

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 05.07.2016

CORAM

THE HONOURABLE MR. JUSTICE S.NAGAMUTHU
AND
THE HONOURABLE MR. JUSTICE V.BHARATHIDASAN

CRL.A.Nos.594 of 2015 and 64 of 2016

1. Viswanathan
2. Selvam
Bagavathi

...Appellants in C.A.No.594/2015/A1 and A2
...Appellant in C.A.No.64/2016/A3

Vs

State by
The Inspector of Police,
Grand Bazaar Police Station,
Puducherry.

... Respondent in both appeals

Appeals filed u/s.374 Cr.P.C., against the Judgment of conviction and sentence passed by the learned II Additional Sessions Judge, Fast Track Court, Puducherry, made in S.C.No.30 of 2003 dated 09.09.2015.

For Appellants in both appeals : Mr.I.Paul Nobel Devakumar

For Respondent in both Appeals : Mr.V.Balamurugan,
Addl. Public Prosecutor,
Puducherry

C O M M O N J U D G M E N T

[Judgment of the court was delivered by S.NAGAMUTHU, J.]

The appellants in Crl.A.No.594 of 2015 are the accused 1 and 2 and the appellant in Crl.A.No.64 of 2016 is the 3rd accused in S.C.No.30 of 2003 on the file of the learned II Additional Sessions Judge, Fast Track Court, Puducherry. They stood charged for offence under Section 364-A read with 34 of IPC. By judgment dated 09.09.2015, the trial court convicted all the three accused under the said charge and sentenced them to undergo imprisonment for life and to pay a fine of Rs.1,000/- each, in default, to undergo rigorous imprisonment for one year. Challenging the same, the appellants are before this Court with these appeals.

2. The case of the prosecution in brief is as follows:

(a) P.Ws.1 and 2 are father and mother respectively and P.W.3 is the uncle of P.W.9 Ms.Sangavi. During the year 2002, P.W.9 was hardly aged at 8 years. She was studying in III Standard in a private school at Puducherry. She used to go to the school in a rickshaw in the morning and return in the evening in the same rickshaw. On 18.10.2002, as usual, P.W.9 had gone to the school. The school working time was over at 03.30 p.m. P.W.9 came out of the school to go to her house. It is alleged that at that time, one person, who was not already known to P.W.9 (identified as A1), came to the said place. He told P.W.9 that her parents had gone to Chengi to purchase a land and they had sent him to take her to Chengi. Believing his words, she went along with him. He took her to the place where he had parked a scooter. The 1st accused then took P.W.9 in the said scooter to a C.D. Shop at Puducherry. P.W.9 was asked to sit on the scooter itself. Two other persons were already lying in wait for the 1st accused (Those two persons have been later on identified as accused 2 and 3). The accused 2 and 3 took P.W.9 in the same scooter. The 3rd accused drove the scooter and the 2nd accused sat as a pillion rider and P.W.9 was made to sit in between them. They drove the scooter to Chengi Kottai. For some time, they made her to sit there. When she enquired, they said that her parents would come. Then, they took P.W.9 to a house of a relative of the 2nd accused. They kept P.W.9 in the said house. She was told that her parents would come soon.

(b) P.W.9, then told a woman in the house about the above occurrence. She, in turn, scolded the 2nd accused for having kidnapped P.W.9. The 2nd accused went out of the house. Then, on the next day, in the afternoon, the 2nd accused returned to the said house where P.W.9 was kept. The 3rd accused also came. Again, they took P.W.9 in the very same scooter. They again took P.W.9 in the Scooter to Chengi. When the scooter was nearing a petrol bunk, policemen came in a TATA Sumo Car. The TATA Sumo Car hit the scooter. The accused 2 and 3 jumped out of the scooter and started running. P.W.9 fell down from the scooter. Believing that it was an accident, P.W.9 also started following the accused 2 and 3. But, from the TATA Sumo Car, the grandfather of P.W.9 and others got down. On seeing them, P.W.9 returned. Thus, P.W.9 was rescued. The accused 2 and 3 could not be caught hold as they ran away from the scene of occurrence.

(c) Reverting back to the family of P.W.9, since P.W.9 did not return from the school, P.W.1 and other family members went in search of her. They were told by someone near the vicinity of the school that P.W.9 was taken by an unidentifiable male in a

scooter. Apprehending that it was a kidnapping, P.W.1 went to Pondicherry Police Station on 18.10.2002 and made a complaint at 08.00 p.m.

(d) P.W.12, the then Sub-Inspector of Police, on receipt of the said complaint, registered a case in Crime No.319 of 2002 under Section 363 of IPC. Ex.P.12 is the First Information Report and Ex.P.1 is the complaint. He forwarded both the documents to court.

(e) P.W.12 took up the case for investigation. He proceeded to the place of occurrence and examined P.Ws.1 and 2 and recorded their statements. P.W.12 made a thorough search for P.W.9. But, he could not succeed. He was informed by P.W.1 that on 19.10.2002, he received a phone call from the phone No.04145-224054 demanding Rs.2,00,000/- as ransom for releasing P.W.9. P.W.12 during investigation found that the said telephone call was that of a public booth at No.27, Villupuram Road, Chengi. Therefore, suspecting that the child had been taken to Chengi, along with another Sub-Inspector of Police, he went to Chengi. While so, again P.W.1 received a phone call from Phone No.04145 222594 and again such demand was reiterated. During investigation, it turned out that it was from a public booth at Villupuram Main Road, Appambut, Chengi. Again at 04.00 p.m., P.W.1 received a telephone call from Telephone No.04145 223079. This time also, the culprit demanded money for releasing P.W.9. The investigation revealed that it was again a public booth at No.162, Tiruvannamalai Road, Chengi.

(f) P.W.12, when enquired the person who was present there, he identified the 1st accused who was staying somewhere near the said booth. P.W.12 arrested the 1st accused. He disclosed that P.W.9 had been kept by the accused 2 and 3 at Sathyamangalam. Therefore, along with the grandfather of P.W.9 and others, they went in search of her. They found the accused 2 and 3 moving in the scooter bearing Registration No. PY-01 A 0443 along with the child. When P.W.12 with his vehicle tried to intercept the accused 2 and 3, they abandoned the scooter along with the child and ran away. Thus, it was at 07.00 p.m., P.W.9 was rescued by P.W.12. P.W.12 then examined P.W.9 and recorded her statement. On 20.10.2002, P.W.12 recovered a compact disc in which the telephone calls and conversations had been recorded and he forwarded the 1st accused to court for judicial remand. Then, he altered the case into one under Section 364-A read with 34 of IPC against all the three accused. Then, he arrested the other accused and forwarded them to court. The investigation was continued by P.W.13 who laid charge sheet against the accused.

3. The learned Judicial Magistrate No.I, Puducherry, by his order dated 09.04.2003 committed the said case to the Courts of Sessions under Section 209 of Cr.P.C. for trial. The case was made over to the Additional Assistant Sessions Judge, Puducherry on 11.04.2003 by the Principal Sessions Judge, Puducherry for trial. The Additional Assistant Sessions Judge, Puducherry, framed charges against all the three accused on 28.07.2005. Then, on administrative grounds, the Chief Judge, Puducherry, by order dated 28.11.2006, withdrew the said case from the file of the learned Additional Assistant Sessions Judge, Puducherry and transferred the same to the II Additional Sessions Judge, Fast Track Court, Puducherry for trial. Accordingly, the original records of the case were sent from the Additional Assistant Sessions Judge, Puducherry to the II Additional Sessions Judge, Fast Track Court, Puducherry. But the properties (material objects) collected during investigation and submitted to the learned Magistrate were not sent to the trial court. There were number of correspondences between the II Additional Sessions Judge, Puducherry, the Additional Assistant Sessions Judge, Puducherry and the learned Judicial Magistrate No.I, Puducherry in this regard wherein the trial court wanted the said properties to be sent to the trial court so as to commence the trial. But the properties were never traced out. Thus, no progress could be made in the trial until 14.11.2014. Since the properties were once for all lost, the II Additional Sessions Judge, Puducherry, decided to proceed with the trial of the case on 14.11.2014. The learned Judge recorded that since for more than 11 years, the case was pending without any progress in the trial and since the accused was entitled for speedy trial as a fundamental right, he decided to proceed with the case, even in the absence of the production of the case properties. Accordingly, the trial was commenced on 14.11.2014 and the judgment was pronounced on 09.09.2015, convicting all the 3 accused under Section 364-A read with 34 of IPC.

4. During the course of trial, in order to prove the case, on the side of the prosecution, as we have already pointed out, 13 witnesses were examined and 18 documents and 1 material object, namely, the Scooter bearing registration No.PY 01 A 0443 were marked .

5. Out of the said witnesses, P.W.1 is the father of the victim girl. He has stated that since the occurrence was 12 years before, he had forgotten everything about the case. Thus, he did not speak any fact in favour of the prosecution. He only admitted the complaint, namely, Ex.P.1 and his statement recorded by the learned Judicial Magistrate under Section 164 of Cr.P.C. vide Ex.P.2. Thus, the evidence of P.W.1 is of no use

for the prosecution in any manner. P.W.2 is the mother of the victim girl. She has stated that when P.W.9 was doing 3rd standard, the rickshaw puller who used to take P.W.9 to the school, came and told that one person had taken her. P.W.3 is an Advocate by profession. He is the younger brother of P.W.1. He has stated that on 18.10.2002, the victim girl P.W.9 had gone to the school in the morning, but, she did not return after the school time was over at 03.00 p.m. He has further stated that the rickshaw puller told him that one unknown person had taken P.W.9. He has further stated that thereafter, P.W.1 went to the police station and made a complaint. Thus, his evidence is also of no use to the case of the prosecution. P.W.4 has turned hostile and he has not supported the case of the prosecution in any manner. As a matter of fact, he was examined to speak about the telephone calls made by the accused 2 and 3 from a STD Booth. P.W.5 has also turned hostile. She was also examined to speak about the fact that the accused 2 and 3 spoke from a telephone booth on the day of occurrence. P.W.6 has also turned hostile. He was also examined to speak about the accused 2 and 3, who according to him, they came in a scooter along with the child and made a phone call. P.W.7 has turned hostile and he has not supported the case of the prosecution in any manner. P.W.8 is the sister--in-law of the 2nd accused. She has also turned hostile and she has not supported the case of the prosecution in any manner.

6. P.W.9 victim girl has stated that in the usual course, she went to the school on 18.10.2002 and at 03.30 p.m. after the school was over, when she came out of the school, the 1st accused took her in a scooter by deceiving her that he was taking her to Chengi where her parents had gone to purchase a land. She has further stated that he took her to a CD shop in Puducherry from where she was taken in M.O.1 Scooter by the accused 2 and 3 to Chengi. She has narrated the entire events in a vivid manner as we already stated. She has further stated that she was kept in the house of one woman at Chengi Fort and on the next day, when they took her in the same scooter to Chengi, police came and intercepted and rescued her.

7. P.W.10 is the Inspector of Police at Chengi Police Station. He has stated that he went along with P.W.1 in search of the accused 2 and 3 and he has spoken about the arrest of the 1st accused and then, searched for the accused 2 and 3. He has further stated that when the accused 2 and 3 were found moving in M.O.1 Scooter, they were intercepted by the police and at that time, they have started running away, abandoning the scooter and the child. P.W.11, the then Judicial Magistrate No.II, Puducherry, has spoken about the Test Identification Parade conducted. According to him, P.W.9-Sangavi identified

all the three accused during Test Identification Parade. P.W.12 has spoken about the investigation done and P.W.13 has spoken about the further investigation and his final report.

8. When the above incriminating materials were put to the accused u/s.313 Cr.P.C., they denied the same as false. Their defence was a total denial. Having considered all the above, the Trial Court convicted the accused as detailed in the first paragraph of the judgment. Challenging the said conviction and sentence, the appellants are before this Court.

9. We have heard the learned Counsel appearing for the appellants and the learned Additional Public Prosecutor appearing for the State and we have also perused the records carefully.

10. The learned Counsel for the appellants would submit that in this case, except the evidence of P.W.8, there is no other evidence to prove the charges. He would further submit that absolutely, there is no evidence that they demanded ransom. He would also submit that P.W.9, the child witness cannot be given much weightage as there are not of discrepancies in her evidence. He would further submit that there is no proper identification of the accused by P.W.9. For these reasons, according to the learned Counsel for the appellants, the appellants are entitled for acquittal.

11. The learned Additional Public Prosecutor, Puducherry, would vehemently oppose this appeal. He would submit that though it is true that the family members of P.W.1 and others have turned hostile, the evidence of P.W.9 would be suffice to sustain the conviction. He would further submit that during the Test Identification Parade also, P.W.9 correctly identified all the three accused. The learned Additional Public Prosecutor would further submit that the evidence of P.W.3 is duly corroborated by the evidences of P.Ws.10 and 12. Thus, according to the learned Additional Public Prosecutor, the conviction and sentence imposed on the appellants deserve to be confirmed.

12. We have considered the above submissions.

13. According to the case of the prosecution, P.W.9 was kidnapped by these three accused and these three accused spoke on few occasions through phone from various telephone booths to P.W.1 and demanded Rs.2,00,000/- as ransom for releasing P.W.9. But, unfortunately, P.W.1 could not support the case of the prosecution, as according to him, he had forgotten the events, which took place 12 years before. Thus, the prosecution is not able to prove the demand of ransom by these accused through the

oral evidence of P.W.1. As instructed by the police, P.W.1 had recorded all the conversations through telephone talks and that was given by way of a compact disc to the police and the same was, in turn, produced before the learned Magistrate along with the final report. But unfortunately, that compact disc has been lost somewhere in the court. Thus, the compact disc is also not available to prove the above demand for ransom. There is no other evidence to prove that all these accused demanded ransom for releasing P.W.9. Thus, the allegation that all these accused demanded ransom from P.W.1 for releasing the kidnapped P.W.9 has not been proved.

14. Now, to prove that P.W.9 was kidnapped, the prosecution has to rely only on the evidence of P.W.9, the victim and P.Ws.10 and 12. P.W.9 has stated that as usual, she went to the school in the morning on 18.10.2002 and after the school time was over at 03.30 p.m., she came out of the school. She has further stated that at that time, an unknown person came to her, persuaded her and told her that her parents had gone to Chengi and he would take her to Chengi. Then, he took her in the Scooter (M.O.1) to a C.D.Shop in Puducherry. Thus, P.W.9 has identified the 1st accused as the said person who took her from the school to the CD Shop. She has identified the 1st accused in the Test Identification Parade as well as during the trial also. We do not find any reason to reject the said identification made by P.W.9 on both occasions.

15. According to the further evidence of P.W.9, in the C.D.Shop, two other persons were already lying in wait. Those two persons took her in the very same scooter to Chengi Kottai. She has identified the accused 2 and 3 as those two persons who took her to Chengi Kottai. Thus, the accused 2 and 3 have also been identified during Test Identification Parade and during the trial of the case. We do not find any reason to reject the identification of the accused 2 and 3 made by P.W.9.

16. P.W.9 has further stated that she was taken to Chengi where they made her to wait for some time and took her to a house and they kept her there during night. P.W.9 was waiting for the parents to come. One of the accused gave a skirt and told her that it was given by her parents. The next day, the woman in the house shouted at the 2nd accused. Then, in the evening, they took again P.W.9 in the same scooter. It was only, at that time, the scooter was intercepted by the police, namely, P.Ws.10 and 12 and the girl was secured. This fact has been spoken by P.Ws.10 and 12 also. Thus, from 03.30 p.m. on 18.10.2002, till 7.00 p.m. on 19.10.2002 the victim was either in the custody of the 1st accused or in the custody of the accused 2 and 3. Thus, she was kidnapped and illegally confined by them.

17. The learned Counsel for the appellants would submit that P.W.9's evidence cannot be believed as there are discrepancies. In this regard, we have to state that at the time when she was kidnapped, she was hardly aged at 8 years. After the arrest of the accused, the Test Identification Parade was conducted on 30.10.2002, at the earliest point of time. In that Test Identification Parade, P.W.9, correctly identified all the three accused as culprits. Therefore, it cannot be said that after about 12 years, P.W.9 had been tutored to identify these assailants. There is no evidence even to remotely infer that before 30.10.2002, P.W.9 would have been tutored to identify these three accused as the culprits. P.W.9 has got no enmity against the accused. After all, she was a child. When she was subjected to lengthy cross-examination by the accused, nothing has been elicited to create even a slightest doubt in her evidence. Thus, from the evidence of P.W.9 coupled with the evidence of P.Ws.10 to 12, we hold that the prosecution has clearly proved that it was these three accused who kidnapped P.W.9 and secretly and wrongfully confined her at Chengikottai at the house of a woman until she was rescued by the police. Though, the prosecution has failed to prove that these three accused had committed the offence of kidnapping of ransom punishable under Section 364-A of IPC., the prosecution has proved beyond reasonable doubts that these 3 accused had kidnapped P.W.9 and secretly and wrongfully confined her in their custody and thus, they are liable to be punished for the offence under Section 365 read with 34 of IPC.

18. Speedy trial is an integral and essential part of the fundamental right to life and liberty enshrined in Article 21 of the Constitution. A Constitution Bench of the Supreme Court in Pankaj Kumar Vs. State of Maharashtra reported in AIR 2008 SC 3077 has held as follows:

"The exposition of Article 21 in Hussainara Khatoon's case (supra) was exhaustively considered afresh by the Constitution Bench in Abdul Rehman Antulay and Others Vs. R.S.Nayak and Another. Referring to a number of decisions of this Court and the American precedents on the Sixth Amendment of their Constitution, making the right to a speedy and public trial a constitutional guarantee, the Court formulated as many as eleven propositions with a note of caution that these were not exhaustive and were meant only to serve as guidelines. For the sake of brevity, we do not propose to reproduce all the said propositions and it would suffice to note the gist thereof. These are: (i) fair, just and reasonable procedure implicit in Article 21 of the Constitution creates a right in the

accused to be tried speedily; (ii) right to speedy trial flowing from Article 21 encompasses all the stages, namely, the stage of investigation, inquiry, trial, appeal, revision and retrial; (iii) in every case where the speedy trial is alleged to have been infringed, the first question to be put and answered is - who is responsible for the delay? (iv) while determining whether undue delay has occurred (resulting in violation of right to speedy trial) one must have regard to all the attendant circumstances, including nature of offence, number of accused and witnesses, the work-load of the court concerned, prevailing local conditions and so on - what is called, the systemic delays; (v) each and every delay does not necessarily prejudice the accused. Some delays may indeed work to his advantage. However, inordinately long delay may be taken as presumptive proof of prejudice. In this context, the fact of incarceration of accused will also be a relevant fact. The prosecution should not be allowed to become a persecution. But when does the prosecution become persecution, again depends upon the facts of a given case; (vi) ultimately, the court has to balance and weigh several relevant factors - 'balancing test' or 'balancing process' - and determine in each case whether the right to speedy trial has been denied; (vii) Ordinarily speaking, where the court comes to the conclusion that right to speedy trial of an accused has been infringed the charges or the conviction, as the case may be, shall be quashed. But this is not the only course open and having regard to the nature of offence and other circumstances when the court feels that quashing of proceedings cannot be in the interest of justice, it is open to the court to make appropriate orders, including fixing the period for completion of trial; (viii) it is neither advisable nor feasible to prescribe any outer time-limit for conclusion of all criminal proceedings. In every case of complaint of denial of right to speedy trial, it is primarily for the prosecution to justify and explain the delay. At the same time, it is the duty of the court to weigh all the circumstances of a given case before pronouncing upon the complaint; (ix) an objection based on denial of right to speedy trial and for relief on that account, should first be addressed to the High Court. Even if the High Court entertains such a plea, ordinarily it should not stay the proceedings, except in a case of grave and exceptional nature. Such proceedings in High Court must, however, be disposed of on a priority basis.'

19. In the instant case, the trial commenced after eleven long years after the alleged occurrence. The delay was not caused either by the accused or by the prosecution, but, unfortunately, by the court. Because, the properties submitted to the court were lost and search was going on for more than 10 years, the trial could not be commenced. At last, since the trial was conducted without the properties, the beneficiaries are the accused. The compact disc containing the telephonic conversation between the accused and P.W.1 has been lost. Further benefit to the accused came from P.W.1 who has stated that he had forgotten the events as he was examined after eleven years. Thus, because of the court to afford speedy trial, the accused have been benefited and the prosecution has suffered. Speedy trial is not a concept known only in the view point of the accused. It is equally guaranteed to the victim also. In this case, the victim has been deprived of speedy trial and not the accused as they stand gained. We record our hope that this would not occur in future.

20. Now turning to the quantum of punishment, the learned Counsel for the appellants is not able to make out any mitigating circumstance in favour of the accused. We are of the view that the gravity of the offence is enormous inasmuch as a young child aged at 8 years had been kidnapped and confined, which would have caused a serious psychological impact on P.W.9. The trauma of P.W.9 on account of the above crime committed would be everlasting. Having considered all the above, we are of the view that sentencing these three accused to undergo rigorous imprisonment for 5 years and to pay a fine of Rs.20,000/- each for the offence under Section 365 read with 34 of IPC would meet the ends of justice.

21. In the result, the Criminal Appeal is partly allowed in the following terms:

1. The conviction and sentence imposed on the appellants by the trial court under Section 364 (A) read with 34 of IPC are set aside and instead, they are convicted under Section 365 read with 34 of IPC and sentenced to undergo rigorous imprisonment for 5 years and to pay a fine of Rs.20,000/- each, in default, to undergo rigorous imprisonment for 8 weeks;

2. On realisation of the said fine amount, the entire fine amount shall be paid to P.W.9 as compensation.

Sd/-
Assistant Registrar(CS VI)

//True Copy//

Sub Assistant Registrar

Note to the Registry :

In this case, the alleged occurrence was on 18.10.2002 and the case was committed to the Court of Sessions by the learned Judicial Magistrate No.I, Puducherry, on 09.04.2003. It was made over to the learned Additional Assistant Sessions Judge, Puducherry on 11.04.2003. Then, it was withdrawn by the Chief Judge, Puducherry, on 28.11.2006 and transferred to the file of the II Additional Sessions Judge, Fast Track Court, Puducherry, for disposal. Thus, it was pending on the file of the learned II Additional Sessions Judge from 28.11.2006 onwards. But the examination of the witnesses could commence only on 14.11.2014 and the judgment was delivered on 09.09.2015. Though the charges in this case were framed as early as on 28.07.2005, it was not known as to why it had taken about 11 years for the completion of the trial. This disturbed our mind. Therefore, we called for remarks from the learned II Additional Sessions Judge, Fast Track Court, Puducherry, as to why there occurred such undue delay of 11 years for the disposal of the case.

2. The learned II Additional Sessions Judge by Letter No.193/Jud/II ADJ/2016 dated 05.07.2016 has submitted to this Court that since the case properties were not received by the trial court for more than 9 years either from the learned Judicial Magistrate No.I, Puducherry or from the Additional Assistant Sessions Judge, Puducherry, the trial could not be commenced on time. The learned Judge has further stated that the properties have not been traced out so far. As a result, the accused have escaped from the punishment for the offence under Section 364-A of IPC.

3. The Registry is, therefore, directed to hold a thorough enquiry into the above episode as to how the valuable property in a sensational case has disappeared and to take appropriate action.

tsi

To

1. The Inspector of Police,
Grand Bazaar Police Station,
Pondicherry.
2. The II Additional Sessions Judge,
Fast Track Court,
Pondicherry.
3. Do- Through The Principal Sessions Judge,
Fast Track Court, Pondicherry.
4. The Judicial Magistrate No.1,
Pondicherry.
5. The Chief Judicial Magistrate,
Pondicherry.
6. The Superintendent,
Central Prison,
Pondicherry.
7. The District Collector,
Pondicherry.
8. The Public Prosecutor(pondicherry),
High Court, Chennai.

Copy To

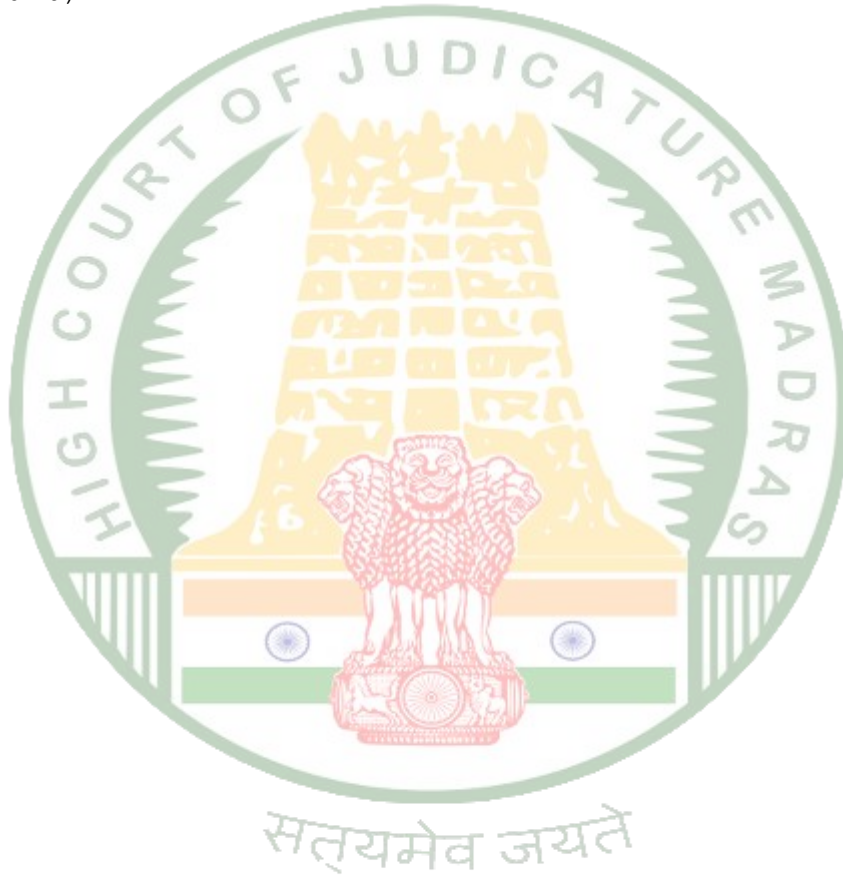
- 1.The Registrar(Judicial),
High Court, Madras
(For taking further action)
- 2.The Section Officer,
'B' Section,
High Court, Madras 104.
(For taking further action)

3.The Section Officer,
Criminal Section,
High Court, Madras 104.

+lcc to Mr.I.Paul Noble Deva Kumar, Advocate, S.R.No.38315

Crl.A.Nos.594 of 2015 & 64 of 2016

RJ(CO)
CA(21/07/2016)



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