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Crl.A(MD) No.32 of 2017

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on: 11.09.2023

Pronounced on: .09.2023

CORAM:

THE HONOURABLE MR.JUSTICE **P.DHANABAL**

CRIMINAL APPEAL(MD)No.32 of 2017

1. Maharajothi

2. Alagammal

.. Appellants

Vs.

1. The Deputy Superintendent of Police
Melur Sub Division
Madurai District

2. The Inspector of Police
Melur All Women Police Station
Melur, Madurai District

...Respondents

PRAYER : Criminal Appeal is filed under Section 374(2) of Cr.P.C to call for the records and set aside the order passed by the learned III Additional District and Sessions Judge(PCR)Madurai in Spl.S.C.No.54 of 2006 dated 30.12.2016.

For Appellant : Mr.V.Kannan

For Respondent : M/s.M.Aasha
Government Advocate(Crl.Side)



JUDGMENT

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This Criminal Appeal has been filed against the judgment and conviction passed in Spl.S.C.No.54 of 2006 dated 30.12.2016 on the file of the learned III Additional District and Sessions Judge(PCR)Madurai, wherein the trial Court had convicted the appellants who are arrayed as A1 and A3 respectively before the trial Court

2. The first appellant was convicted for the offences under Sections 366(A) of IPC and 376 of IPC and sentenced to undergo three years rigorous imprisonment and to pay a fine of Rs.2000/- in default to undergo three months simple imprisonment for the offence under section 366(A) of IPC and sentenced to undergo ten years rigorous imprisonment and to pay a fine of Rs.25,000/- in default to undergo one year simple imprisonment for the offence under Section 376 of IPC. As against the third accused sentenced to undergo three years rigorous imprisonment and to pay a fine of Rs.2000/- in default to undergo one year simple imprisonment for the offence under Section 366(A) of IPC. Before the trial Court four persons have been arrayed as accused and the trial Court has acquitted the accused 2 and 4 and these petitioners are arrayed as A1 and A3.



3. The case of the prosecution is that the victim belongs to Scheduled Caste Community and the accused belongs to Non Scheduled Caste community. The victim is the daughter of the defacto complainant and she was brought up by the mother of the defacto complainant and on 18.04.2004 the defacto complainant, mother of the victim went to her house of mother i.e., grand mother of the victim and at that time she had taken Rs.10,000/- and she also kept the same in her house. On the next day at about 5.00 am., when she woke up her daughter disappeared and she came to know that Rs.10,000/-, gold chain, ring, three sets of stud, one nose stud and anklet were also missing. Thereafter she gave a complaint/Ex.P.1 on 27.04.2004 and based on the complaint P.W.18 registered the First Information Report/Ex.P.9 in Crime No.16 of 2005. Thereafter the case was investigated by P.W.22 and thereafter filed final report as against all the accused persons for the offences under Sections 366(A), 376 r/w. 109 of IPC and Section 3(2)(v) of SC/ST(PoA) Act. Thereafter the case was committed to the learned III Additional District and Sessions Judge(PCR)Madurai and the same was taken on file in Spl.S.C.No.54 of 2006.

4. After receipt of case records the trial court framed charges as against the first accused for the offences under Sections



366(A), 376 of IPC and Section 3(2)(v) of SC/ST(PoA) Act as against the accused 2 to 4 for the offences under Sections 366(A) of IPC and Section 3(2)(v) of SC/ST(PoA) Act and the charges were read over and explained to the accused and the accused denied the charges and thereafter in order to prove the charges levelled against the accused before the trial Court P.W.1 to P.W.22 were examined and marked Exhibits Ex.P.1 to P.13 and Court documents Ex.C.1 to C.4 were marked and no material object was marked. On the side of the defence no witnesses were examined and no documents were marked.

5. After completion of prosecution evidence the accused was questioned under Section 313(1) (b) of Cr.P.C and they denied the evidence and thereafter the trial Court passed judgment by convicting the first appellant and sentenced to undergo three years rigorous imprisonment and to pay a fine of Rs.2000/- in default to undergo three months simple imprisonment for the offence under section 366(A) of IPC and sentenced to undergo ten years rigorous imprisonment and to pay a fine of Rs.25,000/- in default to undergo one year simple imprisonment for the offence under Section 376 of IPC. As against the third accused sentenced to undergo three years rigorous imprisonment and to pay a fine of Rs.2000/- in default to undergo one year simple imprisonment for the offence under Section



366(A) of IPC and the trial Court has acquitted the accused 2 and 4 from all the charges and these petitioners are arrayed as A1 and A3

6. As against the judgment and conviction passed by the learned III Additional District and Sessions Judge(PCR)Madurai the present appeal has been preferred by the appellants on the following grounds:

a) the order of trial Court is against facts, law, evidence and all the probabilities of the case.

b) the trial Court failed to consider the fact that allegations found in the FIR, charge sheet and judgment are contradict to each other

c) the trial Court failed to notice that the contradictory evidence of P.W.1 and P.W.2 with regard to the manner of occurrence and lodging of complaint. The names of the accused were not mentioned in the First Information Report.

d) the trial Court ought to have held that the prosecution had not established the guilt of the accused beyond all reasonable doubts. The trial Court ought to have given the benefit of doubt to the appellants.



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e) the trial court preconceived the matter and failed to consider the actual facts. There are major discrepancies in the prosecution case and the same has not been considered by the trial Court.

7.1 The learned counsel appearing for the appellant would contend that the age of the victim has not been proved by the prosecution. The parents of the victim also did not state about the age of the victim and the doctor who conducted ossification test for the victim has stated that the age of the victim is above 18 years on the date of occurrence and the doctor who conducted medical examination in the evidence has also stated that the victim was 20 years on the date of occurrence. The trial court has summoned the documents through school authorities and based on those documents came to conclusion that the victim was aged about 15years on the date of occurrence. Infact the verdict of the trial Court with regard to the age is not correct and the school records have not been identified either by the victim or by her parents. Therefore the prosecution failed to prove the age of the victim. There is a delay in lodging the complaint. Even according to the prosecution the alleged occurrence is on 19.04.2004 at about 5.00 a.m., but the complaint was lodged



only on 27.04.2004 and there is an inordinate delay and the same has not been properly explained by the prosecution.

7.2. Further as per the medical reports the victim was eight months pregnant and according to prosecution case the victim stayed with the accused only for 45 days and thereby it is improbable to have conceived for eight months within 45 days and the same also creates serious doubt over the prosecution case. Further P.W.1 who is defacto complainant in this case has deposed that his grand daughter was disappeared along with money and gold ornaments, hence she gave complaint and the same has been marked as Ex.P.1. As per complaint there is no mention about four accused. In this case the complaint was given on suspicion. P.W. 2 is the grand father of the victim and he deposed that on 27.04.2004 they kept the jewels and Rs.10000/- in their house and he was sleeping outside the house. At that time at about 5.00 am., the above said jewels and money were missing and the neighbours told that the first accused had taken her grand daughter. Immediately they went to the house of the first accused but they did not hear the matter, hence he gave complaint along with his wife. Therefore even according to the evidence of P.W.2 the first accused only taken the victim and there is no reference about the other accused. P.W.3 /victim in her evidence has admitted that she



was seven months pregnant and she during cross examination stated that in the year 2004 she was alleged to have been kidnapped and she was not conceived. She was abducted on 14.03.2004 and she returned on 21.04.2004 and she also admitted that she stayed with the accused during that period she was with the accused in the rental house. Whiles, the conduct of P.W.3 would show her consent and the same has not been considered by the trial Court. Further the evidence of P.W. 3 is doubtful and she has not stated the real version.

7.3. The Doctor P.W.21 in her evidence stated that the victim was eight months pregnant at the time of examination and her age was 20 years.P.W.20 has also given certificate Ex.P.11 stating that the victim was above 18 years on the date of examination. Further P.W.22 who is the investigation officer admitted that P.W. 3/victim during his investigation she has not stated that she was abducted. Therefore the prosecution case is highly doubtful and the trial Court failed to consider the major discrepancies and hence the appellants are entitled for acquittal by allowing this appeal.

8. The learned Government Advocate(Crl.Side)appearing for the State would contend that in this case P.W.3 is the victim and she stated that P.W1 and PW2 are the grand parents of the victim.



While so, the victim was 15 years old she was abducted by the accused and P.W.1 has given complaint before the respondent police and P.W. 2 also signed in the complaint. Based on the complaint First Information Report has been registered and thereafter P.W.22 investigated the case and as per the investigation the accused have kidnapped the minor girl and A1 committed rape on the victim and the other accused have forced and seduced to have illicit intercourse with the first accused and thereby they committed the offence under Section 366(A) and 376 of IPC. Since the victim girl belongs to SC community and the accused belongs to non SC community they also committed the offence under Section 3(2)(v) of SC/ST(PoA) Act. The trial Court had examined witnesses P.W.1 to P.W.22 and marked documents Ex.P.1 to Ex.P.13 and marked court documents Ex.C.1 to C.4. As per school records the victim was only 15 years on the date of occurrence and thereby the consent of the victim is immaterial and therefore based on the evidence the trial court had convicted the appellants and hence appeal is liable to be dismissed.

9. Upon hearing both sides and perusing the judgement of the trial Court and ground of appeal the point for determination in this appeal are:



a) whether the prosecution proved the charges levelled against the accused for the offences under Sections 366(A) and 376 of IPC as against the first appellant and 366 (A) of IPC as against the second appellant beyond any reasonable doubt or not ?

10. According to the prosecution the victim was aged about 15 years on the date of occurrence and the accused 1 to 4 have kidnapped the victim and thereafter A1 committed rape on the victim and other accused facilitated to commit the offence, thereby the accused have been charged for the offences under Sections 366(A) and 376 of IPC. The first accused has been charged for the offences under Sections 366(A), 376 of IPC and the other accused have been charged for the offences under Section 366(A) of IPC. Since the victim belongs to SC community the accused have been charged for the offence under Section 3(2)(v) of SC/ST(PoA) Act.

11. In this case the very framing of charges itself is not in proper form.

The first charge is (1முதல்4 எதிரிகள் மீது)

பட்டியலினத்தைச் சார்ந்த பதினெட்டு வயதுக்கு கீழான சாட்சி
பெத்தியின் மகள் வழி பேத்தியை 1வது எதிரியுடன் உடல் உறவு
கொள்வதற்காக அவ்வகுப்பைச் சேர்ந்த எதிரிகள் ரூ.10,000- மற்றும் தங்க



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சங்கிலி மற்றும் 3 செட் தோடு மாட்டல், முக்குத்தி கொலுசு இவைகளுடன் கடத்திச் சென்றுதன் மூலம் இந்திய தண்டனைச் சட்டத்தின் கீழ் பத்தாண்டுகள் அல்லது அதற்கு அதிகமாக தண்டனை விதிக்கக்கூடிய குற்றத்தை புரிந்ததாக இதச பிரிவு 366(எ)உ/இ பட்டியலினத்தவர்கள் மற்றும் பழங்குடியினர்(வன் கொடுமை தடுப்பு) சட்டப் பிரிவு 3(2)(V) ன் கீழ் தண்டிப்பதற்குரியது.

The second charge is (1வது எதிரி மீது)

பட்டியலில் கண்டிராத சாட்சியைச் சேர்ந்த பதினெட்டு வயதுக்கு கீழான சாட்சி பெத்தியின் மகள் வழி பேத்தியை காதலித்து திருமனம் செய்து கொள்வதாக கூறி பதினெட்டு வயதுக்குட்பட்ட இளவர் பெண்ணுடன் அடிக்கடி உடல் உறவு கொண்டு அவரை கர்ப்பமாக்கி பட்டியலினத்தைச் சேர்ந்த அவருக்கு வன்கொடுமை செய்ததன் மூலம் இந்திய தண்டனைச் சட்டத்தின் கீழ் பத்தாண்டுகள் அல்லது அதற்கு அதிகமாக தண்டனை விதிக்கக்கூடிய குற்றத்தை புரிந்ததாக இதச பிரிவு 376 உ/இ பட்டியலினத்தவர்கள் மற்றும் பழங்குடியினர்(வன் கொடுமை தடுப்பு) சட்டப் பிரிவு 3(2)(V) ன் கீழ் தண்டிப்பதற்குரியது

12. The trial Court has framed charges for the offences under Section 366(A) of IPC r/w Section 3(2)(v) of SC/ST(PoA) Act and section 376 of IPC r/w. Section 3(2)(v) of SC/ST(PoA) Act. The offences under Sections 366(A), 376 of IPC and section 3(2)(v) of SC/ST(PoA) Act are separate and distinct offences. The trial Court ought to have framed charges under Sections 366(A) and 376 of IPC and Section



3(2)(v) of SC/AT(PoA) act separately. On careful perusal of the charges they revealed that the contents of the charge reveals that the charges against A1 are only under Section 3(2)(v) of SC/ST(PoA) Act and not for the main offence under Section 366(A) of IPC and 376 of IPC. Likewise the charge as against the A3 is under Section 366(A) of IPC r/w. 3(2)(v) of SC/ST(PoA) Act. The offence under Section 3(2)(v) of SC/ST (PoA) Act is based on the main offences under Section 366(A) and 376 of IPC but unfortunately no separate and specific charges framed for the main offences. Section 3(2)(v) of SC/ST (PoA) Act reads as follows:

“(v) commits any offence under the Indian Penal Code (45 of 1860) punishable with imprisonment for a term of ten years or more against a person or property on the ground that such person is a member of a Scheduled Caste or a Scheduled Tribe or such property belongs to such member, shall be punishable with imprisonment for life and with fine;

13. This framing of charge itself is not in accordance with law and the same has caused prejudice to the accused. However the trial Court has acquitted the accused for the offence under Section 3(2)(v) of SC/ST Act. So far as charge under Section 366(A) of IPC is concerned the trial Court has convicted the first accused who seems to have intercourse with the victim.



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14. Section 366(A) of IPC reads as follows:

366A. Procurement of minor girl —

Whoever, by any means whatsoever, induces any minor girl under the age of eighteen years to go from any place or to do any act with intent that such girl may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person shall be punishable with imprisonment which may extend to ten years, and shall also be liable to fine.

15. Therefore from the above reading of the said provision it is clear that in order to attract the provisions under Sections 366(A) of IPC the person who induces minor girl to go any place with intent that such girl may be or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person shall be punishable, here A1 himself had illicit intercourse with the victim thereby 366(A) of IPC would not attract.

16. First of all the age of the victim has to be determined by the Court. According to the prosecution case she was aged about 15 years. The parents of the victim have not witnessed about the age of the victim. P.W.1 is the grand father of the victim and P.W. 2 is the grand mother of the victim. P.W.4 is the mother of the victim and P.W.5 is the father of the victim. The parents of the victim have not stated about the exact age of the victim. The trial Court has relied on



the school records . It is well settled law that in order to ascertain the age of the victim the trial Court have to follow the procedures prescribed under section 94 of the Juvenile Justice Act(Care and Protection of Children) Act, 2015, which reads as follows:

“94 .*Presumption and determination of age.*

(1) Where, it is obvious to the Committee or the Board, based on the appearance of the person brought before it under any of the provisions of this Act (other than for the purpose of giving evidence) that the said person is a child, the Committee or the Board shall record such observation stating the age of the child as nearly as may be and proceed with the inquiry under section 14 or section 36, as the case may be, without waiting for further confirmation of the age.

(2) In case, the Committee or the Board has reasonable grounds for doubt regarding whether the person brought before it is a child or not, the Committee or the Board, as the case may be, shall undertake the process of age determination, by seeking evidence by obtaining—

(i) the date of birth certificate from the school, or the matriculation or equivalent certificate from the concerned examination Board, if available; and in the absence thereof;

(ii) the birth certificate given by a corporation or a municipal authority or a panchayat;

(iii) and only in the absence of (I) and (ii) above, age shall be determined by an ossification test or any other latest medical age determination test conducted on the orders of the Committee or the Board:

Provided such age determination test conducted on the order of the Committee or the Board shall be completed within fifteen days from the date of such order.



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(3) The age recorded by the Committee or the Board to be the age of person so brought before it shall, for the purpose of this Act, be deemed to be the true age of that person.

17. As per the Juvenile Justice Act(Care and Protection of Children) Act, 2015, the date of birth certificate from the school or the matriculation or equivalent certificate from the concerned examination board if available in the absence there of the birth certificate given by a Corporation of Municipality Authority of a Panchayat and only in the absence of (i) and (ii) age shall be determined by an ossification test or any other latest medical test.

18. In this case the prosecution has examined the school authorities and school records. However, in this case school records have been summoned by the trial Court and the same have been marked as Court documents Ex.C.1 to Ex.C.4. Based on those documents the trial court has fixed the aged of the victim as 15 years as contained in the documents. The trial Court documents i.e., Ex.C.1 to C.4 have not been brought to the knowledge of either to the victim or to the parents of the victim. There is no evidence that the parents have admitted the victim in the said school and there is no evidence who admitted the victim in the particular school and who stated about



the date of birth of the victim. The said documents were not even brought to the knowledge of the parents of the victim. In the absence of the above said evidence contents of the school documents cannot be taken as proved. Even according to the documents there is no signature of the parents of the victim in the document. Per contra EX.C.2 reveals that the parents name mentioned as Thiruman and further there is a correction in the date and further in the Ex.C.4 the parents name is mentioned as Sevugan. The prosecution failed to obtain school certificate where the victim was initially admitted. During investigation also the investigation officer failed to obtain school certificate of the victim. Therefore the certificate marked by the trial Court as court documents creates doubt and those documents have not been properly proved in accordance with law.

19. During investigation the investigation officer admitted the victim in the hospital and the doctor who examined the victim has conducted ossification test and issued Ex.P.11 and as per Ex.P.11 the age of the victim was above 18 years on the date of occurrence. P.W. 20 doctor who had examined the victim has mentioned the age of the victim as 20 years, hence reasonable doubt arises over the case of prosecution. The prosecution failed to prove the age of victim and Ex.C1 to C4 have not been proved in the manner known to law. Mere



marking of documents are not sufficient to prove those documents.

Those documents have to be proved through sufficient evidence and there is no evidence that when the victim was admitted in the school and by whom she was admitted and who stated about the date of birth of the victim have to be proved by the prosecution. It is well settled law that if two views are possible the view in favour of the accused has to be taken into account, thereby this Court has taken view in favour of the accused that the victim was aged above 18 years . Even according to the court documents Ex.C.1 to C.4, the victim was only 15 years but the parents of the victim have not stated about the age of the victim and they have not witnessed about the admission of the victim in the school records, thereby the document Ex.C.1 to C.4 have not been proved in accordance with law.

20. Even according to the evidence of P.W. 1 the victim was 12 years old. According to the school certificate she was 15 years old . According to medical certificate she was 18 years old. Therefore the age of the victim has not been proved by the prosecution. Further at the time of examination of P.W.22 the trial Court has put a question to the investigation officer whether the school records of the victim was seized or not for that the investigation officer replied no. When the trial Court put a question to the investigation officer the trial



Court failed to put question to the victim or the parents of the victim with regard to the school admission of the victim. Therefore the age of the victim has not been proved by the prosecution. In the absence of birth certificate and school records ossification test conducted by the medical officer which has to be taken into account and thereby this Court has taken the age of the victim as 18years. The trial Court has not considered the above aspects and wrongly came to the conclusion that the age of the victim was 15 years old.

21. Since this Court came to conclusion that the victim was aged above 18 years. Now coming to the point with regard to the commission of offence under Section 376 of IPC . Inorder to attract the provision under Section 376 of IPC the conduct of the victim shows that she was consented for intercourse and as per medical evidence she was eight months pregnant and no steps were taken to prove that the foetus belongs to whom and whether it was through the accused or not.

22.The lodging of the First Information Report itself creates doubts over the prosecution case and the delay of nine days have not been properly explained by the prosecution. Even according to the evidence of P.W.1 on the date of alleged occurrence the victim had



taken Rs.10,000/- and other gold ornaments and it shows the consent of the victim. Further on seeing the complaint it reveals that the grand father of the victim signed in the complaint but the thumb impression of the P.W. 1 was not found in the complaint but only some black mark only present in the complaint. This also creates serious doubts over the prosecution case. Further in the Ex.P.1 there is no seal and signature of the court in the complaint. This also creates serious doubt over the case of prosecution. P.W.2 who is the grand father of the victim has also stated that the victim with money and jewels left from home and he also in his evidence stated that he did not know the age of the victim.

23. P.W .3 is the victim in this case. She deposed before the trial Court that on 18.04.2004 she along with A1 and his mother A3 went to Pollachi and she also handed over six sovereigns of gold jewels and Rs.10,000/- and transfer certificate and A1 had intercourse with her and thereby she got conceived and marriage was also solemnized at Pollachi and she deposed before the trial Court that at the time of occurrence she was 16years but during cross examination she stated that during the period of occurrence in the year 2004 she was not conceived. Further she stated that she stayed with first accused in Pollachi in the rented house. Whiles the



investigation officer failed to investigate where the victim was lived with the accused for 45 days. Further the investigation officer failed to recover the vehicle in which the accused and the victim travelled. These are all the major discrepancies and the trial Court failed to consider the same. P.W.22 in his evidence admitted that in order to investigate the case the Superintendent of police has not given any written authorization under Section 7(1)(a) of the SC/ST(PoA) rules thereby created serious doubt over the fair investigation. Even according to the evidence of P.W.3 she was pregnant of seven months and nowhere stated that she was pregnant through accused. Further P.W.3 in the evidence stated that she stayed with the first accused for more than 45 days and during those days she had not raised any alarm and even at the time of alleged kidnap P.W.3 has not raised any alarm and she also taken money and other gold ornaments. This conduct of victim also shows the consent and she voluntarily left from the home. Whereas this Court already came to conclusion that the victim was not child not completed age of 18 years, hence the offence under Section 366 (A) of IPC would not attract.

24. So far as offence under Section 376 of IPC is concerned since the victim is aged above 18 years and her conduct shows the consent the offence under Section 376 of IPC would not attract. The



trial court has acquitted the accused for the offence under Section 3(2)(v) of SC/ST(PoA) act and the other accused were acquitted from the offence under Section 366(A) of IPC. So far as first accused is concerned he was convicted for the offences under section 366(A) and 376 of IPC and already this Court has also discussed that section 366(A) of IPC would not attract since he himself had intercourse with the victim. So far as offence under Section 376 of IPC is concerned as against the first accused since the victim herself has given consent and the conduct of the victim shows her consent the offence under Section 376 of IPC would not arise. So far as offence under Section 366(A) of IPC as against the third accused is concerned since the victim was not minor on the date of occurrence the offence under Section 366(A) of IPC would not attract. The trial Court failed to consider all the above aspects and convicted the accused. With the available evidences of prosecution it is unsafe to convict the accused.

25. Therefore the charges levelled against the accused are not proved by the prosecution beyond any reasonable doubts and the accused are entitled for acquittal and the conviction and sentence imposed by the trial Court through the judgment are unsustainable and liable to be set aside.



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26. In the result, the Criminal Appeal is allowed and the judgment and conviction passed by the learned III Additional District and Sessions Judge(PCR)Madurai in Spl.S.C.No.54 of 2006 are set aside and the first accused/ first appellant is acquitted from the charges under Sections 366(A) and 376 of IPC and the third accused/second appellant is acquitted from the charge under Section 366(A) of IPC and they be set at liberty subject to other cases if any. The bail bond, if any, executed by the appellants shall stand cancelled and fine amount, if any, paid by them is ordered to be refunded to them.

.09.2023

Index : Yes/No
Internet : Yes/No
NCC : Yes/No
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To

1. The III Additional District and Sessions Judge(PCR)Madurai
2. The Deputy Superintendent of Police
Melur Sub Division
Madurai District
3. The Inspector of Police
Melur All Women Police Station
Melur, Madurai District



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4. The Section Officer,
Criminal Records,
Madurai Bench of Madras High Court,
Madurai.
5. The Additional Public Prosecutor
Madurai Bench of Madras High Court,
Madurai



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