



Crl.A.No.641 of 2021

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 19.06.2024

CORAM :

THE HON'BLE MR. JUSTICE M.S.RAMESH

AND

THE HON'BLE MR. JUSTICE SUNDER MOHAN

Crl.A.No.641 of 2021

Krishnaraj @ Thangaraj ... Appellant/Sole Accused

v.

State represented by
Inspector of Police,
All Women Police Station,
Tiruppatur, Tiruppatur Taluk,
Tirupattur District.

(Crime No.2 of 2014) ... Respondent/Complainant

Criminal Appeal filed under Section 374(2) of Code of Criminal Procedure, 1973, against the conviction of the appellant/sole accused and sentence in Spl.S.C.No.4 of 2018 dated 06.09.2021, on the file of the learned Sessions Judge, Special Court for Exclusive Trial of Cases under the POCSO Act, 2012, Vellore and set aside the conviction and sentence imposed in judgment dated 06.09.2021 and acquit the appellant/sole accused.

For Appellant : Mr.S.Shanmugasundaram
Mr.R.Muruga Bharathi

For Respondent : Mr.E.Raj Thilak



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CrL.A.No.641 of 2021

Additional Public Prosecutor



CrL.A.No.641 of 2021

JUDGMENT

(Order of the Court was made by SUNDER MOHAN,J.)

This Criminal Appeal has been filed by the sole accused, challenging the conviction and sentence imposed upon him, vide judgment dated 06.09.2021 in Spl.S.C.No.4 of 2018, on the file of the learned Sessions Judge, Special Court for Exclusive Trial of Cases under the POCSO Act, 2012, Vellore.

2.(i) It is the case of the prosecution that the appellant who was the relative of the victim aged about 17 years at the time of occurrence, had kidnapped her on 03.04.2013 at about 3.00 p.m., and took her to a bush near Murugan Temple and committed penetrative sexual assault; that thereafter, on 06.04.2013 committed penetrative sexual assault on the victim, promising that he would marry her, as a result of which the victim became pregnant.

(ii) On 20.02.2014, PW1, the step-father of the victim lodged a complaint [Ex.P8] to the respondent police. PW7, the Inspector of Police,



CrL.A.No.641 of 2021

registered the FIR in Cr.No.2 of 2014 for the offences under Sections 376, 417 and 506 of the IPC against the appellant. The FIR was marked as Ex.P9.

(iii) On 20.02.2014, PW7 went to the scene of the occurrence and prepared the Observation Mahazar [Ex.P10] and the Rough Sketch [Ex.P11] in the presence of witnesses. On the same day, she arrested the accused at 7.00 p.m., near Kodumampalli Bus Stand. She sent the victim and the accused for medical examination. Thereafter, after examination of all other accused, PW7 filed the final report on 25.06.2014 against the appellant for the offences under Sections 376(2)(h)(m), 417 of the IPC and Sections 4 and 6 r/w 5(l), 6 r/w 5(n), 6 r/w 5(j)(ii) of the Protection of Children from the Sexual Offences Act, 2012 [hereinafter referred to as 'POCSO Act, 2012'], before the learned Sessions Judge, Magalir Neethimandram [Fast Track Mahila], Vellore, which was taken on file as Special S.C.No.4 of 2018.



CrL.A.No.641 of 2021

(iv) On the appearance of the appellant, the provisions of Section 207 Cr.P.C., were complied with, and the trial Court framed charges against the appellant, and when questioned, the appellant pleaded 'not guilty'.

(v) To prove the case, the prosecution examined 9 witnesses as P.W.1 to P.W.9 and marked 11 exhibits as Exs.P1 to P11. When the appellant was questioned, u/s.313 Cr.P.C., on the incriminating circumstances appearing against him, he denied the same. The appellant examined one Devaraj, Village Chief [நாட்டாமை] as DW1 and did not mark any documents.

(vi) On appreciation of oral and documentary evidence, the trial Court found that the prosecution had established its case beyond reasonable doubt and held the appellant guilty of the offences under Section 417 of the IPC and Section 6 r/w 5(1) of the POCSO Act, 2012. The appellant was sentenced as follows:

<i>Offence under</i>	<i>Sentence imposed</i>
6 r/w 5(1) of the POCSO Act	To undergo imprisonment for life and to pay a fine of Rs.5,000/-, in default to undergo RI for three months.
417 of the IPC	To undergo RI for one year.
The sentences were ordered to run concurrently.	



CrL.A.No.641 of 2021

WEB COPY

Hence, the accused has preferred the appeal challenging the said conviction and sentence.

3. Heard, Mr.S.Shanmugasundaram, learned counsel appearing for the appellant, and Mr.E.Raj Thilak, learned Additional Public Prosecutor appearing for the respondent/State.

4. The learned counsel for the appellant submitted that though all the witnesses turned hostile, the trial Court had convicted the appellant on the basis of the DNA report, which is incorrect and relied upon the judgment of this Court in ***Chandra Mohan v. The State, rep. by its Inspector of Police***, reported in **MANU/TN/7260/2023**. He therefore prayed for acquittal of the appellant.

5. The learned Additional Public Prosecutor *per contra* submitted that though the witnesses have turned hostile, there is no infirmity in relying



CrL.A.No.641 of 2021

upon the DNA report and submitted that the judgment of this Court in ***Chandra Mohan's case*** [cited supra] is distinguishable on facts. He further submitted that the trial Court, was right in convicting the appellant and there is no reason to set aside the finding of guilt rendered by the trial Court. Hence, he prayed for dismissal of the appeal.

6. We have carefully considered the rival submissions and have perused all the relevant records.

7. (i) PW1 is the step-father of the victim. Though he had supported the case of the prosecution in the chief examination, in the cross examination, he had stated that the appellant had not committed the penetrative sexual assaults on the victim and it was one Shanmugam, with whom the victim had a love affair, who had committed the penetrative sexual assaults. PW2 the victim herself had deposed that she had originally informed her parents falsely that the appellant committed the penetrative sexual assaults, since she did not want to disclose her love affair with the said Shanmugam. PW2, therefore was treated hostile. In the cross



examination, she admits that she told the police that the appellant had committed penetrative sexual assaults.

(ii) PW3 is the mahazar witness, who turned hostile. PW4 is the doctor who examined the appellant and had issued Potency Certificate [Ex.P5]. PW5 is the doctor, who had examined the victim and had issued Ex.P6-Certificate, wherein she had mentioned that the victim was pregnant for about six months. In the said report, she had also stated that victim had sexual contacts with the appellant.

(iii) PW6 is the Scientific Officer in the DNA Typing Unit, Forensic Sciences Department, who had compared the samples and had issued the DNA report-Ex.P7. PW7 is the investigating officer, as stated earlier. PW8 is the Headmistress of the school, where the victim studied and had marked Ex.P2-Transfer certificate showing the date of birth of the victim as 23.12.1995. PW9 is the Inspector of Police, who had made an application to the Court to send the blood samples of the victim's child and that of the accused for DNA comparison.



CrL.A.No.641 of 2021

WEB COPY

(iv) The appellant examined DW1, to show that there was a panchayat held in the village in which the victim had stated that the appellant was not responsible for her pregnancy.

8. From the above narrative, it could be seen that the victim had originally stated to her relatives and to the doctor that the appellant had committed penetrative sexual assaults. However in her deposition, she would state that she had stated so because she did not want to reveal her love affair with one Shanmugam, as she feared harassment by her relatives. In the light of her deposition that the appellant had not committed any penetrative sexual assault and in the light of the evidence of PW1 who in the cross examination turned hostile, it may not be possible to render a finding of guilt against the appellant. However, we find that in the DNA report, which compared the blood samples collected from the victim's child and the appellant, it is stated as follows:

“(i) the cumulative probability of paternity of Mr.Krishnaraj @ Thangaraj for being the father of the child Boopathi is found to be 99.999999998%.



CrL.A.No.641 of 2021

(ii) the cumulative chance of exclusion of any random man from the paternity of the child Boopathi is 99.99999999999999%

9. Now, the question is, in the absence of any other evidence, whether this Court can render a finding of guilt only on the basis of the DNA report. In a similar case, the Division Bench of this Court in ***Chandra Mohan's case*** [cited supra] to which one of us was a party, had held as follows:

“8. Now the question is that in the absence of any other evidence can it be held that the appellant committed the offences alleged against the victim on the basis of the opinion evidence of the expert. The question as to the accuracy of the results by comparison of the DNA profile had come up for consideration in several cases before the Hon’ble Supreme Court. In a recent Judgment in Manoj Vs. State of Madhya Pradesh, reported in (2023) 2 SCC 353. The Hon’ble Supreme Court held as follows:

“151. During the hearing, an article published by the Central Forensic Science Laboratory, Kolkata [DNA Profiling in Justice Delivery System, Central Forensic Science Laboratory, Directorate of Forensic Science, Kolkata (2007).] was relied upon. The relevant extracts of the article are reproduced below:

“Deoxyribonucleic acid (DNA) is genetic material present in the nuclei of cells of living organisms. An average human body is composed of about 100 trillion of cells. DNA is present in the nucleus of cell as double helix, supercoiled to form chromosomes along with intercalated proteins.



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CrL.A.No.641 of 2021

Twenty-three pairs of chromosomes present in each nucleated cells and an individual inherits 23 chromosomes from mother and 23 from father transmitted through the ova and sperm respectively. At the time of each cell division, chromosomes replicate and one set goes to each daughter cell. All information about internal organisation, physical characteristics, and physiological functions of the body is encoded in DNA molecules in a language (sequence) of alphabets of four nucleotides or bases : Adenine (A), Guanine (G), Thymine (T) and Cytosine (C) along with sugar phosphate backbone. A human haploid cell contains 3 billion bases approx. All cells of the body have exactly same DNA but it varies from individual to individual in the sequence of nucleotides. Mitochondrial DNA (mtDNA) found in large number of copies in the mitochondria is circular, double stranded, 16,569 base pair in length and shows maternal inheritance. It is particularly useful in the study of people related through the maternal line. Also being in large number of copies than nuclear DNA, it can be used in the analysis of degraded samples. Similarly, the Y chromosome shows paternal inheritance and is employed to trace the male lineage and resolve DNA from males in sexual assault mixtures.

Only 0.1 % of DNA (about 3 million bases) differs from one person to another. Forensic DNA Scientists analyse only few variable regions to generate a DNA profile of an individual to compare with biological clue materials or control samples.

DNA Profiling Methodology

DNA profile is generated from the body fluids, stains, and other biological specimen recovered from evidence and the results are compared with the results obtained from reference samples. Thus, a link among victim(s) and/or suspect(s) with one another or with crime scene can be established. DNA profiling is a complex process of analyses of some highly variable regions of DNA. The variable areas of DNA are termed genetic markers. The current genetic markers of choice for forensic purposes are Short Tandem Repeats (STRs). Analysis of a set of 15 STRs employing



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CrL.A.No.641 of 2021

Automated DNA Sequencer gives a DNA profile unique to an individual (except monozygotic twin). Similarly, STRs present on Y chromosome (Y-STR) can also be used in sexual assault cases or determining paternal lineage. In cases of sexual assaults, Y-STRs are helpful in detection of male profile even in the presence of high level of female portion or in case of azoospermic or vasectomized male. Cases in which DNA had undergone environmental stress and biochemical degradation, min ISTRs can be used for over routine STR because of shorter amplicon size.

DNA profiling is a complicated process and each sequential step involved in generating a profile can vary depending on the facilities available in the laboratory. The analysis principles, however, remain similar, which include:

- 1. isolation, purification & quantitation of DNA*
- 2. amplification of selected genetic markers*
- 3. visualising the fragments and genotyping*
- 4. statistical analysis & interpretation.*

In mtDNA analysis, variations in Hypervariable Region I & II (HVR I & II) are detected by sequencing and comparing results with control samples:

Statistical Analysis

Atypical DNA case involves comparison of evidence samples, such as semen from a rape, and known or reference samples, such as a blood sample from a suspect. Generally, there are three possible outcomes of profile comparison:

(1) Match : If the DNA profiles obtained from the two samples are indistinguishable, they are said to have matched.

(2) Exclusion : If the comparison of profiles shows differences, it can only be explained by the two samples originating from different sources.

(3) Inconclusive : The data does not support a conclusion of the three possible outcomes, only the “match” between samples needs to be supported by statistical calculation. Statistics attempt to provide meaning to the



WEB COPY



CrL.A.No.641 of 2021

match. The match statistics are usually provided as an estimate of the Random Match Probability (RMP) or in other words, the frequency of the particular DNA profile in a population.

In case of paternity/maternity testing, exclusion at more than two loci is considered exclusion. An allowance of 1 or 2 loci possible mutations should be taken into consideration while reporting a match. Paternity or Maternity indices and likelihood ratios are calculated further to support the match.

Collection and Preservation of Evidence

If DNA evidence is not properly documented, collected, packaged, and preserved, it will not meet the legal and scientific requirements for admissibility in a court of law. Because extremely small samples of DNA can be used as evidence, greater attention to contamination issues is necessary while locating, collecting, and preserving. DNA evidence can be contaminated when DNA from another source gets mixed with DNA relevant to the case. This can happen when someone sneezes or coughs over the evidence or touches his/her mouth, nose, or other part of the face and then touches area that may contain the DNA to be tested. The exhibits having biological specimen, which can establish link among victim(s), suspect(s), scene of crime for solving the case should be identified, preserved, packed and sent for DNA profiling.”(emphasis supplied).

152. In an earlier judgment, Rv.Dohoney & Adams the UK Court of Appeal laid down the following guidelines concerning the procedure for introducing DNA evidence in trials : (1) the scientist should adduce the evidence of the DNA comparisons together with his calculations of the random occurrence ratio; (2) whenever such evidence is to be adduced, the Crown (prosecution) should serve upon the defence details as to how the calculations have been carried out, which are sufficient for the defence to scrutinise the



basis of the calculations; (3) the Forensic Science Service should make available to a defence expert, if requested, the databases upon which the calculations have been based.

153. *The Law Commission of India in its Report [185th Report, on Review of the Indian Evidence Act, 2003.], observed as follows:*

“DNA evidence involves comparison between genetic material thought to come from the person whose identity is in issue and a sample of genetic material from a known person. If the samples do not “match”, then this will prove a lack of identity between the known person and the person from whom the unknown sample originated. If the samples match, that does not mean the identity is conclusively proved. Rather, an expert will be able to derive from a database of DNA samples, an approximate number reflecting how often a similar DNA “profile” or “fingerprint” is found. It may be, for example, that the relevant profile is found in 1 person in every 1,00,000 : This is described as the “random occurrence ratio” (Phipson 1999, 15th Edn., Para 14.32).

Thus, DNA may be more useful for purposes of investigation but not for raising any presumption of identity in a court of law.” (emphasis in original)

154. *In Dharam Deo Yadav v. State of U.P. [Dharam Deo Yadav v. State of U.P., (2014) 5 SCC 509 : (2014) 2 SCC (Cri) 626] this Court discussed the reliability of DNA evidence in a criminal trial, and held as follows : (SCC pp. 528-29, para 36)*

“36. The DNA stands for deoxyribonucleic acid, which is the biological blueprint of every life. DNA is made up of a double stranded structure consisting of a deoxyribose sugar and phosphate backbone, cross-linked with two types of nucleic acids referred to as adenine and guanine, purines



WEB COPY



CrL.A.No.641 of 2021

and thymine and cytosine pyrimidines. ... DNA usually can be obtained from any biological material such as blood, semen, saliva, hair, skin, bones, etc. The question as to whether DNA tests are virtually infallible may be a moot question, but the fact remains that such test has come to stay and is being used extensively in the investigation of crimes and the court often accepts the views of the experts, especially when cases rest on circumstantial evidence. More than half a century, samples of human DNA began to be used in the criminal justice system. Of course, debate lingers over the safeguards that should be required in testing samples and in presenting the evidence in court. DNA profile, however, is consistently held to be valid and reliable, but of course, it depends on the quality control and quality assurance procedures in the laboratory.”

155. The US Supreme Court in District Attorney's Office for the Third Judicial District v. Osborne [District Attorney's Office for the Third Judicial District v. Osborne, 2009 SCC OnLine US SC 73 : 557 US 52 (2009)] dealt with a post-conviction claim to access evidence, at the behest of the convict, who wished to prove his innocence, through new DNA techniques. It was observed, in the context of the facts, that : (SCC OnLine US SC)

“Modern DNA testing can provide powerful new evidence unlike anything known before. Since its first use in criminal investigations in the mid-1980s, there have been several major advances in DNA technology, culminating in STR technology. It is now often possible to determine whether a biological tissue matches a suspect with near certainty. While of course many criminal trials proceed without any forensic and scientific testing at all, there is no technology comparable to DNA testing for matching tissues when such evidence is at issue. ... DNA testing has exonerated wrongly convicted people, and has confirmed the convictions of many others.”



WEB COPY



CrL.A.No.641 of 2021

156. Several decisions of this Court — Pantangi Balarama Venkata Ganesh v. State of A.P. [Pantangi Balarama Venkata Ganesh v. State of A.P., (2009) 14 SCC 607 : (2010) 2 SCC (Cri) 190], Santosh Kumar Singh v.State [Santosh Kumar Singh v.State, (2010) 9 SCC 747 : (2010) 3 SCC (Cri) 1469], State of T.N. v. John David [State of T.N. v. John David, (2011) 5 SCC 509 : (2011) 2 SCC (Cri) 647], Krishan Kumar Malik v.State of Haryana [Krishan Kumar Malik v. State of Haryana, (2011) 7 SCC 130 : (2011) 3 SCC (Cri) 61], Surendra Koli v. State of U.P. [Surendra Koli v. State of U.P., (2011) 4 SCC 80 : (2011) 2 SCC (Cri) 92] , Sandeep v. State of U.P.[Sandeep v.State of U.P., (2012) 6 SCC 107 : (2012) 3 SCC (Cri) 18] , Rajkumar v. State of M.P. [Rajkumar v. State of M.P., (2014) 5 SCC 353 : (2014) 2 SCC (Cri) 570] and Mukesh v. State (NCT of Delhi) [Mukesh v. State (NCT of Delhi), (2017) 6 SCC 1 : (2017) 2 SCC (Cri) 673] have dealt with the increasing importance of DNA evidence. This Court has also emphasised the need for assuring quality control, about the samples, as well as the technique for testing in Anil v. State of Maharashtra [Anil v. State of Maharashtra, (2014) 4 SCC 69 : (2014) 2 SCC (Cri) 266] : (Anil case [Anil v. State of Maharashtra, (2014) 4 SCC 69 : (2014) 2 SCC (Cri) 266] , SCC p. 81, para 18)

“18. Deoxyribonucleic acid, or DNA, is a molecule that encodes the genetic information in all living organisms. DNA genotype can be obtained from any biological material such as bone, blood, semen, saliva, hair, skin, etc. Now, for



several years, DNA profile has also shown a tremendous impact on forensic investigation. Generally, when DNA profile of a sample found at the scene of crime matches with DNA profile of the suspect, it can generally be concluded that both samples have the same biological origin. DNA profile is valid and reliable, but variance in a particular result depends on the quality control and quality procedure in the laboratory.”

157. This Court, in one of its recent decisions, Pattu Rajan v. State of T.N. [Pattu Rajan v. State of T.N., (2019) 4 SCC 771 : (2019) 2 SCC (Cri) 354], considered the value and weight to be attached to a DNA report : (SCC p. 791, para 52)

“52. Like all other opinion evidence, the probative value accorded to DNA evidence also varies from case to case, depending on facts and circumstances and the weight accorded to other evidence on record, whether contrary or corroborative. This is all the more important to remember, given that even though the accuracy of DNA evidence may be increasing with the advancement of science and technology with every passing day, thereby making it more and more reliable, we have not yet reached a juncture where it may be said to be infallible. Thus, it cannot be said that the absence of DNA evidence would lead to an adverse inference against a party, especially in the presence of other cogent and reliable evidence on record in favour of such party.”

158. This Court, therefore, has relied on DNA reports, in the past, where the guilt of an accused was sought to be established. Notably, the reliance, was to corroborate. This Court highlighted the need to ensure quality in the testing and eliminate the possibility of contamination of



CrL.A.No.641 of 2021

evidence; it also held that being an opinion, the probative value of such evidence has to vary from case to case."

In the above judgment there is a reference to the article published by the Central Forensic Science Laboratory, Calcutta, which states that if DNA evidence is not properly documented, collected, packaged, and preserved, it would not meet the legal and scientific requirements for admissibility in a Court of law. The report also states that DNA evidence can be contaminated when DNA from another source gets mixed with the DNA relevant to the case. This can happen when someone sneezes or coughs over the evidence or touches his or her mouth, nose, or other parts of the face and then touches an area that may contain the DNA to be tested. Therefore, it is evident that DNA testing can be a powerful technique in investigations and criminal trials. However, care has to be taken to ensure that the samples collected are properly documented, packaged, and preserved, which is not so in this case.

9. Therefore, it is seen that DNA testing can be a powerful technique in investigations and criminal trials. However, care has to be



CrL.A.No.641 of 2021

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taken to ensure that the samples collected are properly documented, packaged, and preserved.”

10. From the above judgment, where this Court had extracted the judgment of the Hon'ble Supreme Court, it would be clear that the DNA report can be relied upon for the purpose of 'corroboration'. Further, it has to be clearly established that the samples collected for comparison were properly documented, packed and preserved.

11. In the instant case, there is absolutely no evidence let in by the prosecution as to when the blood sample of the accused was taken and the blood sample of the victim's child was collected. Further, there is absolutely no evidence to establish as to how it was packed and preserved. Even assuming that blood samples were taken from the accused, the 'chain of custody' of the sample has not been established. In the absence of the same, the report based on the comparison of such a sample, would be of no value.

12. In a similar case, where there was no evidence of blood sample



CrL.A.No.641 of 2021

being taken from the accused and in the absence of establishing the chain of custody, to ensure that the blood samples were collected from the person concerned, packed and preserved properly, the Hon'ble Supreme Court in ***Prakash Nishad @ Kewat Zinak Nishad v. State of Maharashtra***, in **CrL.A.Nos.1636-1637 of 2023 dated 19.04.2023**, held that the DNA report cannot be relied upon in such circumstances. The judgment laid stress on the importance of establishing the chain of custody of the sample. The relevant observations are as follows:

“62. The document also lays emphasis on the ‘chain of custody’ being maintained. Chain of custody implies that right from the time of taking of the sample, to the time its role in the investigation and processes subsequent, is complete, each person handling said piece of evidence must duly be acknowledged in the documentation, so as to ensure that the integrity is uncompromised. It is recommended that a document be duly maintained cataloguing the custody. A chain of custody document in other words is a document, “which should include name or initials of the individual collecting the evidence, each person or entity subsequently having custody of it, dated the items were collected or transferred, agency and case number, victim’s or suspect’s name and the brief description of the item.””

13. Therefore, in the absence of any other evidence, we cannot sustain the conviction on the basis of the DNA test reports alone, especially in view



CrL.A.No.641 of 2021

of the infirmities that we have pointed out as regards the collection, packing and preservation of the blood samples.

14. For all the aforesaid reasons, we are of the view that the prosecution has not proved the case against the appellant beyond reasonable doubt, and therefore, the judgment of conviction and sentence passed in Spl.S.C.No.4 of 2018, dated 06.09.2021 on the file of learned Sessions Judge, Special Court for Exclusive Trial of Cases under the POCSO Act, 2012, Vellore, is liable to be set aside.

15. As a result, this Criminal Appeal is allowed, and the appellant is acquitted of all the charges. The conviction and sentence passed in Spl.S.C.No.4 of 2018, dated 06.09.2021 on the file of learned Sessions Judge, Special Court for Exclusive Trial of Cases under the POCSO Act, 2012, Vellore, are set aside. The fine amount, if any, paid by the appellant shall be refunded. Bail bond, if any, executed shall stand discharged.

(M.S.R.,J.) (S.M.,J.)
19.06.2024



CrL.A.No.641 of 2021

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Speaking /Non-speaking order
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WEB COPY



Crl.A.No.641 of 2021

M.S.RAMESH,J.
AND
SUNDER MOHAN,J.
ars

To

1. The Sessions Judge,
(Under POCSO Act, 2012)
Vellore, Vellore District.

2. The Inspector of Police,
All Women Police Station,
Tiruppatur, Tiruppatur Taluk,
Tirupattur District.

3. The Superintendent,
Central Prison, Vellore.

4. The Public Prosecutor,
High Court, Madras.

Crl.A.No.641 of 2021



WEB COPY



CrL.A.No.641 of 2021

19.06.2024