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Crl.A.No.605 of 2017

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 27.06.2024

CORAM :

THE HONOURABLE MRS. JUSTICE R.HEMALATHA

Crl.A.No.605 of 2017

Ganesan

...Appellant

vs.

State by Station House Officer,
Muthialpet Police Station,
Puducherry.

Crime No.119 of 2014.

...Respondent

PRAYER: Criminal Appeal filed under Section 374(2) Criminal Procedure Code, 1973, against the judgment and orders dated 07.09.2017 passed by the Principal Sessions Judge, Puducherry, in Spl.S.C.No.06 of 2015.

For Appellant : Mr.Swami Subramanian
For Respondent : Mr.K.S. Mohandass
Public Prosecutor (Puducherry)
Assisted by N.Danalatchoumy

JUDGMENT

This criminal appeal is filed against the judgment and orders dated 07.09.2017 passed by the learned Principal Sessions Judge, Puducherry, in Spl.S.C.No.06 of 2015.



Crl.A.No.605 of 2017

2. The appellant stands charged for the offences punishable under Sections 10 & 12 of the Protection of Children from Sexual Offences Act, 2012 (in short POCSO Act) by the trial court in Spl.S.C.No.06 of 2015.

3. The learned trial court Judge, after full trial, convicted and sentenced the appellant, vide her judgment dated 07.09.2017, as detailed hereunder.

<i>Conviction</i>	<i>Sentence</i>
Section 9(l) and (n) of POCSO Act punishable under Section 10 of POCSO Act.	Rigorous Imprisonment for five years and a fine of Rs.2,000/-, in default, to undergo Rigorous Imprisonment for six months.
Section 11(i) of POCSO Act punishable under Section 12 of POCSO Act, 2012.	Rigorous Imprisonment for two years and a fine of Rs.2,000/-, in default, to undergo Rigorous Imprisonment for six months.
The period of sentence already undergone shall be set off under Section 428 Cr.P.C. The sentences shall run concurrently.	

4. The case of the prosecution is as follows:

4.1. The victim child (P.W.1) aged about 14 years was residing with her mother and step father (appellant) at Door No.13, Ganaptahy



CrL.A.No.605 of 2017

Nagar, Muthialpet, Puducherry. The appellant is the younger brother of the biological father of the victim child (P.W.1). After the death of the father of the victim child, the appellant married the mother of the victim child even though he was already married and had children through his first wife.

4.2. Mohan Naicker (P.W.2), was the owner of the house in which the appellant, his second wife and the victim child were residing. Tmt. Mangavarathal @ Sathya (P.W.3), and Tmt. Jayalakshmi (P.W.4), who are the Secretary and the Joint Secretary respectively of the All India Democratic Women's Association, Puducherry Union, were also residing in one of the portions of the same building. On 15.08.2014 at about 7 p.m all of them heard a loud noise from the house of the victim child and they immediately rushed there. They were informed by the mother of the victim child that the appellant sexually assaulted the victim child. The victim child was weeping. They also saw the step father (appellant) of the victim child holding his lungi in his hands. They advised the mother of the victim child and the victim to lodge a complaint with the police.



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4.3. Thereafter on 18.09.2014, both the victim and her mother went to Child Welfare Committee office and informed Dr.Vidya Ram Kumar (P.W.7), Chairperson of the Child Welfare Committee about the sexual assault made on the victim child by the appellant. P.W.7 enquired the victim child separately and since it came to light that the occurrence alleged by the victim child actually took place, she got a written complaint (Ex.P1) from the victim child and sent it to Thiru. Muthukumaran (P.W.13), Sub Inspector of Police, Muthialpet Police Station. P.W.7 also gave counselling to the victim child.

4.4. P.W.13 received Ex.P1 from P.W.7 and registered an FIR (Ex.P12) in Crime No.119 of 2014 of Muthialpet Police Station against the appellant for the offences punishable under Section 8 of the POCSO Act. He went to the scene of occurrence and prepared a rough sketch (Ex.P17). Thereafter, he sent the victim child to the Rajiv Gandhi Women and Child Hospital, Puducherry, for medical examination where Dr.Manju Bargavi, examined the child on 09.10.2014. The victim child had stated that she was subjected to sexual assault by her step father (appellant) for more than three years. The doctor after examining the



Crl.A.No.605 of 2017

victim child recorded the following:

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No contusion, congestion over that area.

On inspection, old tear at 6'O clock and 8'O clock position in the hymen.

No abnormal discharge or bleeding from the vagina."

The Medical Report was marked as Ex.P11.

4.5. Thiru. Muthukumaran (P.W.13) arrested the appellant on 10.10.2014 and recorded his confessional statement in the presence of the witnesses Udhayakumar (P.W.5) and Kandan (P.W.6) and produced him before the concerned court for remanding him to judicial custody.

4.6. The appellant was also subjected to medical examination by Dr.R.Balaraman (P.W.9) attached to Indira Gandhi Government General Hospital and Post Graduate Institute, Puducherry, and he opined that there was nothing to suggest that the appellant is impotent. His Medical Certificate was marked as Ex.P7.



Crl.A.No.605 of 2017

WEB COPY

4.7. The victim child was produced before Thiru.S.Prakash (P.W.11), Judicial Magistrate-III, Puducherry, for recording her statement under Section 164 Cr.P.C. P.W.11 after observing necessary legal formalities recorded the statement of the victim child under Section 164 Cr.P.C., which was marked as Ex.P3. The signature of the victim child was marked as Ex.P2.

4.8. Thiru. Chinta Kothandaraman (P.W.14), the Inspector of Police took up further investigation in Crime No.119 of 2014 and altered the sections of law from 8 of POCSO Act to Sections 10 and 12 of POCSO Act. The Alteration Report was marked as Ex.P16.

4.9. After completing investigation, P.W.14 laid a final report before the Principal Sessions Judge, Puducherry in Spl. S.C. No.6/2015 against the appellant for the offences punishable under Sections 10 & 12 of POCSO Act.

4.10. The victim child had complained before the Chairperson,



CrI.A.No.605 of 2017

Child Welfare Committee, the doctor who examined her, the judicial Magistrate who recorded her statement under Section 164 Cr.P.C., and the Investigation Officer P.W.13 and P.W.14 that she was sexually assaulted by her step father, but did not support the case of the prosecution and turned hostile. The other witnesses supported the case of the prosecution.

4.11. The learned Principal Sessions Judge, Puducherry, after furnishing copies of records to the accused under Section 207 Cr.P.C, framed charges against the accused as stated in paragraph No.2.

4.12. In order to bring home the guilt of the accused the prosecution examined 14 witnesses, marked 17 documents and 6 Material Objects.

4.13. The appellant, when questioned under Section 313 Cr.P.C with regard to the incriminating circumstances appearing in evidence against him, denied of having committed any offence. He did not examine any witness. However, he marked a complaint (Ex.D1) given by the mother of the victim child to the Child Welfare Committee on



CrL.A.No.605 of 2017

18.09.2014.

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4.14. The learned Principal Sessions Judge, after analysing the oral and documentary evidence on record, convicted and sentenced the appellant as stated in Paragraph No.3 vide her judgment dated 07.09.2017.

4.15. Aggrieved over the same, the appellant has preferred the present appeal.

5. Heard Mr.Swami Subramanian, learned counsel appearing for the appellant and Mr.K.S. Mohandass, learned Public Prosecutor (Puducherry), assisted by N.Danalatchoumy, learned counsel for the respondent.

6. Mr.Swami Subramanian, learned counsel for the appellant contended that the victim child had turned hostile and had also specifically stated that she was tutored by one Sathya (P.W.3) to lodge a complaint against her step father and in the circumstances, the conviction and sentence passed by the trial court cannot be sustained. He would



Crl.A.No.605 of 2017

further contend that the mother of the victim child was not examined and that on 15.08.2014 itself a police complaint was preferred even as per the version of the victim child (P.W.1) and the said complaint has not seen the light of the day. It is his further submission that on 18.09.2014 the victim child had given a separate complaint Ex.P1 and the mother of the victim child had preferred a complaint Ex.D1. He therefore prayed for setting aside the conviction and sentence passed by the trial court judge.

7. Per contra, Mr.K.S. Mohandass, learned Public Prosecutor (Puducherry), assisted by N.Danalatchoumy, learned counsel for the respondent, contended that merely because P.W.1 (victim child) had turned hostile the entire case of the prosecution cannot be thrown out. He also relied on the decision in ***Rajesh Yadav and another vs. State of Uttar Pradesh*** reported in ***(2022) 12 SCC 200*** and contended that the evidence of the hostile witness cannot be discarded as a whole, and relevant parts thereof which are admissible in law can be used by the prosecution or the defence. He drew the attention of this court to the cross examination of P.W.1 (victim child), where she had clearly admitted that her step father misbehaved with her. According to him, the mere non examination of the mother of the victim child *per se* would not



Crl.A.No.605 of 2017

WEB COPY
vitiating the case of the prosecution and the prosecution in the instant case had adduced acceptable evidence to hold that the victim child was subjected to sexual assault by her step father. It is also his submission that in respect of serious offences like murder, rape, dacoity, etc., the settlement between the offender and the victim can have no legal sanction at all. According to him, in the present case, the sexual assault against a child aged 14 years had led to registration of a Crime punishable under Sections 10 & 12 of POCSO Act and when P.W.1 had admitted even during cross examination that she was sexually assaulted by her step father, the conviction and sentence passed by the trial court cannot be assailed. He therefore, prayed for dismissal of the present appeal.

8. In the instant case, the appellant is the younger brother of the biological father of the victim child. He is already married and has two children through his first wife. However, it is seen from the evidence of P.W.1 that the appellant married her mother also and they were all living under the same roof. P.W.1 was taken to the Chairperson, Child Welfare Committee (P.W.7) on 18.09.2014 by her mother Uma where the victim child informed the Chairperson that she was subjected to sexual assault by the appellant for several years. She had also given a written complaint



Crl.A.No.605 of 2017

(Ex.P1) to the Chair Person, Child Welfare Committee (P.W.7). The said complaint was forwarded to the Sub Inspector of Police, Muthialpet Police Station, Puducherry. P.W.7 had infact enquired the child separately to ascertain the truth of her contention. Since it appeared that the victim was speaking truth, she had forwarded the complaint to the police station.

8.1. P.W.2 to P.W.4 are all independent witnesses and they were all residing in several portions of the same building in which the victim child, her mother and the appellant were residing. They have clearly deposed that on 15.08.2014 at about 7 p.m, they heard a loud noise from the house of the victim child and they all rushed there. They saw the victim child crying and her mother Uma informed them that her husband (appellant) sexually assaulted her daughter. They all had advised P.W.1 and her mother to lodge a police complaint. However, P.W.1 and her mother had appeared before the Child Welfare Committee only on 18.09.2014 and preferred a complaint, which was sent to the Sub Inspector of Police, Muthialpet police station, Puducherry. P.W.3 and P.W.4 are the Secretary and the Joint Secretary respectively of All India Democratic Women's Association, Puducherry Union, and they have



CrI.A.No.605 of 2017

rushed to the house of the appellant on hearing the noise. They have also enquired the mother of the victim and the victim. P.W.3, infact, had stated that she saw the appellant holding his lungi in his hand. Nothing useful was suggested to P.W.2 to P.W.4 to discredit or disbelieve their versions. As already observed, P.W.3 and P.W.4 are holding important posts in All India Democratic Women's Association and there is no reason to discard their evidence in toto. The Chairperson of the Child Welfare Committee (P.W.7) had also enquired the child to ascertain as to whether she is speaking truth and thereafter had also given counselling to the child. The doctor who examined the child had found an old tear at 6'O clock and 8'O clock position in the hymen. Though P.W.1 in her examination before the Court had turned hostile, she had actually deposed during the course of cross examination that she informed the Chairperson of the Child Welfare Committee about her step father sexually assaulting her. In the decision in ***Rajesh Yadav and another vs. State of Uttar Pradesh*** (cited supra), it has been held thus:

22.The expression “hostile witness” does not find a place in the Evidence Act. It is coined to mean testimony of a witness turning to depose in favour of the opposite party. We must bear it in mind that a witness may depose



in favour of a party in whose favour it is meant to be giving through his chief-examination, while later on change his view in favour of the opposite side. Similarly, there would be cases where a witness does not support the case of the party starting from chief-examination itself. This classification has to be borne in mind by the Court. With respect to the first category, the Court is not denuded of its power to make an appropriate assessment of the evidence rendered by such a witness. Even a chief-examination could be termed as evidence. Such evidence would become complete after the cross-examination. Once evidence is completed, the said testimony as a whole is meant for the court to assess and appreciate qua a fact. Therefore, not only the specific part in which a witness has turned hostile but the circumstances under which it happened can also be considered, particularly in a situation where the chief-examination was completed and there are circumstances indicating the reasons behind the subsequent statement, which could be deciphered by the court. It is well within the powers of the court to make an assessment, being a matter before it and come to the correct conclusion.

23. On the law laid down in dealing with the testimony of a witness over an issue, we would like to place



WEB COPY



Crl.A.No.605 of 2017

reliance on the decision of this Court in C. Muniappan v. State of T.N. [C. Muniappan v. State of T.N., (2010) 9 SCC 567 : (2010) 3 SCC (Cri) 1402] : (SCC pp. 596-97, paras 81-85).

“81. It is settled legal proposition that : (Khujji case [Khujji v. State of M.P., (1991) 3 SCC 627 : 1991 SCC (Cri) 916] , SCC p. 635, para 6)

‘6. ... the evidence of a prosecution witness cannot be rejected in toto merely because the prosecution chose to treat him as hostile and cross-examined him. The evidence of such witnesses cannot be treated as effaced or washed off the record altogether but the same can be accepted to the extent their version is found to be dependable on a careful scrutiny thereof.’

(Vide Bhagwan Singh v. State of Haryana [Bhagwan Singh v. State of Haryana, (1976) 1 SCC 389 : 1976 SCC (Cri) 7], Rabindra Kumar Dey v. State of Orissa [Rabindra Kumar Dey v. State of Orissa, (1976) 4 SCC 233 : 1976 SCC (Cri) 566], Syad Akbar v. State of Karnataka [Syad



Crl.A.No.605 of 2017

Akbar v. State of Karnataka, (1980) 1 SCC 30 : 1980 SCC (Cri) 59] and Khujji v. State of M.P. [Khujji v. State of M.P., (1991) 3 SCC 627 : 1991 SCC (Cri) 916] , SCC at p. 635, para 6)

82. In State of U.P. v. Ramesh Prasad Misra [State of U.P. v. Ramesh Prasad Misra, (1996) 10 SCC 360 : 1996 SCC (Cri) 1278] this Court held that (at SCC p. 363, para 7) evidence of a hostile witness would not be totally rejected if spoken in favour of the prosecution or the accused but required to be subjected to close scrutiny and that portion of the evidence which is consistent with the case of the prosecution or defence can be relied upon. A similar view has been reiterated by this Court in Balu Sonba Shinde v. State of Maharashtra [Balu Sonba Shinde v. State of Maharashtra, (2002) 7 SCC 543 : 2003 SCC (Cri) 112], Gagan Kanojia v. State of Punjab [Gagan Kanojia v. State of Punjab, (2006) 13 SCC 516 : (2008) 1 SCC (Cri) 109], Radha Mohan Singh v. State of U.P.



[Radha Mohan Singh v. State of U.P., (2006) 2 SCC 450 : (2006) 1 SCC (Cri) 661], Sarvesh Narain Shukla v. Daroga Singh [Sarvesh Narain Shukla v. Daroga Singh, (2007) 13 SCC 360 : (2009) 1 SCC (Cri) 188] and Subbu Singh v. State [Subbu Singh v. State, (2009) 6 SCC 462 : (2009) 2 SCC (Cri) 1106] .

83. Thus, the law can be summarised to the effect that the evidence of a hostile witness cannot be discarded as a whole, and relevant parts thereof which are admissible in law, can be used by the prosecution or the defence.

84. In the instant case, some of the material witnesses i.e. B. Kamal (PW 86) and R. Maruthu (PW 51) turned hostile. Their evidence has been taken into consideration by the courts below strictly in accordance with law. Some omissions, improvements in the evidence of the PWs have been pointed out by the learned counsel for the appellants, but we find them to be very trivial in nature.



WEB COPY



Crl.A.No.605 of 2017

85. *It is settled proposition of law that even if there are some omissions, contradictions and discrepancies, the entire evidence cannot be disregarded. After exercising care and caution and sifting through the evidence to separate truth from untruth, exaggeration and improvements, the court comes to a conclusion as to whether the residuary evidence is sufficient to convict the accused. Thus, an undue importance should not be attached to omissions, contradictions and discrepancies which do not go to the heart of the matter and shake the basic version of the prosecution's witness. As the mental abilities of a human being cannot be expected to be attuned to absorb all the details of the incident, minor discrepancies are bound to occur in the statements of witnesses. Vide Sohrab v. State of M.P. [Sohrab v. State of M.P., (1972) 3 SCC 751 : 1972 SCC (Cri) 819], State of U.P. v. M.K. Anthony [State of U.P. v. M.K. Anthony, (1985) 1 SCC 505 : 1985 SCC (Cri) 105], Bharwada*



CrI.A.No.605 of 2017

Bhoginbhai Hirjibhai v. State of Gujarat
[*Bharwada Bhoginbhai Hirjibhai v. State of Gujarat*, (1983) 3 SCC 217 : 1983 SCC (Cri) 728], *State of Rajasthan v. Om Prakash* [*State of Rajasthan v. Om Prakash*, (2007) 12 SCC 381 : (2008) 1 SCC (Cri) 411], *Prithu v. State of H.P.* [*Prithu v. State of H.P.*, (2009) 11 SCC 588 : (2009) 3 SCC (Cri) 1502], *State of U.P. v. Santosh Kumar* [*State of U.P. v. Santosh Kumar*, (2009) 9 SCC 626 : (2010) 1 SCC (Cri) 88] and *State v. Saravanan* [*State v. Saravanan*, (2008) 17 SCC 587 : (2010) 4 SCC (Cri) 580] .”

8.2. In the light of the above decision, the entire evidence of P.W.1 has to be carefully scanned. P.W.1 had in her deposition stated that as per the instructions of one Sathya (P.W.3), her neighbour, she gave a police complaint against her step father. It has not been explained as to how Sathya was inimical towards her step father. Nothing was elicited from P.W.3 during the course of cross examination as to how she would gain by convicting the present appellant. The appellant had also not explained this aspect when questioned under Section 313 Cr.P.C. The



Crl.A.No.605 of 2017

trial court judge had, infact, analysed these aspects in her judgment and observed thus:

The other witness namely PW2, who is the owner of the house and another one witness-namely PW4 Jayalakshmi, who is also a tenant in the same apartment who witnessed the occurrence while she along with the witness PW3-Mangalathammal @ Satya, who is the Secretary of Madhar Sangham and another person Baskar, who were all gathered and were talking in the house of the tenant Jayalakshmi, have clearly deposed that while they were talking in the house of Jayalakshmi they heard a noise in the upstairs, where the minor girl and her mother Uma were residing and when they rushed to the the of the said Uma, they saw the accused standing in a nude manner and was holding his lungi in his hand and he also left the house and they also saw the victim child's mother was quarrelling with the accused and the victim child was crying by her mother's side. It is the clear evidence of PW3, who has deposed that -

கடந்த 15.8.2014 அன்று நானும், வாலிபர்
சங்கத்தின் துணை செயலாளராக இருக்கும்
பாஸ்கர் என்பவரும் எனது மாதர் சங்கத்தின்



Crl.A.No.605 of 2017

துணை செயலாளர் Jayalakshmi குடியிருக்கும் முத்தியால் பேட்டையில் மோகன் நாயகர் வீட்டில் Jayalakshmi-யுடன் பேசி கொண்டிருந்தோம். அப்போது மாலை சுமார் 7 மணியிருக்கும். அந்த வீட்டின் மேல் பகுதியில் சத்தம் கேட்டது. நான், Jayalakshmi, மற்றும் பாஸ்கர் மேலே சென்று பார்த்தோம். அங்கே உமாவும் ஆஜர் எதிரியும் சண்டை போட்டு கொண்டிருந்தார்கள். Jayalakshmi, உமாவை விசாரித்த போது நானும் பாஸ்கரும் அங்கு இருந்தோம். அந்த வீட்டில் பாதிக்கப்பட்ட சிறுமி மஞ்சளா தேவி அழுது கொண்டிருந்தார். அப்போது உமா எங்கள் மூவரிடமும் தன்னுடைய கணவர் கணேசன் தான் அணிந்திருந்த கைலியை அவிழ்த்துவிட்டு, உடம்பில் துணி இல்லாமல், தன் மகளை கையை பிடித்து இழுத்ததாக கூறினார். இதற்கு முன்பும் 2012-ல் சிதம்பரத்தில் குடியிருக்கும் போதும், அவ்வாறே சிறுமி மஞ்சளா தேவியின் சிறு நீரகம் கழிக்கும் இடத்தில் கை வைத்து, தடவியதாக கூறினார். அதே போல், மேலும் முத்தியால்பேட்டு, ஜபாஸ்தியான் பேட்டில் குடியிருக்கும் போதும், ஆஜர் எதிரி சிறுமி அடி வயிற்றில் கையை வைத்து தடவியதாக கூறினார்.

55.Further the PW3 in her cross-examination also clearly deposed that -

சம்பவம் நடந்த போது, நாங்கள் மேலே உடனே சென்று பார்த்த போது எதிரி அவருடைய



கைலியை கழற்றி கையில் பிடித்திருந்ததை பார்த்தோம். இந்த விபரத்தை நான் கூச்சப்பட்டு, போலீசார் விசாரிக்கும் போது சொல்லவில்லை

56. PW4-Jayalakshmi, who has also deposed the same and corroborated the evidence of PW3 and she has deposed that while hearing the noise from the upstairs, this three persons went upstairs and they saw the accused standing in a nude manner and on seeing them the accused left the place by holding his lungi in his hand. She has further deposed that -

உடனே நாங்கள் மூவரும் உமா வீட்டிற்கு சென்று பார்த்தோம். ஆஜர் எதிரி கணேசன் அப்போது பிறந்த மேனியான நின்று கொண்டிருந்தார். எங்களை பார்த்தவுடன், லுங்கியை கையில் பிடித்துக் கொண்டு, வெளியே சென்றுவிட்டார். பாதிக்கப்பட்ட சிறுமி, அம்மா உமா பக்கத்தில் நின்று கொண்டு அழுது கொண்டிருந்தார்.

57. She has also further deposed that on enquiry, the victim child's mother had informed them that even when they were residing at Chidambaram in 2012, accused Ganesan was giving sexual harassment to her daughter and only on her request, they were taken to CWC, wherein, the victim child was enquired by the Chairperson and the complaint was forwarded to



Crl.A.No.605 of 2017

Muthialpet Police Station. She has also clearly deposed that in the crime details form, she along with one Baskar signed and the report was marked as Ex.P5.

8.3. In the light of the evidence of P.W.2 to P.W.4, the Chairperson of the Child Welfare Committee (P.W.7) and the Protection Officer, Child Welfare Committee (P.W.8), it has to be held that the accused is guilty of the offence punishable under Sections 10 and 12 of POCSO Act. It is pertinent to point out that the victim is the step daughter of the appellant and he is not a stranger to the family of the victim child and her mother. In fact, he is the own brother of the biological father of the victim child and despite having his own family, he had married the mother of the victim for the second time, though it is illegal. It appears that he has instigated the child to turn hostile as seen from the contention of the learned counsel for the appellant that the appellant is now taking care of the victim child and her mother. It is also evident that both P.W.1 and her mother were financially dependent on the appellant. However, the prosecution was able to prove the case beyond any reasonable doubt. Therefore, the conviction and sentence passed by the trial court is hereby confirmed.



WEB COPY



Crl.A.No.605 of 2017

9. In the result,

- i. The Criminal Appeal is dismissed.
- ii. The judgment and orders dated 07.09.2017 passed by the Principal Sessions Judge, Puducherry, in Spl.S.C.No.06 of 2015. is confirmed.
- iii. The accused is directed to surrender before the trial Court viz., the Principal Sessions Court, Puducherry, within fifteen days from the date of receipt of a copy of this order / uploading of the order, failing which, the trial Court shall take necessary steps to secure the presence of the accused to serve the remaining period of sentence.

27.06.2024

bga

Index : yes/no

Speaking /Non speaking Order

To

1. State by Station House Officer,
Muthialpet Police Station,
Puducherry.



Crl.A.No.605 of 2017

Crime No.119 of 2014.

2. The Principal Sessions Judge, Puducherry.
3. The Public Prosecutor, High Court, Madras.
4. The Section Officer, Criminal Section, High Court, Madras.

R.HEMALATHA, J.

bga

Crl.A.No.605 of 2017

27.06.2024