

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Date: 23.02.2017

CORAM:

THE HONOURABLE MR.JUSTICE **V.BHARATHIDASAN**

Crl.A.No.737 of 2009

1.Nagarajan
2.Thiyagarajan

... Appellants

vs.

The State, rep. by
The Deputy Superintendent of Police,
Pennagaram.
(Crime No.434 of 2007)

... Respondent

Criminal Appeal preferred under Section 374(2) Cr.P.C.,
against the judgement dated 12.10.2009 passed by the learned
Principal Sessions Judge, Dharmapuri, in S.C.No.86 of 2008.

For Appellants : Mr.V.Rajamohan

For Respondent : Mrs.M.F.Shabana
Government Advocate(Crl. Side)

JUDGMENT

The accused 1 and 2, in Sessions Case No.86 of 2008, on
the file of the learned Principal Sessions Judge, Dharmapuri, are the
appellants herein. The first accused stood charged for offence under
Sections 448, 341, 366, 376 IPC and Sections 3(1)(xii) and 3(2)(v)
of Scheduled Caste and Scheduled Tribes (Prevention of Atrocities)

Act,1989. The second accused stood charged for offence under Sections 448, 341, 366, 376 r/w 109 IPC and Sections 3(1)(xii) and 3(2)(v) of Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Act,1989. The trial Court, by judgment dated 12.10.2009, convicted the appellants/accused for the offence under Section 366 IPC and sentenced them to undergo rigorous imprisonment for ten years and to pay a fine of Rs.1000/- in default, to undergo simple imprisonment for 40 months and convicted the first appellant/first accused for the offence under Section 376 IPC and sentenced him to undergo rigorous imprisonment for ten years and to pay a fine of Rs.1000/- in default, to undergo 40 months simple imprisonment and convicted the second appellant/second accused for the offence under Section 376 r/w 109 IPC and sentenced him to undergo rigorous imprisonment for ten years and to pay a fine of Rs.1000/- in default, to undergo 40 months simple imprisonment and the appellants/accused were acquitted for the offence under Sections 448, 341 IPC and Section 3(1)(xii) and 3(2)(v) of Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Act,1989. Challenging the above said conviction and sentence, the appellants/accused are before this Court with this appeal.

(i) P.W.1 is victim girl in this case. She belongs to Schedule Caste Aathi-Dravidar community. On 20.08.2007, there was a festival in the village temple, at about 10.00 p.m., P.W.1, her mother and some of her relatives went to the temple for watching light music programme, at about 11.00 p.m., there was a heavy rain and the entire crowd disbursed, P.W.1 and others returned back to her house. At that time, A-1 and A-2 came behind her and forcibly abducted her, took her to a nearby Sugar cane field at Velavalli Village, where, A-2 standing out side the field and A-1 raped her. Then, P.W.3, the uncle of P.W.1 and others went in search her and found P.W.1 there and took her to the house. Then, she was taken to the Government Hospital, Palacode.

(ii) P.W.15, a Doctor, working in the Government Hospital, Palacode, admitted P.W.1 in the Hospital. At that time, P.W.1 told him that two known persons raped her. Then, he referred her to the Government Hospital, Dharmapuri with a memo [Ex.P10]. P.W.18, a Doctor, working in the Government Hospital, Dharmapuri, admitted P.W.1, examined her and given medical test report [Ex.P13].

(iii) P.W.17, the Inspector of Police, working in the All Women Police Station, Dharmapuri, based on the instruction given by the Deputy Superintendent of Police, Dharmapuri, proceeded to the Government Hospital, Dharmapuri, recorded the statement of P.W.1, read over the same to her and after obtaining her signature,

sent the same to the higher officials.

(iv) Then, based on the memo sent by the Government Hospital, Dharmapuri, P.W.16, the Sub Inspector of Police, Palacode Police Station, proceeded to the Government Hospital, Dharmapuri, recorded the statement of P.W.1 and based on her statement, registered a case in Crime No.434 of 2007 for the offence under Sections 366 and 376 IPC and Section 3(1)(xii) of Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Act,1989 and prepared first information report[Ex.P11], sent the same to the Judicial Magistrate Court and copies of the same to the higher officials.

(v) P.W.20, the Deputy Superintendent of Police, District Crime Branch, Dharmapuri, on receipt of the first information report, commenced investigation, proceeded to the Government Hospital, Dharmapuri, recorded the statement of P.W.1, recovered the dresses worn by P.W.1, then proceeded to the scene of occurrence, prepared observation mahazar[Ex.P3], a rough sketch[Ex.P15] in the presence of witnesses. He examined the witnesses and recorded their statements, arranged the photographer for taking photograph in the scene of occurrence and also recovered the broken bangles pieces. Then, on 21.08.2007 at about 7.00 pm., he arrested the second accused and on such arrest, he has voluntarily given a confession and based on the disclosure statement, he recovered chappels [M.O.7] of P.W.1. Then, he sent a

memo to the Government Hospital for examining P.W.1. On 22.08.2007, he arrested the first accused and on such arrest, he voluntarily given a confession, based on the disclosure statement, he recovered a pant and shirt [M.Os.4 & 5] and inner wear [M.O.8]. Then, he sent the same to the medical examination. Thereafter, he recorded the statement of witnesses and handed over the investigation to P.W.21. P.W.21, the Deputy Superintendent of Police, Dharmapuri, continued the investigation, obtained a community certificate for P.W.1 and also A1 and A2 from the Tahsildar. Then, he examined the Doctors, Tahsildar and other witnesses and recorded their statements, after completion of investigation, he laid charge sheet.

3. Based on the above materials, the Trial Court framed charges as detailed above and the accused denied the same as false. In order to prove its case, the prosecution examined as many as 21 witnesses, exhibited 23 documents and 10 material objects were marked.

4. Out of the said witnesses examined, P.W.1 is the victim girl in this case. According to her, on 20.08.2007, there was a temple festival in her village, at about 10.00 p.m., a light music programme was arranged in the temple, P.W.1 and her relatives

went there and watching light music. At that time, there was heavy rain, hence all of them return back to house. While she went inside the house, both the accused came behind her, closed her mouth and forcibly took her to a near by sugar cane field, where, A-2 was standing out side and watching, A-1 removed her dresses and then he fall on her and raped her. P.W.3 and other persons found her missing in the home came there and took her to the house. Thereafter, she was taken to the Government Hospital, Palacode, where, the respondent police recorded the statement and also recovered the dress worn by her and her mother brought a new dress for her. She also identified the pant and shirt worn by the first accused at the time of occurrence.

5. P.W.2 is mother of P.W.1. She had stated that she and her daughter P.W.1 and other relatives went to temple for watching a light music, at about 11.00 p.m., there was heavy rain and the entire crowd disbursed, P.W.1 returned to the house and they followed her. Then, P.W.1 was found missing, P.W.2, and others searched for her. P.W.3 and some others found her near a Tank and brought her to the house, then they took her to the Government Hospital, Palacode, where, she was referred to Government Hospital, Dharmapuri.

6. P.W.3, said to have took P.W.1 from the scene of

occurrence to her house, he turned hostile. P.W.4 is a villager, he went along with P.W.1 to light music, he also turned hostile. P.W.5 is father of P.W.1. According to him, on the date of occurrence, at about 11.00 p.m., he was sleeping in his house and P.W.1 was found missing, P.W.3 and others searched for her and they brought to her back to his house, when he enquired her, she told him that, A1 and A2 has molested her. Then, he took her to the Government Hospital, Palacode. P.W.6 is a neighbour of P.W.1, he turned hostile. P.W.7 is the grandmother of P.W.1, she also turned hostile. P.W.8 is another neighbour of P.W.1, according to her, on the date of occurrence, at about 11.00 p.m., P.W.1 was found missing, P.W.3 and others virtually lifting her and brought her to the house then she was taken to the Hospital. P.W.9 is also a neighbour of P.W.1. She turned hostile. P.W.10 is another neighbour of P.W.1. According to her, on the date of occurrence, P.W.1 was found missing, P.W.3 and some other persons searched her, and brought to her house, and she was trampling, when she enquired her, she told that A-1 and A-2 abducted and misbehaved with her. P.W.11 is also neighbour of P.W.1. According to her, on the date of occurrence, P.W.1 was found missing, and she told her that A-1 and A-2 abducted her and took her near one Pachiappan Garden and A-1 raped her. P.W.12 is witness to the observation mahazar. P.W.12 is a Village Administrative Officer. He is a witness to the arrest and confession of A-1 and A-2 and recovery of material

objects. P.W.14 is the another Village Administrative Officer. He also witness to the arrest and confession of A1 and A2 and recovery of material objects. P.W.15, the Doctor, working in the Government Hospital, Palacode. According to him, on 20.08.2007, at about 11.30 p.m., he admitted P.W.1 in the Government Hospital, Palacode, at that time, P.W.1 told him that two known persons raped her. He also examined her, and he found no external injuries then he referred her to the Government Hospital, Dharmapuri with reference letter Ex.P10. The same Doctor was also examined by the Defence side as D.W.1, where, he has stated that at the time of admitting P.W.1 in the Hospital, he issued a accident register and the same was marked as Ex.D1. In the accident register, it has been stated that two known persons attempted to rape her. P.W.16 is the Inspector of Police working in the respondent police station. According to her, on receipt of the wireless message, he went to the Government Hospital, Dharmapuri. Where, already P.W.17 recorded the statement of P.W.1 and after obtained her statement, he registered a case, prepared a first information report, sent the same to the higher officials. P.W.17 is the Inspector of Police working in All Women Police Station, Dharmapuri. According to her, on 21.08.2007 at about 7.00 p.m., based on the direction given by the Deputy Superintendent of Police, Dharmapuri, she went to the Government Hospital, Dharmapuri, recorded the statement of P.W.1 at about 8.15 a.m., read over the same to her, obtained her

signature and handover the statement to P.W.16 at about 9.00 a.m. P.W.18 is the Doctor working in the Government Hospital, Dharmapuri. He examined P.W.1 and based on the radiology test he has given opinion that the victim was completed 17 years, running 18 years and there is no symptoms for recent intercourse and also issued wound certificate Ex.P12. P.W.19 is a photographer. He took the photograph of the scene of occurrence. P.W.20 is the Deputy Superintendent of Police, District Crime Branch, Dharmapuri. He continued the investigation, arrested the accused, examined the witnesses and recorded their statements and then handed over the investigation to P.W.21. P.W.21 is working as the Deputy Superintendent of Police, Dharmapuri, according to him, he obtained a community certificate of the accused as well as P.W.1 from the Tahsildar, examined the witnesses and recorded their statements and after completion of investigation, he laid the charge sheet.

7. When the above incriminating materials were put to the accused under Section 313 Cr.P.C., they denied the same as false. Their defence was a total denial. The accused examined P.W.15, the Doctor working at Government Hospital, Palacode, as D.W.1 and exhibited one document Ex.D1.

8. Considering the above materials, the Trial Court convicted and sentenced the accused for the offences as stated in

the first paragraph of this judgment. Challenging the above said conviction and sentence, the accused are before this Court.

9. I have heard Mr.V.Rajamohan, learned counsel appearing for the appellants and Mrs.M.F.Shabana, learned Government Advocate(Crl. Side) appearing for the State and I have also perused the records carefully.

10. The learned counsel appearing for the appellants would submit that the prosecution totally suppressed the origin and genuine of the case. The first complaint said to have given by P.W.1 before the police at Government Hospital, Palacode was suppressed, and only at the instigation of the political parties, the second statement was obtained from P.W.1 and then the case was registered, and from the evidence of P.Ws.1 and 2, no offence was made out for an offence Section 376 IPC. Apart from that D.W.1, the Doctor, who has admitted P.W.1, in the Government Hospital, Palacode, stated that at the time of admission, P.W.1 stated that two known persons attempted to rape her and to that effect he has also issued Accident Register, which was marked as Ex.D1. Apart from that D.W.1 has also issued memo[Ex.P10] referring P.W.1, to the Government Hospital, Dharmapuri. In the memo it has been stated that on 20.08.2007 two known persons attempted to rape her. P.W.18, the Doctor working in the Government Hospital,

Dharmapuri, examined P.W.1 found no symptoms for recent intercourse, to that effect he also issued wound certificate Ex.P12, apart from P.Ws.1 and 2, the other independent witnesses were turned hostile. Even from their evidence, no offence is made out under Section 376 IPC. So far as the offence under Section 366 IPC is concerned, except the evidence of P.W.1, there is no evidence is available to prove the charge, the prosecution has failed to prove the case beyond any reasonable doubt, and he sought for allowing this appeal.

11. Per contra, the learned Government Advocate(Crl. Side) appearing for the State would submit that the prosecution has clearly proved that both the accused abducted P.W.1, and took her to a nearby sugar cane field and committed rape, immediately she was taken to the Government Hospital, Palacode and on the next day morning she referred to the Government Hospital, Dharmapuri, where P.W.1 has given complaint and hence there was no delay in filing the complaint. The evidence of prosecutrix is fully reliable, and based on her testimony, the conviction can be sustained, and the trial Court after elaborately considering the evidence convicted the accused, hence there is no reason to interfere with the judgment of the trial Court, she sought for dismissal of this appeal.

13. The first question to be decided in this appeal is as to whether the prosecution has proved the offence under Section 376 IPC. To prove the charge, the prosecution has examined P.W.1, the victim in this case. According to her, on the date of occurrence at about 11.00 p.m., while she was coming back from the temple after watching a light music, both the accused followed her and while she was entering into her house, both the accused closed her mouth with hands and forcibly abducted and took her to a sugar cane field, where, A-2 standing out side and watching, A-1 removed her dresses and fall on her and raped her. At that time, P.W.3 and others came there and took her back to the house. Then, she was taken to the Government Hospital, Palacode, where, police came, recorded her statement and read over the same to her, then she put the signature in the statement, the respondent police also recovered the dress worn by P.W.1, and her mother brought a new dress. But, in her cross examination, she has stated that while the accused abducted her she did not raised any alarm as they have closed her mouth and both the accused had detained her for more than 1-1/2 hours, she did not make any attempt to escape from there, on the next day morning one of the political party members came and met her at Government Hospital, Dharmapuri, thereafter, the respondent police obtained statement from her.

14. P.W.2 is the mother of P.W.1. According to her, after the music show her daughter returned to the house, she followed her after some time her daughter found missing. While she was searching for her, P.W.3 and others brought her to the house, then she was taken to the Government Hospital, Palacode. In her cross examination, she has stated that in the Government Hospital, Palacode, the Inspector of Police came and recorded the statement of P.W.1 and also obtained signature in the statement of P.W.1, on the next day morning once again the police recorded the statement of P.W.1 at about 10.00 a.m., in Government Hospital, Dharmapuri. Before recording the statement, one political party members came there and also indulged in a agitation. P.W.3 said to have taken P.W.1 from the scene of occurrence to her house. Even though, he turned hostile. In his chief examination, P.W.3 has stated that while they were searching for P.W.1, she raised alarm and she told him that A-1 and A-2 abducted her and she did not say anything about the rape. P.W.5 is the father of P.W.1. According to him, at the time occurrence, he was sleeping in his house, and P.W.1 was found missing, P.W.3, and others searched for her and they brought to her back to his house, while he enquired her, she told him that A1 has molested her, from his evidence it could be seen that P.W.1 did not say that she was raped by A-1. P.W.7 is grand mother of P.W.1. She turned hostile.

15. Another important witness is P.W.15, a Doctor, working in the Government Hospital, Palacode. He had admitted P.W.1 in the Hospital. In his evidence, he has stated that at the time of admission, P.W.1 told him that two known persons attempted to rape her and he referred her to the Government Hospital, Dharmapuri, and he also issued memo for reference [Ex.P10]. In the said memo it has been stated that P.W.1 alleged to have been attempt rape by two known persons on 20.08.2007 at 11.30 p.m., at Belrahalli, Korateri. In the cross examination, he has admitted the same. Even though, he issued a Accident Register, the same was not marked by the prosecution. But, the defence side has examined the same Doctor as D.W.1 and marked the Accident Register as Ex.D1. In his evidence, he stated that at the time of admission, P.W.1 told him that two unknown persons attempt to rape her and to that effect the Accident Register was issued and the same was marked as Ex.D1. In the accident register it has been stated that "alleged to have been attempt to rape by two known persons on 20.08.2007 around 11.30 p.m., at Belarahalli, Korateri." P.W.15 referred her to the Government Hospital, Dharmapuri. Yet another important witness is P.W.18, the Doctor, working in the Government Hospital, Dharmapuri. He examined P.W.1 at the time of admission in the hospital. In his evidence, he has clearly stated that at the time of examination he did not found any symptoms of rape and to that effect he has issued wound certificate[Ex.P13]. He

is of the opinion that as per clinical findings, there is no evidence for recent sexual intercourse. Considering the above evidence, it could be seen that there is no rape as alleged by P.W.1, and the medical evidence of P.Ws.15 and 18, clearly contradicts the evidence of P.W.1.

16. As per the evidence of P.W.17, the Inspector of Police, All Women Police Station, Dharmapuri, she recorded the statement of P.W.1 in the Government Hospital, Dharmapuri, which was handed over to P.W.16, the Inspector of Police, Palacode Police Station and P.W.16 registered the complaint, which totally contradicts the evidence of P.Ws.1 and 2. It was also brought out in the evidence of P.Ws.1 and 2 that after P.W.1 was admitted in the Government Hospital, Dharmapuri, one political party members came there and at their instigation, the second statement was recorded from P.W.1 in the Government Hospital, Dharmapuri, and based on that statement FIR was registered. Hence, the prosecution has suppressed the earlier statement obtained from P.W.1 at Government Hospital, Palacode. Apart from that even though the first information report was registered at about 08.15 a.m, on 21.08.2007, it reached the Judicial Magistrate Court at about 8.00 p.m., on the same day, with a delay of more than 10 hours. It is also creates a doubt about the prosecution.

17. To bring home the offence under Section 376 IPC, the prosecution should establish the penetration of the male organ within the labia majora or the vulva or pudenda, with or without any emission of semen or even an attempt for penetration on the private part of the victim completely, partially or slightly would be enough for conviction under Sections 375 and 376 IPC. The Hon'ble Supreme Court in **TARKESHWAR SAHU Vs. STATE OF BIHAR (NOW JHARHAND)** reported in 2006(8) SCC 560, has held as follows:-

"13. In order to constitute rape, what [section 375](#) IPC requires is medical evidence of penetration, and this may occur and the hymen remain intact. In view of the explanation to [section 375](#), mere penetration of penis in vagina is an offence of rape. Slightest penetration is sufficient for conviction under [Section 376](#) IPC.

14. Position of law in England is the same. To constitute the offence of rape, there must be a penetration. Even the slightest penetration will be sufficient. Where a penetration was proved, but not of such a depth as to injure the hymen, still it was held to be sufficient to constitute the crime of rape. This principle has been laid down in [R v. M'Rue](#) and [R v. Allen](#). In the case of [R v. Hughes](#) and [R v. Lines](#), the Court has taken the view that 'proof of the rupture of the hymen is unnecessary'. In the case of [R v. Marsden](#), the Court has laid down that 'it is now

unnecessary to prove actual emission of seed; sexual intercourse is deemed complete upon proof of penetration only.

15. In *Nirmal Kumar v. State* , the Court held as under:-

"Even slightest degree of penetration of the vulva by the penis with or without emission of semen is sufficient to constitute the offence of rape. The accused in this case had committed rape upon a minor girl aged 4 years and he could not explain the reasons regarding congestion of labia majora, labia minora and redness of inner side of labia minor and vaginal mucosa of victim. Stains of semen were also found on the underwear worn by the accused. The conviction of accused held proper."

16. *The distinction between rape and criminal assault has been aptly described in the English case Rex v. James Lloyd . In this case, while summing up the charge to the jury, Justice Patterson observed:*

"In order to find the prisoner guilty of an assault with intent to commit a rape, you must be satisfied that the prisoner, when he laid hold of the prosecutrix, not only desired to gratify his passions upon her person but that he intended to do so at all events, and notwithstanding any resistance on her part."

17. *A similar case was decided by Mirza and Broomfield JJ. of the Bombay High Court in Ahmed Asalt Mirkhan . In that case the complainant, a milkmaid, aged 12 or 13 years, who was hawking*

milk, entered the accused house to deliver milk. The accused got up from the bed on which he was lying and chained the door from inside. He then removed his clothes and the girl's petticoat, picked her up, laid her on the bed, and sat on her chest. He put his hand over her mouth to prevent her crying and placed his private part against hers. There was no penetration. The girl struggled and cried and so the accused desisted and she got up, unchained the door and went out. It was held that the accused was not guilty of attempt to commit rape but of indecent assault. The point of distinction between an offence to commit rape and to commit indecent assault is that there should be some action on the part of the accused which would show that he is just going to have sexual connection with her.

18. In *Halsbury's Statutes of England and Wales*, 4th Edition, Vol. 12, it is stated that even the slightest degree of penetration is sufficient to prove sexual intercourse.

19. In *Encyclopaedia of Crime and Justice* (Vol. 4 page 1356), it is stated "even slight penetration is sufficient and emission is unnecessary".

20. In *Aman Kumar & Anr. v. State of Haryana*, this Court stated as under:

"Penetration is the sine qua non for an offence of rape. In order to constitute penetration, there must be evidence clear and cogent to prove that some part of the virile member of the accused was within the labia of the pudendum of the woman, no matter

how little."

21. In view of the catena of judgments of Indian and English Courts, it is abundantly clear that slight degree of penetration of the penis in vagina is sufficient to hold accused guilty for the offence under [Section 375 IPC](#) punishable under [Section 376 IPC](#).

18. It is settled law that in case of this nature, the evidence of prosecutrix alone is sufficient to convict the accused, provided it should be truth full and genuine. But, in this case, the medical evidence totally contradicts the evidence of P.W.1, and other evidence adduced by the prosecution did not support P.W.1.

19. In the above circumstances, in absence of any evidence to show that there is a penetration of penis in vagina, the first accused cannot found guilty for the offence under Section 376 IPC. Hence he is entitled for acquittal. Consequently, A-2 also entitled to acquittal for the offences under Section 376 r/w 109 IPC. From the evidence of P.W.1, it was proved that A-1 and A-2 took her to near by sugar cane field, P.W.3, even though he turned hostile from his evidence it could seen that he along with other persons took her from the water tank to her house. P.W.2 also corroborated it saying P.W.3 and others brought to her daughter to her house and then she was taken to the Government Hospital, Palacode. From their evidence, the prosecution has clearly

established that A-1 and A-2 forcibly taken P.W.1 with an intention to commit illicit intercourse and they have committed the offence under Section 366 IPC. Hence the prosecution has proved the offence under Section 366 IPC.

20. Now, with regard to the quantum of sentence is concerned, the occurrence took place in the year 2007. A-1 was in jail for more than 5 months and A-2 was in jail for more than four months and both A1 and A2 are poor persons and they have a big family, they have a chance to reform, and they have no bad antecedents. Considering the mitigating as well as the aggravating circumstances, both the accused are sentenced to undergo the period already undergone.

21. In the result, the Criminal Appeal is partly allowed. The conviction and sentence imposed on the first accused/first appellant, under Section 376 IPC is set aside, both the appellants are convicted under Section 366 IPC and sentenced them to undergo the period already undergone and to pay a fine of Rs.1000/- each, in default, to undergo, four weeks rigorous imprisonment and the conviction and sentence imposed on the second appellant/second accused under Section 376 r/w 109 IPC is set aside and he is acquitted from the said charge.

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Index : Yes/No

Internet : Yes/No

To

1.The Principal Sessions Judge,
Dharmapuri.

2.The Deputy Superintendent of Police,
Pennagaram.

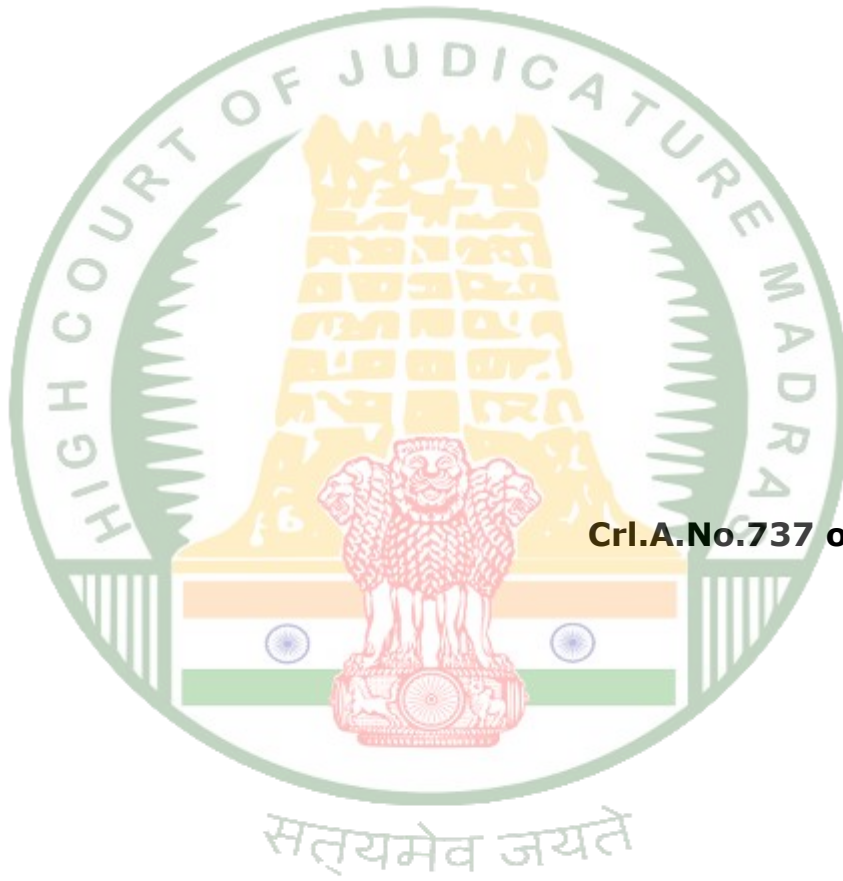
3.The Public Prosecutor,
High Court, Madras.



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