was fit for physical relationship and she was found pregnant of 18 to 20 weeks and there was no external injury. The Doctor [P.W.9] further stated that the victim girl informed her that she was kidnapped on 29.09.2005 by known person and was kept in a relative's house at Ayyampalayam. The age of the victim girl was mentioned by P.W.9 Doctor as '16'.

2.3. The further investigation was taken over by Nallu, Inspector of Police [P.W.13] from 20.05.2010 and he recorded the statement of the Doctors, who examined the appellant/accused and the victim girl and also collected a Certificate for age proof of the victim girl from one Mahendran [P.W.10], Assistant Headmaster of Eriyodu Government Higher Secondary School on 14.06.2010 and recorded further statement from the victim girl [P.W.8] on the said date and thereafter, filed final report as against this appellant for the offences punishable under Sections 366(A) and 376 IPC and deleted Accused Nos.2 to 5 from the case.

3. During the trial, 13 witnesses were examined and 6 documents were marked. The father of the victim girl was examined as P.W.1 and he stated about the missing of his daughter from 29.09.2005 and the steps taken by him to search her daughter with the help of P.Ws.2 to 4 and about the lodging of complaint on 04.10.2005. P.Ws.2 and 3, brothers-in-law of P.W.1, have stated about the search made by them along with P.W.1 and P.W.4, the grandfather of the victim girl also gave evidence in the similar line. P.W.5 - Kendisamy, Instructor of the Computer Centre, has stated that both the accused as well as the victim girl taken computer training from his Centre and they were moving closely and it was also warned by him. P.W.6 - Sureshbabu is the Doctor, who examined the appellant/accused and issued Ex.P.2 - Certificate and P.W.9 - Reena Prabha Gokila is the Doctor, who treated the victim girl and issued Ex.P.3 Certificate. The victim girl was examined as P.W.8 and P.W.7, who is a tea shop owner, turned hostile. P.W.10 - Thiru.Mahendran, Assistant Headmaster of Eriyodu Government Higher Secondary School was examined for the purpose of Ex.P.4 - Certificate and P.W.11 is the Sub-Inspector of Police, who registered the FIR in this case. P.W.12 is the Inspector of Police, who conducted the preliminary investigation and filed final report.

4. In conclusion of the trial, the incriminating materials were put to the appellant/accused under Section 313 Cr.P.C. and the appellant/accused denied the same. Though the appellant/accused stated that there are witnesses on his side, no witness was examined on his behalf. The Trial Court viz., Magalir Neethimandram [Fast Track Mahila Court], Dindigul, found the appellant guilty for the offences, convicted and sentenced him as stated supra.



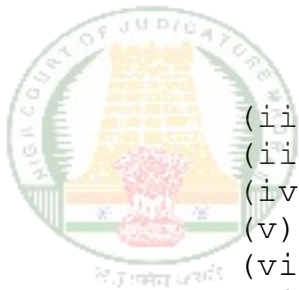
5. As against the conviction and sentence imposed on the appellant, the present criminal appeal is filed.

6. Heard Mr.V.Kathirvelu, learned Senior Counsel, assisted by Mr.Haja Mohideen, learned counsel for the appellant and Mrs.S.Bharathi, learned Government Advocate [Criminal side] appearing for the respondent/complainant.

7. The learned Senior Counsel appearing for the appellant by referring the provisions under Section 375 IPC, contended that even according to the case of prosecution, the age of the victim girl was 16 years at the time of occurrence and therefore, it would not fall under 6th description of Section 375 IPC and the Trial Court erred in convicting the appellant by relying upon Ex.P.4 - Certificate, issued by P.W.10 - Mahendran, Assistant Headmaster of Government Higher Secondary School at Eriyodu. The father of the victim girl, in his complaint Ex.P.1, has specifically mentioned the age of her daughter/victim as '16' years. He also confirmed the same during his evidence. P.W.8 - victim girl, in her evidence also, admitted that her age was 16 at the relevant point of time. P.W.9 - Doctor, who examined the victim girl, has also issued a Certificate to the effect that age of the victim girl was 16. However, the Trial Court has erred in relying upon a Certificate, which was obtained from P.W.10 - Mahendran, Assistant Headmaster, regarding the date of birth of the victim girl as 16.05.1990, proceeded based on that to slap the conviction on the appellant. The learned Senior Counsel by referring upon Ex.P.4 - Certificate would further submit that this Certificate was obtained on 01.06.2010 at the time of filing the final report, when the occurrence was taken place in the year 2005 and the victim girl was examined by the Doctor on 03.03.2006. To make out an offence under Section 366 IPC, this record has been created after four years, when the Assistant Public Prosecutor refused to approve the final report.

8. The learned Senior Counsel appearing for the appellant has also relied upon the evidence of P.W.12 and P.W.8 and submit that the victim girl was aged about 16 years and she went on her own volition along with the accused, since her parents arranged a marriage for her with another person. They travelled only in a bus and they have also shifted their residence to various places and lived together for more than six months. While so, victim girl did not even make an attempt to escape from the appellant/accused in all these six months when she was with the accused and it is P.W.12 secured the victim girl on the directions of this Court in a Habeas Corpus Petition, otherwise, according to him, they could have lived together and begotten a child, and thereafter, the entire scenario would have been depicted.

9. In support of his contentions, the learned Senior Counsel appearing for the appellant relied on the following decisions.



- (ii) 2010 (2) CTC 723
- (iii) 2012 (7) SCC 171
- (iv) 2018 (9) SCC 248
- (v) Order in Crl.A.(MD)No.666 of 2007, dated 30.10.2018
- (vi) Order in CRA-S-571-SB-2012, dated 03.02.2018
- (vii) Order in R/Crl.A.No.301/2002, dated 10.08.2018
- (viii) 1999 Cri. L.J. 998
- (ix) 1963 (1) Cri. L.J. 686 (Vol.66, C.N.211)
- (x) 2002 Cri. L.J. NOC 199
- (xi) Order in Crl.A.No.490 of 2018, dated 09.01.2019

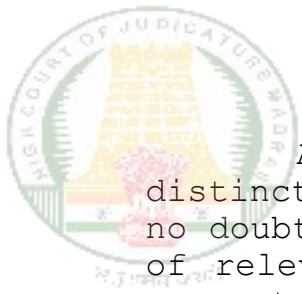
10. Further, the learned Senior Counsel appearing for the appellant relied on the judgment of the Delhi High Court in the case of **Ramesh Singh Vs. State of Delhi** reported in **1988 (3) Crimes 890**, wherein it has been held as follows:-

'On these facts it could not be held that the appellant had taken the prosecutrix out of the lawful guardianship of her parents as contemplated by Section 361 IPC. It has to be established by the prosecution by cogent evidence that the accused person had taken or enticed a minor girl out of the lawful guardianship of her parents of such minor. The keeping of a girl slightly below 18 years of age and capable of understanding the implications of such an act by a male person with the full consent of the former by itself may not necessarily give rise to the offence of kidnapping from the lawful guardianship of her parents.'

11. The learned Senior Counsel appearing for the appellant has also relied on the judgment in **S.Varadarajan Vs. State of Madras** reported in **1965 AIR [SC] 942**, wherein the Hon'ble Supreme Court while confirming the conviction under Section 303 IPC, has held as follows:-

'19.

'Reliance is placed upon the decision of Mustaq Ahmed J. in AIR 1949 All 710 wherein the learned Judge observed that where a minor girl voluntarily leaves the roof of her guardian and when out of his house, comes across another who treats her with kindness, he cannot be held guilty under section 361, Indian Penal Code. This decision cannot help the accused for, on the facts of that case, it was found that the girl went out of the protection of her parents of her own accord and thereafter went with the accused. In the present case it is not possible to hold that she is not under the guardianship of her father. In either contingency, namely, whether she went out to answer calls of nature, or whether she went to the house of the accused pursuant to a previous arrangement, she continued to be under the guardianship of her father. On the evidence, it is not possible to hold that she abandoned the guardianship of her father and, thereafter, the accused took her with him.'

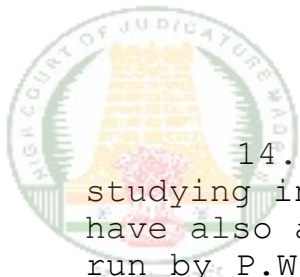


After pointing out that there is an essential distinction between the words "taking" and "enticing" it was no doubt observed that the mental attitude of the minor is not of relevance in the case of taking and that the word "take" means to cause to go, to escort or to get into possession. But these observations have to be understood in the context of the facts found in that case. For, it had been found that the minor girl whom the accused was charged with having kidnapped had been persuaded by the accused when she had gone out of her house for answering the call of nature, to go along with him and was taken by him to another village and kept in his uncle's house until she was restored back to her father by the uncle later. Thus, here there was an element of persuasion by the accused person which brought about the willingness of the girl and this makes all the difference. In our opinion, therefore, neither of these decisions is of assistance to the State.

20. We are satisfied, upon the material on record, that no offence under S. 363 has been established against the appellant and that he is, therefore, entitled to acquittal. Accordingly, we allow the appeal and set aside the conviction and sentence passed upon him.''

12. Per contra, Mrs.S.Bharathi, learned Government Advocate (Criminal Side) appearing for the respondent submitted that Ex.P4 - Certificate disclose the date of birth of the victim girl as 16.05.1990 and therefore, as on the date of occurrence i.e., on 29.09.2005, the victim girl must be 15 years and 4 months and therefore, she was a minor and even if she has consented for sexual intercourse, it is an offence as per 6th description of Section 375 IPC. Mere penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape and in this case, the victim girl was found pregnant when she was recovered. P.W.9 - Doctor, who examined the victim girl on 03.03.2006, has clearly stated that the victim girl was pregnant of 18 to 20 weeks and her Certificate Ex.P.3 was also marked before the Trial Court. The victim girl P.W.8, in her evidence, has clearly stated that the accused in the guise of dropping her in his Car, abducted her to a place, where she was confined and the appellant/accused had also physical relationship with the victim girl, on account of which, she conceived, when she was in the custody of the appellant/accused and therefore, this is a clear case of abduction and rape and the minor contradictions referred to by the learned Senior Counsel appearing for the appellant are not sufficient to reverse the findings of the Trial Court.

13. This Court paid its anxious consideration to the rival submissions made by the learned counsel on either side and also



14. The victim girl [P.W.8] and the appellant/accused were studying in the Government Higher Secondary School at Eriyodu. They have also attended a computer training course in a private Institute run by P.W.5. Since both studying in the same School, they closely moved in the Computer Centre, which was witnessed by P.W.5 and P.W.5 has also warned the appellant/accused as well as P.W.8 on previous occasions. The victim girl left her home on 29.09.2005 for attending the computer class, but she did not attend the class on that day and from there both P.W.8 and the appellant/accused were found missing. The complaint was lodged only on 04.10.2005 by the father of the victim girl after five days from the date of missing of the victim girl. The victim girl was recovered after five months thereafter. The victim girl was produced before the Jurisdictional Magistrate after her rescue and also produced before this Court in a Habeas Corpus Petition. The said statements were not placed before the Trial Court. The victim girl was subjected for medical examination on 03.03.2006. P.W.9 - Doctor, who examined P.W.8, issued Certificate of Examination in Ex.P.3 and according to that report, there was no external injuries, hymen was absent and her private parts were grown up and eligible for physical relationship and she was also found pregnant by 18 to 20 weeks.

15. P.W.8, in her evidence, has stated that on 29.09.2005, while she was returning to home after attending the Computer Centre, the appellant/accused in the guise of dropping her in her house, abducted her, locked her in a house and had sexual relationship with her. She denied any marriage was solemnized between them. She further states that while coming in the steps from the first floor, she fell down and got aborted. The learned Senior Counsel appearing for the appellant by referring her evidence, has pointed out that while giving evidence before the Court on 29.06.2012, she was married to another person and to justify her conduct, she gave evidence as if she was abducted in a Car and locked in a house, whereas, it was not her statement before the respondent/police when she was examined under Section 161(3) Cr.P.C. The learned Senior Counsel has also referred to her statement, which was given before the Jurisdictional Magistrate and it is contra to her evidence before the Trial Court and therefore, the prosecuting agency has suppressed her evidence before the Jurisdictional Magistrate, when she was rescued as on 02.03.2006.

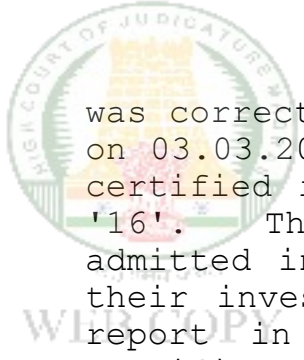
16. This Court feels that there is some force in the argument of the learned Senior Counsel appearing for the appellant. The victim girl was found missing on 29.09.2005 and was rescued on 02.03.2006 after five months. The Investigation Officer [P.W.12], in his evidence, admitted that the victim girl gave statement to him that since her parents made arrangements for her marriage with another person, she went with the appellant/accused in a bus to Palani and from there, they went Erode in another bus and they lived and and wife for four months, where they worked in



an Infra Tex Company and thereafter, shifted to one Arun Tex Panian Company. From October 2006, they have taken a house at Ayyampalayam and when she was pregnant, she also has periodical check up with a Doctor. He further states that according to her statement, as per the direction of this Court, she was secured and produced before this Court. P.W.14 Grandfather of the victim girl also admits that he filed a petition before this Court for securing the victim girl and the victim girl was also examined before this Court. P.W.1 father of the victim girl in his evidence admits that the victim girl was produced before the Court, where the victim girl gave a statement that the appellant/accused has tied a Thali and thereafter, had sexual intercourse with her. P.W.1 further admitted in his cross-examination that, he has arranged a marriage for the victim girl with another person. P.W.2 and P.W.3, who are the brothers-in-law of P.W.1, have also stated in their evidence that the victim girl was produced before the Court pursuant to an order of this Court and a statement was also given by the victim girl before the concerned Court.

17. As rightly pointed by the learned Senior Counsel appearing for the appellant, the available evidence disclose that the victim girl gave a statement before the Court on 02.03.2006 when she was recovered by the respondent police and the said statement was not placed before the Trial Court. This evidence of P.W.8 was recorded by the Trial Court only on 29.06.2012, six years after the occurrence, that too, when she was married to another person and also begotten a child. Moreover, the Trial Court framed the charge that this accused and the victim loved each other and when the parents of the victim girl arranged for a marriage to her with another person, the victim girl eloped with the accused and they married in a Mariamman Temple at Erode by tying a Thali and thereafter, taken a house for rent at K.K.Valasu and the appellant/accused had physical relationship with the victim girl by making her to believe that she was married to him. Therefore, the materials collected and placed before the Trial Court by the Investigating Agency was that the victim girl and the accused loved each other and on knowing that, P.W.1 had arranged for a marriage with another person, she eloped with the appellant/accused, married him in a Temple and lived together for five months. Therefore, admittedly, it is a case of love affair and then elopement.

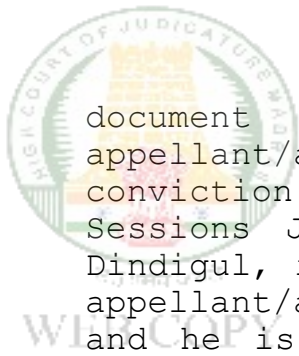
18. Now, this Court has to analyze whether the age of the victim girl at the time of occurrence was below 16 or above 16, which would fall within the definition of 6th description of Section 375 IPC. As per the said description, even if it was consented, when the victim was under 16 years of age, the appellant/accused is said to have committed the offence of rape. The complainant, father of the victim girl while lodging the complaint [Ex.P.1] on 04.10.2005, mentioned the age of the victim girl in the complaint as '16'. When it was referred to P.W.9 and verified during her cross-examination before the Trial Court, the victim girl admitted that it



was correct. The victim girl was produced before the Doctor [P.W.9] on 03.03.2006 and the Doctor, who examined the victim girl has also certified in Ex.P.3 Certificate that the age of the victim girl as '16'. The Investigation Officers P.W.12 and P.W.13 have also admitted in their evidence that the age of the victim girl as per their investigation was 16. However, at the time of filing final report in the year 2010, the Investigation Agency obtained a Certificate from the Assistant Headmaster of Eriyodu Government Higher Secondary School on 01.06.2010 and filed the final report as if the age of the victim girl was 15 years, 4 months and 18 days on the date of complaint. The victim girl was rescued on 03.03.2006. As rightly pointed out by the learned Senior Counsel appearing for the appellant, Ex.P.4 - Certificate was obtained only on 01.06.2010.

19. The learned Senior Counsel disputed the Certificate Ex.P.4 that it was mere a Certificate and it is not the Transfer Certificate [T.C.], based on which, the Certificate was issued and in the absence of the T.C., this secondary evidence cannot be relied upon. He would further submit that the Headmaster is the competent authority to issue such Certificate. However, the Certificate was obtained from incompetent person and on that ground also, this Certificate relied by the prosecution cannot be accepted. P.W.10 admits in his evidence that he was working as an Assistant Headmaster in the Government Higher Secondary School at Eriyodu. But, Ex.P.4 - Certificate was issued as Headmaster of Government Higher Secondary School, Eriyodu. According to P.W.4, P.W.8 Seela @ Jeyaseela was admitted in that School only on 09.06.2003, i.e., two years prior to the occurrence. She studied in a different School prior to that and from that, she was transferred to Eriyodu School and admitted in the School in the year 2003. According to P.W.10, this date of birth was entered in their Register, based on the previous T.C. and admits that it was not based on the Birth Certificate. Now, the previous T.C. and in all the School Registers pertaining to the entry of the year, the date of birth was not recovered by the Investigation Agency and placed before the Court, whereas the father of the victim girl has specifically admitted in his evidence that, he was not aware of the exact date of birth of her daughter, the victim girl. When there is a evidence from the complaint Ex.P.1 and evidence of the Doctor that the age of the victim girl was 16 at the relevant point of time, it is not safe to rely upon the Certificate of P.W.10 issued in Ex.P.4 that the date of birth was 16.05.1990. No doubt, the School Certificate can be relied as an authenticated document for the age proof, it cannot be an authenticated proof in this case, when the Certificate was issued by the Assistant Headmaster as if the Headmaster of the School. Moreover, the Certificate was obtained only at the time of filing final report on 01.06.2010 when the victim girl was rescued as early as on 02.03.2006. Further, the victim girl, the father of the victim girl and the Doctor, who examined the victim girl, gave evidence that the age of the victim girl was 16 and therefore, this

https://hccservicescourts.gov.in/hccservices/ the finding of the Trial Court based on Ex.P.4



document is not safe to sustain the conviction upon the appellant/accused. Accordingly, this appeal is allowed and the conviction and sentence imposed on the appellant by the learned Sessions Judge, Magalir Neethimandram (Fast Track Mahila Court), Dindigul, in S.C.No.58 of 2011, dated 19.12.2013, is set aside. The appellant/accused is acquitted of the charges levelled against him and he is set at liberty. Fine amount, if any paid, shall be refunded to him. The bail bonds, if any, executed by the appellant shall stand cancelled.

Sd/-

Assistant Registrar ()

// True Copy //

/ /2020

Sub Assistant Registrar(CS)

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To

- 1.The Sessions Judge,
Magalir Neethimandram (Fast Track Mahila Court),
Dindigul.
- 2.The Inspector of Police,
Eriyodu Police Station,
Dindigul District.
- 3.The Superintendent,
Central Prison,
Madurai.
- 4.The Additional Public Prosecutor,
Madurai Bench of Madras High Court,
Madurai.

+1 CC to M/s.A.HAJAMOHIDEEN, Advocate (SR-2989[F] dated 24/01/2020)

Copy to:

The Section Officer,
Criminal Section, (2 Copies),
Madurai Bench of Madras High court,
Madurai

CRL.A. (MD)No.2 of 2014
23.01.2020

SPU(29.07.2020)10P 8C

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