

Bail Slip

The Appellant/Sole Accused herein viz Thirumal S/o.Sundaresan was directed to be released on Bail vide order of this Hon'ble Court dated 25.01.2018 in Crl.M.P. No. 28/2018 in Crl.A. No. 4/2018 on the file of this Court.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 26.02.2021

CORAM:

THE HONOURABLE MR.JUSTICE A.D.JAGADISH CHANDIRA

Crl.A.No.4 of 2018

THIRUMAL

S/o.Sundarasan

...Appellant/Single Accused

Vs.

State rep by

Inspector of Police

Thiruthani Police Station

Thiruvallur District

(Crime No.462 of 2011)

...Respondent/Complainant

PRAYER : The Criminal Appeal filed under Section 374(2) of the Criminal Procedure Code, to set aside the judgement passed in S.C.No.135 of 2016 dated 30/11/2017 on the file of the First Additional District Sessions Court, Tiruvallur.

For Appellant : Mr.T.Muruganantham

For Respondent : Ms.V.Sharadha Devi

Government Advocate (Crl. Side)

JUDGMENT

This Criminal Appeal has been filed to set aside the Judgement passed in S.C.No.135 of 2016 dated 30.11.2017 on the file of the First Additional District Sessions Court, Thiruvallur finding the appellant / accused guilty of the offences under Sections 304(A) IPC (4 counts) and convicting and sentencing the petitioner to undergo two years Simple Imprisonment.

2. Brief facts of the case: The defacto complainant/ PW-1 and the wife of the appellant were friends. The defacto complainant is the resident of Arakkonam and she has got 3 children namely Sridevi aged 16 years, Swetha aged 15 years and Divyaprakash aged 5 years. On 12.06.2011, the defato

complainant along with her children and friends Selvi, Hemalatha W/o. Arokyadas and her son Rithik Rakesh aged 6 years had gone to the mother's house of said Hemalatha at Periyar Nagar, Thiruhathani. On the same day at about 4 p.m., the appellant had taken the children of the defacto complainant along with the son of Hemalatha to a pond in a quarry near Thiruthani Foot Hill to teach swimming and that he had tied Thuppattas on the hands of the children and let them into the pond knowing well that the children do not know swimming. Thereby, the children got drowned in the pond and died. Based on the complaint given by the defacto complainant, initially the case was registered for offence under Section 174 Cr.P.C. (Drowning).

3. After completing the investigation, the respondent had altered the offence to one under Section 304(II) IPC (4 counts) and had filed the final report against the appellant/accused before the learned Judicial Magistrate, Thiruthani. Thereafter, the case was taken up in P.R.C.No.16 of 2012 and the copies were served on the accused under Section 207 Cr.P.C. and on finding, that the case was triable by the Court of Sessions, the case was committed to the District and Sessions Court, Tiruvallur and the same was taken up in S.C.No.135 of 2016.

4. On appearance of the accused and after initial questioning, the trial Court framed charges against the accused for offence under Section 304(II) IPC (4 Counts) and the appellant/accused denied the charges and sought it to be tried.

5. On the side of the prosecution, P.W.1 to P.W.16 were examined and M.O.1 and M.O.2 were marked.

6. P.W.1 had deposed that on 12.06.2011, she along with her friends Selvi, Hemalatha had planned to go to Kannikovil at Thiruthani. Accordingly, she along with her two daughters and son and P.W.2 / Hemalatha along with her son, had taken bus to go to Kannikovil and after getting down at Thiruthani bus depot, they had gone to P.W.2/Hemalatha's mother's house where they had taken lunch. The children were playing outside. After 10 minutes, when P.W.1 and P.W.2 had come out, they had seen the appellant /accused taking the 3 children of P.W.1 and the son of the P.W.2 along with him. When P.W.1/defacto complainant had enquired him, the appellant / accused had told her that they were going nearby and he would take care of them. While so, at about 3.30 p.m., the appellant/accused had contacted P.W.2 through her mobile phone and gave some informations following which, P.W.2 got agitated and P.W.2 along with P.W.1 had rushed to the quarry near the foot hill where they had seen some people gathered near that place and the appellant / accused and

his two sons were also there. When P.W.1 had questioned the appellant/accused, he was silent and thereafter, he had informed that he had let the children inside the pond in the quarry by tying their hands with their Thuppattas and that they got drowned and when P.W.1 had questioned him that her children did not know swimming and why did he do that, the appellant/accused had told her that he also did not know swimming. Thereafter, they had called some boys and searched for the children and after sometime, they had taken out the bodies of the children from the pond and gave first aid to them and thereafter, the children were sent to Thiruthani Government Hospital by Ambulance and that the Doctor who had examined them, had informed that all the children were brought dead. On the same day, P.W.1 had given the complaint at the police station and since she does not know reading and writing, some one else had written the complaint. The complaint was marked as Ex.P.1.

7. P.W.2 corroborated the evidence of P.W.1 and she has deposed that the appellant/accused had gone along with the children and that he had contacted her over mobile phone.

8. P.W.3 is the husband of P.W.1 and he had deposed that on coming to know about the incident, he had gone to the Government Hospital and received the bodies of the children after post-mortem.

9. P.W.4 is a hearsay witness. He has deposed that he heard about the incident through his relative Arokyadas.

10. P.W.5 has stated that after hearing about the incident, he had gone to the Government Hospital on 13.06.2011 and seen the bodies of the four children.

11. P.W.6 had spoken about the arrest of the appellant/accused on 16.07.2011 and he had deposed that the appellant/accused had given a confession statement and that he had attested as a witnesses in the confession statement and that the admitted portion of the confession statement has been marked as Ex.P.4.

12. P.W.7 is the Medical Officer. She has deposed that on 13.06.2011 while she was working at the Thiruthani Government Hospital as Assistant Medical Officer, she had conducted post-mortem on a 6 year old boy Rithik Rakesh on the intimation of the respondent police. She had further deposed that the viscera was sent to the Forensic Lab for chemical analysis and that the deceased Rithik Rakesh had died due to drinking more water and chest congestion and suffocation due to drowning and that the post-mortem report of the Rithik Rakesh is marked as Ex.P.6.

13. P.W.8 had deposed that on 06.07.2011, the appellant/ accused was arrested near B.D.O. Office and P.W.6 stood as witness and that he had signed as witness in the confession statement given by the appellant/ accused and his signature is marked as Ex.P.7. He had further deposed that on the confession given by the appellant/accused, two Thuppattas were seized under Mahazar and marked as Ex.P.8 and Ex.P.9.

14. P.W.9 had deposed that she had on the instruction of the respondent police, identified the bodies for post-mortem and after post-mortem, she had handed over the bodies to the relatives of the children.

15. P.W.10 had deposed that she is a Doctor and on 13.06.2011 at about 9 a.m., she had conducted post-mortem on a 5 year old male child viz., Divyaprakash and the post-mortem report is marked as Ex.P.10 and that she had sent the viscera to the Forensic Lab and the viscera report is marked as Ex.P.11. She has further deposed that the victim had died due to suffocation while drowning and on the same day, she had also conducted post-mortem on a 16 year old girl child viz., Sridevi and that the girl child had also died due to Suffocation while drowning and that the post-mortem is marked as Ex.P.12 and the viscera report is marked as Ex.P.13.

16. P.W.11/Forensic Expert has deposed that he had examined the Viscera of the deceased Sridevi on 14.06.2011 and had submitted reported stating that there was no poisonous substance in the Viscera.

17. P.W.12 has deposed that on 12.06.2011, while he was working as Inspector of Police at Thiruthani Police Station, P.W.1 had given a complaint to him. Based on which, he had registered the case under Section 174 Cr.P.C. and the F.I.R. is marked as Ex.P.16. Thereafter, he had gone to the foothill at the west side of Periyar Nagar and prepared Mahazar and rough sketch in the presence of witnesses and the rough sketch is marked as Ex.P.17. Thereafter, he has examined the witnesses Rani, Hemalatha, Ravi, Selvakumar, Pazhani, Vijayalakshmi (Woman Police) and recorded their statements and conducted enquiry in respect of children who died due to drowning, in the presence of Panchayadars and sent the bodies to Thiruthani Government Hospital for post-mortem and the inquest reports (four in member) is marked as Ex.P.18. Thereafter, during investigation on 06.07.2011 P.W.1/Rani's husband had appeared before the station and stated that the children have not died due to drowning themselves and that the appellant/ accused had induced the children under the guise of teaching swimming and taken them to the pond nearby a quarry, tied their hands with Thuppattas

and let them into the water and when they were inside the water, he had left the Thuppattas and due to his recklessness and negligence, the incident had happened. Based on the further information, the case was altered to one under Section 304(II) IPC from 174 Cr.P.C. and the alteration report is marked as Ex.P.19. Thereafter, on 06.07.2011, P.W.12 had arrested the appellant/accused and recorded the confession statement based on which, he had gone to the place of occurrence and recovered the Thuppattas under two Mahazars which are marked as Ex.P.20. Thereafter, the recovered articles were sent to Court by Form 91 which is marked as Ex.P.21. He had further deposed that after examining and recording the statements of the Doctors and Scientific Experts who conducted the post-mortem and chemical analysis, had filed final report against the appellant/accused under Section 304(II) IPC.

18. P.W.13 has deposed that on 12.06.2011, she along with P.W.1/Rani, P.W.2/Hemalatha, Selvi had planned to go to Thiruthani Kannikovil. Accordingly, on the way to Thiruthani Kannikovil, they had lunch at the house of P.W.2's mother and at that time, the appellant accused had taken the children.

19. P.W.14 had deposed that he is the son of the appellant/ accused and that during 2011, he and his mother, mother's friends had gone to Kannikovil and that he along with his father, brother and mother had gone in the morning itself. Thereafter, he had called his father to a park nearby and that his brother, Swetha, Sridevi, Rithik and another boy name not known had accompanied his father. Since, the park was locked, they decided to go to a foothill where they had seen a pond. Since, he knew swimming, he had jumped into the pond and the others were standing and playing on the rock near the pond. Thereafter, when he had jumped into the pond, one of the child had fallen into the pond and when the other children attempted to save the child, they also fell inside and on seeing the hands of his father, he pulled his hands and let him out. Thereafter, when he raised alarm, some people had come there and had taken the children out. On finding that it was so deep, I said no one get into the pond and his father had asked him to stand on the rock.

20. P.W.15 who is the another son of the appellant/accused had deposed that while he along with his mother, father and mother's friend were on the way to Kannikovil, they had lunch at the house of his mother's friend and thereafter, the children had informed that they are going out to play. Therefore, his father had accompanied them and that they had gone to a park nearby and there was a small pond. When they intended to play in the pond, his father had told them not to go there. Thereafter, when he and his brother were taking bath in the pond, the children who were standing near the rock, had slipped and fallen inside the pond one by one.

21. P.W.16 has deposed that after hearing about the incident, he had gone to the Government Hospital and seen the bodies of the children.

22. After completion of trial, the Court questioned the appellant/accused with regard to the incriminating materials found against the him and when he was questioned, he had denied the charges and pleaded not guilty. On the side of the appellant/accused no one was examined and no materials were marked. The trial Court after hearing the Counsels and the accused, found that the charge for offence under Section 304(II) was not proved whereas alternatively, found the appellant/accused guilty for offence under Section 304(A) (4 counts) IPC and thereby, he was convicted and sentenced to undergo Simple Imprisonment of two years for each count and the sentences were ordered to run concurrently. Against which, the present appeal has been filed.

23. Mr.T.Muruganantham, learned Counsel for the appellant/ accused would submit hat the trial court has failed to consider the fact that there is absolutely no material to show that the appellant/ accused is the person who had invited the children to come along with him for the purpose of teaching swimming. He would submit that even as per the prosecution, at the time of giving complaint, no allegation was made against the petitioner as if, the petitioner had taken responsibility for taking the children to the pond and no mention has been made about the appellant/accused in the F.I.R. Further, P.W.1 herself has given the complaint before the respondent and in the complaint, which has been marked as Ex.P.1, she has not spoken anything about the petitioner taking responsibility. After 26 days from the date of incident, the further statements were obtained from P.W.1 and her husband/P.W.3 based on which, the case was altered following which, the appellant/accused was arrested. He would submit that the evidence of the witnesses is exaggerated and only after 26 days, P.W.1 has spoken about that the petitioner having accompanied the children. He would further submit that taking into consideration the entire evidence on record, there was no material to suggest that the petitioner had acted in a negligent manner. In the alternate, he would contend that it is only a case of accident where the children who were standing on a rock near the pond had slipped and fallen one by one into the pond and there is evidence on record, that the petitioner who does not know swimming had infact jumped into the pond to save children risking his own life. He would reiterate that P.W.14 and P.W.15, the sons of the appellant / accused have deposed that the appellant/accused does not know swimming and that he had risking his life, jumped into the pond and attempted to save the children and later he was pulled out

of the pond. Further, he would pray that the act of the petitioner in jumping into the pond to save the children risking his own life when he does not know swimming, may be taken as a mitigating factor and that some leniency may be shown to the appellant /accused in reducing the sentence.

24. Ms.V.Sharadha Devi, Government Advocate (Crl. Side) would vehemently oppose stating that it is a case where due to negligence of the appellant/accused, lives of four innocent children have been lost. She would submit that the prosecution by letting in cogent evidence have proved that the appellant/accused had acted in a negligent manner resulting in the children falling into the pond and losing their lives. She would submit that the appellant/accused who was entrusted with the duty of taking care of the children has acted in a reckless and careless manner. She would submit that act of recklessness covers a whole range of state of mind from failing to give any thought at all to whether or not there is any risk of those harmful consequences, to recognising the existence of the risk and nevertheless deciding to ignore it. The petitioner knowing fully well that the children do not know swimming, had taken them to a pond and allowed them to go inside the pond and had not taken responsible care. She would submit that the standard of conduct is ordinarily measured by what the reasonable man of ordinary prudence would do in that circumstances. The appellant ought to have taken care by not allowing the children to go near the pond, whereas, he has failed to do so and thereby, the trial Court has rightly convicted him for the offence under Section 304A IPC.

25. Now what is to be seen is that whether the trial Court has rightly convicted the appellant/accused for offence under Section 304 (A) IPC. In this case, the evidence of P.W.1 is that the appellant/accused had informed that he would take care of the children and believing his words, she had sent the children along with him. P.W.2 has also corroborated that the children had gone along with appellant accused. P.W. 3 has also stated that the children were in the company of the appellant/accused and that he had taken them to the pond near a Foothill. Further, the sons of the appellant/accused namely P.W.14 and P.W.15 had spoken about the presence of the appellant/accused at the time of occurrence. The learned Government Advocate (Crl. Side) would relied on the Judgement of the Hon'ble Apex Court in Naresh Giri Vs. State of M.P. reported in (2008) 1 SCC 795 and the relevant portion in paragraphs 9 to 15 is extracted hereunder;

9. What constitutes negligence has been analysed in Halsbury's Laws of England (4th Edn.), Vol. 34, Para 1 (p. 3), as follows:

"1. General principles of the law of negligence.—Negligence is a specific tort and in any given circumstances is the failure to exercise that care which the circumstances demand. What amounts to negligence depends on the facts of each particular case. It may consist in omitting to do something which ought to be done or in doing something which ought to be done either in a different manner or not at all. Where there is no duty to exercise care, negligence in the popular sense has no legal consequence. Where there is a duty to exercise care, reasonable care must be taken to avoid acts or omissions which can be reasonably foreseen to be likely to cause physical injury to persons or property. The degree of care required in the particular case depends on the surrounding circumstances, and may vary according to the amount of the risk to be encountered and to the magnitude of the prospective injury. The duty of care is owed only to those persons who are in the area of foreseeable danger; the fact that the act of the defendant violated his duty of care to a third person does not enable the plaintiff who is also injured by the same act to claim unless he is also within the area of foreseeable danger. The same act or omission may accordingly in some circumstances involve liability as being negligent, although in other circumstances it will not do so. The material considerations are the absence of care which is on the part of the defendant owed to the plaintiff in the circumstances of the case and damage suffered by the plaintiff, together with a demonstrable relation of cause and effect between the two."

10. In this context the following passage from Kenny's Outlines of Criminal Law, 19th Edn. (1966) at p. 38 may be usefully noted:

"Yet a man may bring about an event without having adverted to it at all; he may not have foreseen that his actions would have this consequence and it will come to him as a surprise. The event may be harmless or harmful; if harmful the question rises whether there is legal liability for it. In tort (at common law) this is decided by considering whether or not a reasonable man in the same circumstances would have realised the prospect of harm and would have

stopped or changed his course so as to avoid it. If a reasonable man would not, then there is no liability and the harm must lie where it falls. But if the reasonable man would have avoided the harm then there is liability and the perpetrator of the harm is said to be guilty of negligence. The word 'negligence' denotes, and should be used only to denote, such blameworthy inadvertence; and the man who through his negligence has brought harm upon another is under a legal obligation to make reparation for it to the victim of the injury who may sue him in tort for damages. But it should now be recognised that at common law there is no criminal liability for harm thus caused by inadvertence. This has been laid down authoritatively for manslaughter again and again. There are only two states of mind which constitute mens rea, and they are intention and recklessness. The difference between recklessness and negligence is the difference between advertence and inadvertence: they are opposed and it is a logical fallacy to suggest that recklessness is a degree of negligence. The common habit of lawyers to qualify the word 'negligence' with some moral epithet such as 'wicked', 'gross', or 'culpable' has been most unfortunate since it has inevitably led to great confusion of thought and of principle. It is equally misleading to speak of criminal negligence since this is merely to use an expression in order to explain itself."

(emphasis supplied)

11. "Negligence" says Restatement of the Law of Torts published by the American Law Institute (1934), Vol. I, Section 28, "is conduct which falls below the standard established for the protection of others against unreasonable risk of harm". It is stated in Law of Torts by Fleming at p. 124 (Australian Publication, 1957) that this standard of conduct is ordinarily measured by what the reasonable man of ordinary prudence would do under the circumstances. In Director of Public Prosecutions v. Camplin [1978 AC 705 : (1978) 2 WLR 679 : (1978) 2 All ER 168 (HL)] it was observed by Lord Diplock that: (All ER p. 171f-g)

"The 'reasonable man' was a comparatively late arrival in the law of provocation. As the

law of negligence emerged in the first half of the 19th century he became the anthropomorphic embodiment of the standard of care required by the law."

In order to objectify the law's abstractions like "care", "reasonableness" or "foreseeability" the man of ordinary prudence was invented as a model of the standard of conduct to which all men are required to conform.

12. In *Syad Akbar v. State of Karnataka* [(1980) 1 SCC 30 : 1980 SCC (Cri) 59] it was held that: (SCC p. 40, para 28)

"28. ... Where negligence is an essential ingredient of the offence, the negligence to be established by the prosecution must be culpable or gross and not the negligence merely based upon an error of judgment. As pointed out by Lord Atkin in *Andrews v. Director of Public Prosecutions* [1937 AC 576 : (1937) 2 All ER 552 (HL)] (All ER p. 556 C-D) 'simple lack of care such as will constitute civil liability, is not enough'; for liability under the criminal law 'a very high degree of negligence is required to be proved... Probably of all the epithets that can be applied "reckless" most nearly covers the case'."

13. According to the dictionary meaning "reckless" means "careless", regardless or heedless of the possible harmful consequences of one's acts. It presupposes that if thought was given to the matter by the doer before the act was done, it would have been apparent to him that there was a real risk of its having the relevant harmful consequences; but, granted this, recklessness covers a whole range of states of mind from failing to give any thought at all to whether or not there is any risk of those harmful consequences, to recognising the existence of the risk and nevertheless deciding to ignore it. In *R. v. Briggs* [(1977) 1 WLR 605 : (1977) 1 All ER 475 (CA)] it was observed that: (All ER pp. 477j-478a)

"... A man is reckless in the sense required when he carries out a deliberate act knowing that there is some risk of damage resulting from that

act but nevertheless continues in the performance of that act."

14. In R. v. Caldwell [1982 AC 341 : (1981) 2 WLR 509 : (1981) 1 All ER 961 (HL)] it was observed that: (All ER pp. 966g-967a)

"Nevertheless, to decide whether someone has been 'reckless' whether harmful consequences of a particular kind will result from his act, as distinguished from his actually intending such harmful consequences to follow, does call for some consideration of how the mind of the ordinary prudent individual would have reacted to a similar situation. If there were nothing in the circumstances that ought to have drawn the attention of an ordinary prudent individual to the possibility of that kind of harmful consequence, the accused would not be described as 'reckless' in the natural meaning of that word for failing to address his mind to the possibility; nor, if the risk of the harmful consequences was so slight that the ordinary prudent individual on due consideration of the risk would not be deterred from treating it as negligible, could the accused be described as 'reckless' in its ordinary sense if, having considered the risk, he decided to ignore it. (In this connection the gravity of the possible harmful consequences would be an important factor. To endanger life must be one of the most grave.) So to this extent, even if one ascribes to 'reckless' only the restricted meaning, adopted by the Court of Appeal in Stephenson [R. v. Stephenson, 1979 QB 695 : (1979) 3 WLR 193 : (1979) 2 All ER 1198 (CA)] and Briggs [(1977) 1 WLR 605 : (1977) 1 All ER 475 (CA)] , of foreseeing that a particular kind of harm might happen and yet going on to take the risk of it, it involves a test that would be described in part as 'objective' in current legal jargon. Questions of criminal liability are seldom solved by simply asking whether the test is subjective or objective."

15. The decision of R. v. Caldwell [1982 AC 341 : (1981) 2 WLR 509 : (1981) 1 All ER 961 (HL)] has been cited with approval in R. v. Lawrence [1982 AC 510 : (1981) 2 WLR 524

: (1981) 1 All ER 974 (HL)] and it was observed that: (Lawrence case [1982 AC 510 : (1981) 2 WLR 524 : (1981) 1 All ER 974 (HL)] , All ER p. 982e-f)

"... Recklessness on the part of the doer of an act does presuppose that there is something in the circumstances that would have drawn the attention of an ordinary prudent individual to the possibility that his act was capable of causing the kind of serious harmful consequences that the section which creates the offence was intended to prevent, and that the risk of those harmful consequences occurring was not so slight that an ordinary prudent individual would feel justified in treating them as negligible. It is only when this is so that the doer of the act is acting 'recklessly' if, before doing the act, he either fails to give any thought to the possibility of there being any such risk or, having recognised that there was such risk, he nevertheless goes on to do it."

26. Now applying the principles laid down in the Judgement referred above, in this case as per the evidence let in by the prosecution, the appellant/accused is the person who had taken the responsibility for the children and taken them to the pond. The appellant/accused does not know to swim. He very well knew that the children also do not know to swim and in such circumstances, he ought to have recognized the existence of risk and ought not to have allowed the children to go near the pond, whereas he failed in his duty resulting in the death of four children by drowning and thereby, the trial Court has rightly found the appellant/accused guilty for offence under Section 304 A IPC.

27. Further, coming to the question of sentence, this Court takes into consideration the mitigating circumstances in the case, that immediately after the occurrence, the petitioner who does not know swimming had jumped into the pond and attempted to save the children risking his own life and finally, he had been saved by his son by being pulled out of the pond.

28. In view of the above, this Court is of the opinion that while confirming the order of conviction, taking into consideration the mitigating circumstances, the sentence may be modified.

29. Accordingly, this Criminal Appeal is partly allowed and this Court while confirming the conviction imposed by the trial Court, is inclined to modify the sentence to four months Simple Imprisonment.

30. Accordingly, the conviction awarded by the trial Court for offences under Section 304-A IPC invoking Section 325 Cr.P.C., is hereby confirmed; however, taking into consideration the mitigating circumstances, the sentence is modified to four months Simple Imprisonment for each count, to run concurrently. Bail bond executed by the appellant/accused stands cancelled and the trial Court shall take steps to secure the appellant/accused to undergo the remaining period of the sentence if any. The period of sentence already undergone by the petitioner shall be set off under Section 428 Cr.P.C.

-s/d-

Assistant Registrar (CS-IX)

True Copy

Sub-Assistant Registrar

ksa-2

To:

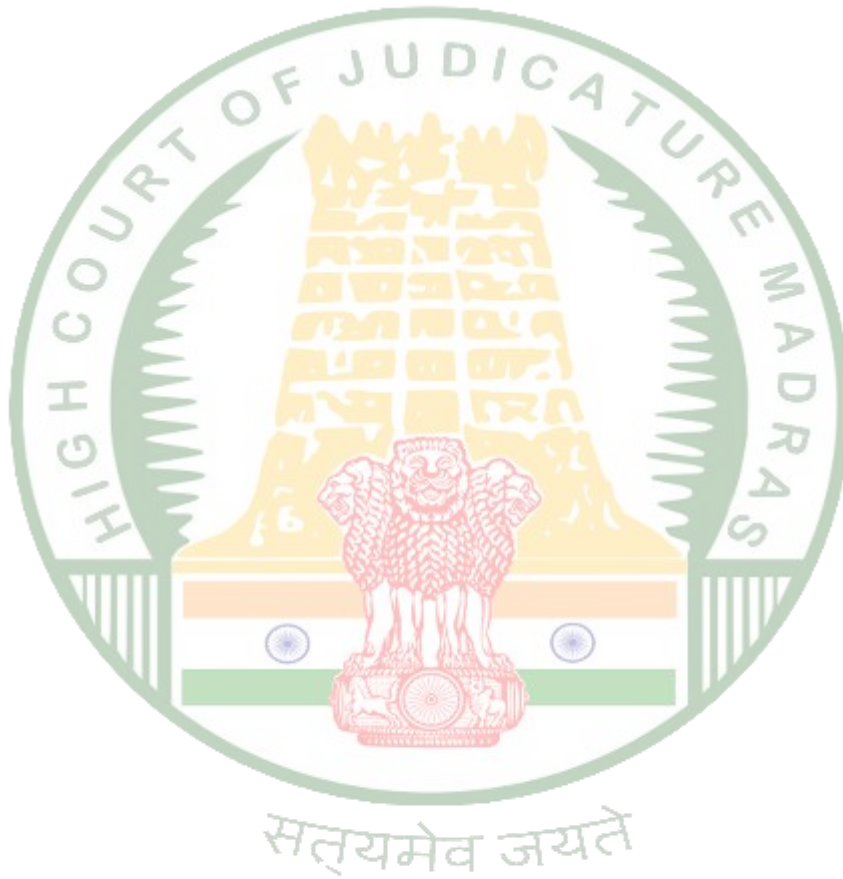
1. The Judicial Magistrate, Thiruthani
2. Do Through The Chief Judicial Magistrate, Thiruvallur
3. First Additional District Sessions Court, Tiruvallur.
4. Do Through The Principal Sessions Judge, Thiruvallur
5. Inspector of Police
Thiruthani Police Station
Thiruvallur District
6. The Section Officer,
Criminal Section
High Court, Madras 104.
7. The Public Prosecutor
High Court of Madras
8. The Director General of Police
Mylapore, Chennai 4.

9.The District Collector
Thiruvallur.

+1 CC to Mr.T. Muruganantham, Advocate sr 12514.

Cr1.A.No.4 of 2018

GMI (CO)
SP(05/07/2021)



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