

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 22.01.2021

CORAM

THE HONOURABLE MR.JUSTICE A.D.JAGADISH CHANDIRA

CRL.RC.NO.233 OF 2015

AND

M.P.NO.1 OF 2015

Balamurugan,
S/o.Lakshmanan

... Petitioner/Accused

Vs

The State Rep., by
Sub - Inspector of Police,
Velankanni Police Station,
Nagapattinam.

... Respondent/Complainant

Prayer:

This Criminal Revision Petition filed, under Section 397 r/w Section 401 Cr.PC, to set aside the conviction and sentence dated 19.11.2014 imposed by the learned District and Sessions Judge, Nagapattinam in C.A.No.13 of 2014 for offence u/s 304 (A) (2 Counts) to undergo Rigorous Imprisonment for two years for each count and to pay a fine of Rs.2,000/- to each count and in default to undergo a simple imprisonment for six month for each count confirming the conviction and sentence dated 18.03.2014 imposed by the Chief Judicial Magistrate, Nagapattinam in C.C.No.53 of 2013.

For Petitioner : Mr.K.C.Karl Marx

For Respondent : Mr.T.Shunmugarajeswaran,
Government Advocate (Crl.Side)

ORDER

(The case has been heard through video conference)

The Criminal Revision has been filed by the Petitioner/Accused, against the judgement of conviction and sentence dated 19.11.2014 imposed by the learned District and Sessions Judge, Nagapattinam in C.A.No.13 of 2014, for the offence under Section 304(A) (2 Counts) to undergo Rigorous Imprisonment for Two Years, for each count and to pay a fine of Rs.2,000/- to each count and in default to undergo Simple Imprisonment for six months for each count, confirming the

judgement of conviction and sentence imposed by the judgement dated 18.03.2014 made in C.C.No.53 of 2013, by the learned Chief Judicial Magistrate, Nagapattinam.

2.The brief facts of the prosecution case is that on 11.10.2009, at about 10.00 p.m., the deceased Chandrasekaran was going in his motor cycle bearing Registration No.TN51 E 4096 in Nagapattinam - Velankanni ECR Main Road, and when he was crossing near Ettaladi and turning towards South, the accused who was driving the auto rickshaw bearing Registration No.TN51 E 4061 with passengers viz., Mahalingam, Mariammal and Mangaiyarkarasi towards North had driven the auto rickshaw in a rash and negligent manner without hooting any horn and dashed against the motorcycle and due to the impact, the rider of the motorcycle Chandrasekaran and one Mahalingam who travelled in the auto rickshaw sustained grievous injury and both were immediately taken to the Government Hospital, Nagapattinam and both of them died, in spite of the treatment given on the very same night itself.

3.Based on the complaint, a criminal case in Crime No.127 of 2013 was registered under Section 279 and 304 (A) IPC (2 counts), against the Revision Petitioner/Accused. After completing the investigation, the Sub - Inspector of Police, Velankanni Police Station, Nagapattinam has filed the Final Report, before the Court of Judicial Magistrate No.1, Nagapattinam, for the offence under Section 279 and 304 (A) IPC (2 Counts). On receipt of the Final Report along with the relevant documents, the case was taken in C.C.No.53 of 2013, on the file of the learned Judicial Magistrate No.I, Nagapattinam and on the appearance of the Petitioner/Accused, he was furnished copies of the relevant documents under Section 207 Cr.P.C.

4.Thereafter, the case was made over to the learned Chief Judicial Magistrate, Nagapattinam and taken on file in C.C.No.53 of 2013. The substance of the case was explained to the Petitioner/Accused and the Petitioner/Accused had denied the offence and claimed to be tried. In the trial, in order to prove the guilt of the Petitioner/Accused, the prosecution, examined witnesses P.W1 to PW19 on its side and marked documents Ex.P1 to Ex.P13. P.W.1 viz. Rengasamy, who is the nephew of one of the deceased Mahalingam (the passenger sitting on the right rear side of the auto rickshaw at the time of incident). Ex.P1 is the complaint given by P.W.1. P.W.2 viz. Mariyammal, P.W.3-Mangaiyarkarasi are the other passengers who were travelling along with P.W.1 and the deceased Mahalingam in the auto rickshaw. P.W.4 to P.W.10 are the witnesses who have heard about the accident and come to know that Mahalingam and Chandrasekaran died in the accident. P.W.11 is the Doctor, who had given

treatment to both the victims viz. Mahalingam & Chandrasekaran. Ex.P3 & Ex.P4 are the Accident Registers of the victims. P.W.11 had noted the injuries sustained by the victims. P.W.13 & P.W.18 are the policemen, who had taken the bodies of the victim for conducting autopsy and handed over the bodies of the victims to their respective relatives. P.W.14 is the Motor Vehicle Inspector, who had inspected the vehicle viz. auto rickshaw bearing Registration No.TN51 E 4061 and issued Ex.P5. He had also inspected the motorcycle bearing Registration No.TN51 E 4096 and issued Ex.P6 M.V.I. Report in respect of the motorcycle. P.W.15, is the inspector, who had received the complaint and registered a case in Crime No.361 of 2009, which is Ex.P7. P.W.16 is the Doctor who conducted autopsy on the body of deceased Mahalingam and issued post mortem report, Ex.P8. P.W.17 is the doctor, who had conducted post mortem on the deceased Chandrasekaran, he had issued Ex.P9, the Postmortem Report. P.W.19 is the Investigation Officer, he had investigated the case and gone to the place of occurrence and prepared Observation Mahazar viz. Ex.P2 and Rough Sketch viz. Ex.P10 in the presence of witnesses. He had conducted inquest on the body of the deceased in the presence of witnesses and Panchayatdhars, Ex.P.11 is the Inquest Report of Chandrasekaran and Ex.P13 is the inquest report of the deceased Mahalingam. On 12.10.2009 this P.W.19, he has altered the Section of Law to one under Section 179 & 304(A) (2 Counts) IPC and Ex.P12 is the Alteration Report. When the incriminating materials were put to the petitioner, he had denied the charges. Further, on the side of the defence, no oral or documentary evidence were adduced and no material object was produced on the side of the prosecution. The Trial Court, found the Petitioner/Accused guilty and convicted him as stated above.

5.Against the said conviction and sentence, the Petitioner/Accused filed C.A.No.13 of 2014 and the Appellate Court had dismissed the appeal and confirmed the conviction and sentence passed by the Learned Chief Judicial Magistrate in C.C.No.53 of 2013. Against which, the present Criminal Revision has been filed.

6.Mr.K.C.Karl Marx, learned counsel appearing for the Petitioner/Accused would submit that both the Courts below erred in convicting the Petitioner/Accused without there being requisite materials to prove the charges against the Petitioner/Accused beyond all reasonable doubt. The prosecution has miserably failed to prove the charges under Section 304 (A) IPC. In order to prove the charge under Section 304 (A) IPC, the prosecution has to prove that the accused had done any rash or negligent act. In this case none of the witnesses have spoken that the accused/petitioner had driven the auto rickshaw in a rash or negligent manner.

7.It is a case of res ipsa loquitor and the very fact the manner in which the accident had happened and the place of impact on the auto rickshaw would clearly show that the act of rashness or negligence was only on the part of the rider of the motor cycle, who had driven the vehicle in a rash and negligent manner and dashed against the autorickshaw and responsible for his death and for the death of one of the passengers in the petitioner's autorickshaw. The impact had happened on the right rear side of the auto rickshaw and the passenger who was sitting on the rear right side of the auto rickshaw had sustained injuries entirely on the right side of the body, due to which he died. The Courts below have failed to take into consideration the evidence of P.W.14, the Motor Vehicle Inspector and the accident vehicle reports given by him with regard to the auto rickshaw and the motor cycle, which have been marked as Ex.P5 and Ex.P6. The evidence of PW14 and Ex.P5 & Ex.P6 would go to show that the impact was on the rear right side of the auto rickshaw to prove the fact that the motor cycle rider (one of the deceased) had come from the side and hit against the auto rickshaw on its right rear side. Further, the evidence of PW16, the Doctor, who conducted the autopsy on the body of the deceased Mahalingam (passenger sitting on the rear right side of the auto rickshaw) and the autopsy report viz. Ex.P8, would go to show that the entire injuries sustained by him were on the right side of his body, due to the impact of the collision on the rear right side of the auto rickshaw. Further, the evidence of P.W.17, the Doctor, who conducted postmortem on the body of the deceased Chandrasekaran (rider of the motor cycle) and the postmortem report viz.Ex.P9 would also fortify the fact that the rider of the motorcycle could not have sustained injuries by riding fast and having dashed against the auto rickshaw. When the case of the prosecution having not been proved beyond reasonable doubts, the Courts below without properly analysing the evidence on record taking into consideration that there were two deaths, have wrongly convicted the petitioner / accused for no fault of him. He would reiterate that none of the witnesses have spoken that the auto rickshaw driven by the petitioner / accused was driven in a rash and negligent manner.

8.Learned counsel for the petitioner would ultimately conclude that in as much as the rash and negligent driving of the petitioner / accused having not been proved by oral and documentary evidence, the conviction and sentence imposed by the Trial Court and confirmed by the Appellate Court deserve to be set aside and the petitioner accused has to be acquitted from the charges framed against him.

9.In support of his contentions, learned counsel relied on the judgement of this Court in M.Subramani Vs. State represented by Inspector of Police, Edapadi Police Station, Salem District,

reported in 2017-1-L.W.(Crl.) 160 wherein this Court placing reliance on the decision of the Hon'ble Apex Court in State of Karnataka Vs. Satish reported in (1998) 8 SCC 493 has held that merely because the vehicle was stated to be driven at high speed it does not mean that the vehicle was driven either rashly or negligently.

10.It is apposite to refer to the relevant paragraphs in M.Subramani Vs. State represented by Inspector of Police stated supra;

"19. In State of Karnataka Vs. Satish {(1998) 8 SCC 493}, in a road accident where the accused was prosecuted under Section 304-A IPC, one of the witness had stated that the bus driver came driven the bus at a high speed. The Hon'ble Apex Court held that it would not satisfy the requirement of the driver driving the vehicle in a rash and negligent manner as required under Section 304-A IPC and acquitted the accused.

20. In this respect, the following observations made by the Hon'ble Supreme Court in SATHISH (supra) are relevant here to note:-

!! 3.Both the Trial Court and the Appellate Court held the respondent guilty for offences under Sections 337, 338 and 304-A IPC after recording a finding that the respondent was driving the truck at a high speed"". No specific finding has been recorded either by the Trial Court or by the First Appellate Court to the effect that the respondent was driving the truck either negligently or rashly. After holding that the respondent was driving the truck at a "high speed", both the Courts pressed into aid the doctrine of res ipsa loquitor to hold the respondent guilty."

"4.Merely because the truck was being driven at a "high speed" does not speak of either "negligence" or "rashness" by itself. None of the witnesses examined by the prosecution could give any indication, even approximately, as to what they meant by "high speed". "High speed" is a relative term. It was for the prosecution to bring on record material to establish as to what it meant by "high speed" in the facts and circumstances of the case. In a criminal trial, the burden of providing everything essential to

the establishment of the charge against an accused always rests on the prosecution and there is a presumption of innocence in favour of the accused until the contrary is proved. Criminality is not to be presumed, subject of course to some statutory exceptions. There is no such statutory exception pleaded in the present case. In the absence of any material on record, no presumption of "rashness" or "negligence" could be drawn by invoking the maxim "res ipsa loquitur".

Further in M. Subramani v. State, this Court had also referred to the decisions Puttaiah @ Mahes v. State by Rural Police (Crl. Review Petition No. 1317 of 2010, dated 04.03.2016 (Karnataka High Court),

11.Per contra, Mr.T.Shunmugarajeswaran, learned Government Advocate (Crl. Side) would vehemently oppose stating that the witnesses who have travelled in the auto rickshaw have categorically spoken about the vehicle being driven in a rash and negligent manner and that the petitioner/accused is responsible for two deaths. It is a case where due to the rashness and negligence act of the petitioner two innocent lives have been lost and it is the evidence of P.W.2 that the vehicle was driven in a fast manner causing fear to her and that in her evidence she has stated that the petitioner/accused was also drunk at that time and he had also allowed one person to sit near him in the driving seat and he should have exercised reasonable care and caution but he has failed to do so, thereby, committed an act of negligence resulting in the accident.

12.At this juncture, learned counsel for the petitioner would submit that it is not a case of accident caused due to drunken driving and no charges have been framed against the petitioner / accused that he had driven the auto rickshaw under the influence of alcohol and the petitioner had not been subjected to any alcohol test. He would further submit that it is the evidence of PW3 that the motorcycle was driven without a head light. Further, P.W.1, who is stated to have deposed that the petitioner had allowed yet another passenger to sit near him in the driver seat had been treated hostile. Learned counsel would further submit that the Courts below have erroneously convicted the petitioner without there being any legal evidence on record.

13.Now what is to be seen is whether the Courts below have rightly appreciated the evidence on record and whether the Courts below are right in convicting the accused based on the

available evidence.

14.This Court is aware and not oblivious of the legal position that the revisional Court cannot re-appreciate the evidence like an Appellate Court, however, when it is shown that there had been gross misappreciation of evidence by the two Courts below, the power of this Court to go into evidence has been preserved by Section 401(1) of Cr.P.C.

15.Now, while analysing the evidence on the side of the prosecution in consonance with the above judgment referred and discussed, P.W.1/ defacto complainant, is a passenger in the auto rickshaw, he is also the nephew of one of the deceased Mahalingam (a passenger who was sitting in the rear right side seat of the auto rickshaw). He had deposed that he was sitting in the front seat of the auto rickshaw and the deceased Mahalingam was sitting on the rear right side of the auto rickshaw. He had further deposed that he was not aware when the accident had occurred and thereby, he had been treated hostile. P.W.2 who is also a co-passenger in the auto rickshaw and the relative of the deceased Mahalingam had deposed that the motorcycle rider dashed against the auto rickshaw, due to which, her brother-in-law, who was sitting in the auto rickshaw sustained injuries and thereafter they had taken both of them in the very same auto rickshaw to the hospital. Further, in the cross examination, she had stated that the motorcycle had hit on the rear right side of the auto rickshaw. P.W.3 had deposed that she is the co-passenger in the auto rickshaw and that the auto rickshaw driver had dashed against the rider of the motorcycle. She had also deposed that the auto rickshaw driver was drunk. However, in her cross examination, she had admitted that she had stated it for the first time before the Court that the auto rickshaw driver was drunk. She had also deposed that she was sleepy and she woke up only after the impact and that she had not seen from where the motorcycle rider came and hit the auto rickshaw. Further, she had stated that both the victims were taken in the same auto rickshaw. P.W.4, P.W.5 and P.W.6 have spoken about having heard about the accident. P.W.7 is the witness for the Observation Mahazor (Ex.P2). P.W.8 is the witness for the Rough Sketch (Ex.P.10) and he had deposed that he had not witnessed the occurrence, thereby, he had been treated hostile. P.W.9 and P.W.10 who are stated to be the eye witnesses have not supported the case of the prosecution and were treated as hostile. P.W.11 is the doctor who had admitted both the victims in the hospital and he had issued the Accident Register, Ex.P.3 is in respect of the victim Mahalingam and he had noted injuries on the right side of the face and cheek of the victim Mahalingam. He had deposed that the motorcycle rider was brought dead and he had issued Accident Register in respect of P.W.4. He had also deposed that the injuries sustained by

the motorcycle rider Chandrasekaran could have happened due to the impact if he had driven the motorcycle in a rash manner and dashed against the auto rickshaw. P.W.12 is a hearsay witness. P.W.14 is the Motor Vehicle Inspector who had inspected both the auto rickshaw and the motorcycle and issued Ex.P5 and Ex.P6 (motor vehicle inspection reports). As per his evidence, he had deposed that he had conducted inspection of both the vehicles and certified there were no mechanical defects in both the vehicles. Further, in Ex.P5 he had noted that the stay rod fixed near the right passenger seat of the auto rickshaw was found bent and that the motorcycle had extensive damages on its front side and that the head light and right indicator of the motorcycle were found damaged. He further deposed that the rider of the two wheeler was not having driving licence. In his cross examination, he had deposed that no inspection was conducted at the place of accident and if the inspection had been done at the place of accident, the tyre marks could have been verified and it could be a conclusive hold to know who is responsible for the accident. P.W.16, is the doctor who conducted autopsy of the victim Mahalingam and the postmortem report is marked as Ex.P8. As per Ex.P8, the injuries found on the body of the deceased Mahalingam are as follows;

"EXTERNAL INJURIES:

1. Red coloured fluid discharge from oral cavity and both nostrils noted.
2. Laceration 1X0.5 c.m X bone depth with fracture of nasal bone noted.
3. Lacerations 1X0.5X0.5 c.m in the right eyebrow. 5X2 c.m X bone depth with fracture of right mandible with contusion noted.
4. Fracture of right mandible with contusion noted.

INTERNAL FINDINGS:

1. Contusion of right side of neck extending to right side of chest upto Axilla.
2. Contusion and fracture of right 2nd, 3rd, 4th, 5th, 6th ribs at constochondral junction.
3. Collection of fluid blood 100 ml noted in the right thoracic cavity.
4. Contusion lower lobe of right lung.
5. Contusion 5X5 c.m anterior aspect of right lobe of Liver.
6. Sub-Scalp contusion noted in frontal, and right temporal region.
7. Linear fracture 19 c.m extending from frontal bone to occipital bone.
8. Laceration 2X1X1 c.m, base of frontal lobe of brain on right side.

9. Fracture of right anterior cranial fossa with herniation of eyeball contents.
10. Contusion and fracture of c7 cervical spine."

P.W.16 had deposed that the victim Mahalingam had sustained four external injuries and nine internal injuries and most of the injuries were on the right side of his body. He had further deposed that the injuries could have been sustained when the victim sitting on the right side of the auto rickshaw would be hit by a motor cycle on the right side.

16.P.W.17, the doctor, who had conducted postmortem on the victim Chandrasekaran (motorcycle rider) found three external injuries and 11 internal injuries on the body of the Chandrasekaran. He had issued Ex.P9, the postmortem report. As per Ex.P9 the following injuries were found on the body of the deceased Chandrasekaran;

"EXTERNAL INJURY: Laceration with Scalp Haematoma over forehead, laceration on R Elbow, Abrasive injury over R thigh.

INTERNAL INJURY: Thorax: No Ribs Fractures. R Lungs - 450 gms L Lungs - 400 gms c/s congested. R Lung contusion with Blood clot 200 ml present. Heart - 300 gms c/s congested. Myoral bone intact. Abdomen: Stomach 200ml partially digested food. Liver - 1500 gms, Spleen - 180 gms c/s. Kidney each 150 gms c/s. Congested. No free fluid Skull: Scalp Laceration with Haematoma over R Frontal region. Skull No fractures. Membrane congested R Temporal Subdural Haematoma 200 ml Brain - 1350 gm c/s. Congested."

In his examination, P.W.17 had deposed that the injuries could have been sustained by the victim if he had dashed in a fast manner on an auto rickshaw.

17.P.W.18 is the Special Sub Inspector and he had handed over the body of Chandrasekaran to his relatives. P.W.19, the Investigating Officer who had completed investigation and filed the final report. He had deposed that the extensive damages were found on the motorcycle and there was damage to the rear right side of the auto rickshaw, due to which, the stay rod on the right side of the passenger seat of the auto rickshaw was found bent.

18.Now, while analysing the evidence in consonance with the judgements referred above, it is needless to mention that none of the witnesses have spoken that the petitioner had driven the

auto rickshaw in a rash and negligent manner. Further, no other material has been brought out by the prosecution to prove that the accident had occurred due to the rashness and negligence of the petitioner. As per the evidence of P.W.14 and Ex.P5 and Ex.P6, the auto rickshaw had severe damages on the rear passenger side, whereas, as per Ex.P6, the motorcycle driven by the other victim had suffered damages on the front portion. There was no damage on the front side of the auto rickshaw and even as per the evidence of the witnesses both the injured had been taken to the hospital in the very same auto rickshaw and other than the rider of the motorcycle and one passenger sitting in the right rear seat in the auto rickshaw no one else was injured. Thus, proving the fact that the victim /motorcycle rider had come in a rash and negligent manner and dashed on the rear right side of the auto rickshaw. It is also corroborated by the evidence of P.W.16, the doctor, who conducted post mortem on the body of the deceased Mahalingam and he had found that the entire injuries sustained by the deceased Mahalingam were on the right side. The said Mahalingam was sitting on the right side of the auto rickshaw and P.W.16, the doctor had also confirmed that there was every possibility of a person sustaining injuries, if he had been hit by the motorcycle in a rash and negligent manner while sitting inside the auto rickshaw. As per Ex.P5, there were severe damages on the right side of the auto rickshaw and that the rear right side of the passenger seat stay rod above the rear side was found bent.

19.P.W.17 viz. Dr.Sivakumar, who conducted post mortem on the deceased Chandrasekaran (motorcycle rider) had deposed that if a person driving a two wheeler dashed against the auto rickshaw, there is a possibility of him sustaining such injuries.

20.None of the witnesses have spoken that the petitioner had driven the auto rickshaw in a rash and negligent manner. However, there is ample materials to show that one of the deceased who is the rider of the two wheeler had come in a rash and negligent manner and had dashed against the auto rickshaw on the right rear passenger side. There was absolutely no damage to the front side of the auto rickshaw, thus, making it clear that the incident had happened only due to the rash and negligent act of the two wheeler rider. The criminal jurisprudence says that unless there is a statutory burden it is always on the prosecution to establish the guilt of the accused and prove its case beyond all reasonable doubt. The prosecution should let in evidence to prove that the ingredient necessary for a particular offence is made out. Merely because there was an accident and that two persons have lost their lives the burden cannot be shifted on the accused to prove his innocence and there can be no presumption that the accused drove the

vehicle in a rash and negligent manner. In this case, prosecution has miserably failed to prove its case. As stated above, the available materials point out that the incident had happened due to an act of the motorcycle driver. The Courts below without properly appreciating the evidence on record have departed from the rule of prudence and had erroneously found the accused guilty for the offence and convicted him as stated above. The judgment and orders passed by both Courts below are liable to be set aside and the accused deserves to be acquitted from all the charges.

21. In the result, the Criminal Revision is allowed and the Judgement dated 19.11.2014, made in C.A.No.13 of 2014 by the learned District and Sessions Judge, Nagapattinam, confirming the Judgment of conviction and sentence imposed by the Judgment dated 18.03.2014 made in C.C.No.53 of 2013 passed by the learned Chief Judicial Magistrate, Nagapattinam are set aside. The petitioner is acquitted from the charges framed against him. The fine amount if any paid by the petitioner to be refunded to him. Consequently, connected miscellaneous petition is closed.

22. It is submitted by the learned counsel for the petitioner that the petitioner has surrendered before the Chief Judicial Magistrate, Nagapattinam on 18.01.2021 and he is in judicial custody, and now confined in Sub Jail, Chidambaram. The petitioner is directed to be released and set at liberty forthwith if he is not otherwise wanted in any other case. The bail bonds stand cancelled. Fine amount if paid is ordered to be returned to the petitioner. Registry shall return the records to the respective Courts.

Sd/-
Assistant Registrar (CS VIII)

//True Copy//

Sub Assistant Registrar

kas

To:

1. The District and Sessions Judge,
Nagapattinam.
2. The Chief Judicial Magistrate,
Nagapattinam.

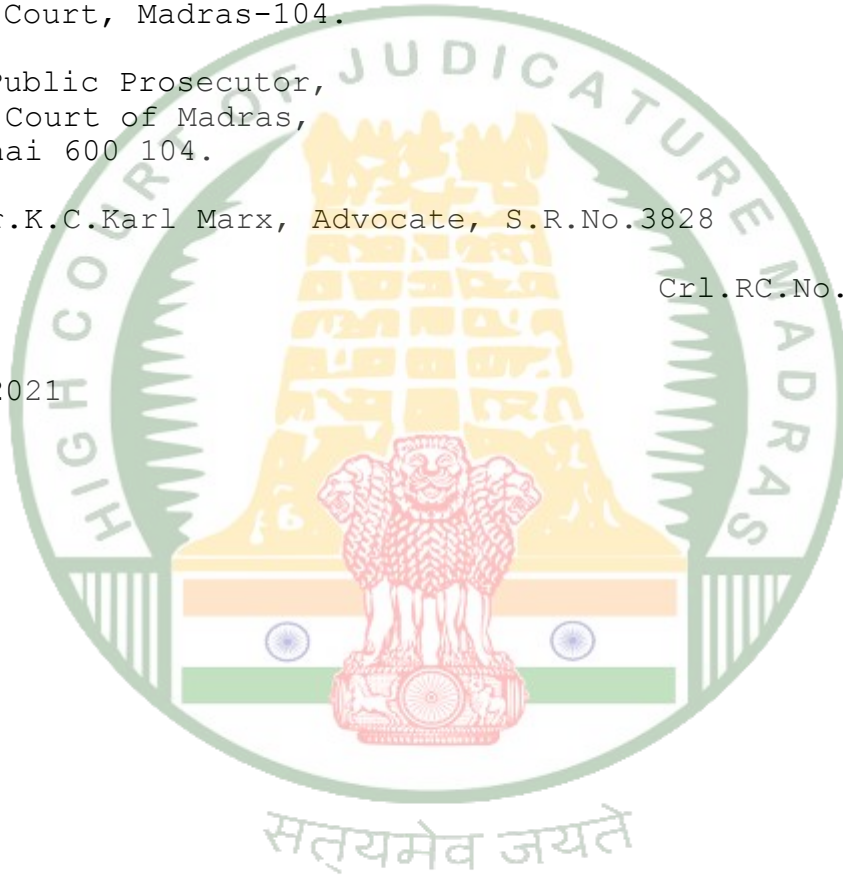
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3. The Judicial Magistrate-I,
Nagapattinam.
4. The Jailer, Sub Jail,
Chidambaram.
5. The Sub - Inspector of Police,
Velankanni Police Station,
Nagapattinam.
6. The Section Officer,
Criminal Section,
High Court, Madras-104.
7. The Public Prosecutor,
High Court of Madras,
Chennai 600 104.

+1cc to Mr.K.C.Karl Marx, Advocate, S.R.No.3828

Cr1.RC.No.233 of 2015

AD(CO)
CS/24/03/2021



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