

Bail Slip

The Appellant/Accused are P.Suryakumar S/o Balakrishnan was directed to be released on bail as per order dated 18/08/2004 in CrI.MP.7883/2004 in CrI A No.457/204.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 10.12.2018

Coram

THE HONOURABLE MR. JUSTICE M.V.MURALIDARAN

CrI.A.No.457 of 2004

P.Suryakumar [A2] ... Appellant/Accused 2

-Versus-

State of Tamilnadu rep. by
The Inspector of Police,
R-2, Kodambakkam Police Station,
Chennai.

... Respondent/Complainant

Prayer: This Criminal Appeal is filed under Section 374(2) of the Criminal Procedure Code, against the judgement dated 05.12.2003 made in S.C.No.451 of 2000 on the file of the learned Sessions Judge, Magalir Neethimandram, Chennai.

For Appellant : Mr.C.Sreedharan

For Respondent : Mr.A.Shanmuga Rajeswaran
Government Advocate (CrI.Side)

JUDGEMENT

The appeal arises out of the judgement of conviction of the appellants imposed by the learned Additional Sessions Judge, Mahila Court, Chennai in S.C.No.451 of 2000 wherein the appellant by name Mr.P.Suryakumar [2nd accused] has been convicted for offence under Section 376 (1) of IPC (on two counts) and in respect of each count he was sentenced to undergo R.I. for a period of 8 year and to pay a fine of Rs.10,000/- in default to undergo S.I. for a period of 6 months.

2. The appellant and other accused namely Ganesan and Vijayasanthi were arrayed as accused in C.C.No.8 of 2000 arising out of the same first information report. In the said case also the accused Ganesan stood charged for offence under Section 354 of IPC; accused Mr.Suryakumar(appellant herein) and the accused

Vijayasanthi [appellant herein] stood charged for offence under Section 324 of IPC.

3. Yet another case in S.C.No.448 of 2010 arising out of the same first information report [FIR] was also tried by the same Court. In the said case, Mr.Suryakumar [appellant herein] and Vijayasanthi were the accused. Mr.Suryakumar [appellant herein] stood charged for offence under 376 of IPC and the appellant Vijayasanthi stood charged for offence under Section 372, 376 r/w 109 of IPC.

4. Similarly, in C.C.No.9 of 2000 Mr.Ganesan has been convicted for the offence under Section 354 of IPC and sentenced to undergo R.I. for a period of 1 year and to pay a fine of Rs.5,000/- in default to undergo S.I. for a period of 3 months. Mrs.Vijayasanthi has been convicted for offence under Section 354 r/w 109 of IPC. However, the trial court did not impose sentence on the accused Vijayasanthi for this offence.

5. The trial court tried all the four cases separately, but delivered a common judgement in all the four cases on 05.12.2003. In C.C.No.9 of 2000, as stated above, the trial court convicted all the three accused namely Mr.Ganesan [A1] and the accused Mrs.Vijayasanthi [A3] and the appellant herein. The trial court in S.C.No.448 of 2000 convicted the accused Mr.Suryakumar for offence under Section 376 of IPC and convicted the accused Vijayasanthi for offence under Section 372 and 376 r/w 109 of IPC. Similarly, in C.C.No.8 of 2000, the trial court convicted the appellant Mr.Ganesan [1st accused] for offence under Section 354 of IPC and acquitted the accused Suryakumar [2nd accused] and Vijayasanthi [3rd accused] from the charge under Section 324 of IPC. Similarly, in the other case in S.C.No.451 of 2000, the trial court convicted the accused Suryakumar for offence under Section 376 of IPC as well as the accused Vijayasanthi for offence under Section 372 and 376 r/w 109 of IPC. Separate appeals have been preferred in respect of the conviction and sentence imposed in S.C.Nos.448 and 451 of 2000, and C.C.No.8 of 2000. Those appeals are dealt with separately. This judgement governs only the conviction and sentence imposed in C.C.No.9 of 2000.

6. Before going into the facts of the case, it would be very appropriate for this court to highlight the serious illegalities / irregularities committed by the trial court, which in fact, have resulted in failure of justice. A little narration of facts would be sufficient to highlight the same.

7. P.W.1 is the victim. She is the daughter of the accused - Vijayasanthi [the 3rd accused]. Accused # Vijayasanthi's husband passed away. The accused Vijayasanthi was thereafter in

living in relationship with Suryakumar [accused in the other case]. It is alleged that during the year 1988, P.W.1, the victim was hardly aged 14 years. She was acting in tele serials. The accused Vijayasanthi was having an ambition to make her as an actress in films. Suryakumar was promising that he would get a chance for her to act in films. Under the said premise, it is alleged that on 29.05.1998, the son in law of Suryakumar took P.W.1 to the house of the accused Ganesan [1st Accused] at No.19-A, 1st Street, Vathiyar Street, Rangarajapuram, Chennai. The accused Vijayasanthi also accompanied him. The accused Vijayasanthi wanted P.W.1 to go into a room where the accused Ganesan was waiting. As soon as P.W.1 entered into the room, the accused Ganesan closed the door. When she questioned as to why he closed the door, he asked her as to whether, her mother did not say anything about the purpose of her visit. Then, he told her that he would get a chance in cinema provided she conceded to his sexual advances. The accused Ganesan attempted to hug and kiss her. But, she pushed him away and ran out of the room. When she told the same to her mother [3rd accused], she in turn told her that if only she conducted herself as desired by the accused Ganesan, he would get cinema chance. Then, the accused Vijayasanthi told the accused Ganesan that she would persuade P.W.1 and bring her back again for the said purpose. These are the allegations which are the foundations for the charges under Section 354 of IPC against the accused Ganesan, the 1st accused and under Section 354 r/w 109 of IPC against Vijayasanthi, the 3rd accused in S.C.No.451 of 2000.

8. Again on 05.06.1998, accused Ganesan, Suryakumar and the accused Vijayasanthi took P.W.1 to Alapuzha in Kerala informing P.W.1 that she was being taken to the cinema shooting spot. In Alleppey, they stayed in a lodge. Mr.Suryakumar and Vijayasanthi along with P.W.1 stayed in a room whereas the accused Ganesan and yet another girl by name Rama stayed in the next room. In the presence of P.W.1, Mr.Suryakumar and Vijayasanthi indulged in sexual activities in the room. Thereafter, they took P.W.1 to the next room where the accused Ganesan was staying. When Ms.Rama went out of the room, P.W.1 was asked to go into the room. The accused Vijayasanthi and Suryakumar instructed P.W.1 to concede to the sexual overtures of the accused Ganesan. They promised her that if she did so, she would get cinema chance and earn a lot. But, she did not bow to the pressure. She bite the hand of the accused Ganesan and cried. Enraged over the same, the accused Vijayasanthi and Suryakumar burnt her back and legs with lighted cigarette buds. The accused Ganesan also helped them to do so. At that time a worker in the lodge came and therefore, they left her. The accused Mrs.Vijayasanthi put ointment for the injuries. Then, they confined P.W.1 alone in the room, locked it from outside

and went away. In the night, they returned and thereafter brought P.W.1 back to Chennai. These are the allegations which are the foundations for the charges in C.C.No.8 of 2000 wherein the Ganesan [1st Accused therein] stood charged for offence under Section 354 of IPC and Mr.Suryakumar and the accused # Vijayasanthi stood charged for offence under Section 324 of IPC.

9. Again on 14.06.1998, the accused Mrs.Vijayasanthi sent P.W.1 along with Mr.Suryakumar to a cinema company for getting a chance. Mr.Suryakumar took her to the house of a cinema producer by name R.B.Choudry. It was around 7.00 p.m. As soon as they entered into a room in the house, Mr.Suryakumar beat her with hands and removed her dress. He closed her mouth and had sexual intercourse. Then, he took her back to her house. P.W.1 told the accused Vijayasanthi about the said incident. But, the accused Vijayasanthi told that she had sent her along with the accused Suryakumar only for the said purpose so that she would not have fear in future to have sex with anybody. The accused Vijayasanthi and Suryakumar threatened her of dire consequences and warned her not to disclose the same to anybody. These are the allegations which are the foundations for the charges in S.C.No.448 of 2000 wherein Mr.Suryakumar [A1 therein] stood charged for offence under Section 376 of IPC and the accused Vijayasanthi [A2 therein] stood charged for offence under Sections 372 and 376 r/w 109 of IPC.

10. Again on 17.06.1998 around 2.00 p.m. at the house of P.W.1, Mr.Suryakumar [A1 therein] again had forcible intercourse with P.W.1 against her wish on the inducement made by the accused Vijayasanthi [A2 therein]. This is the foundation for the charges in S.C.No.451 of 2000 wherein Mr.Suryakumar stood charged for offence under Section 376 of IPC and the accused Vijayasanthi stood charged for offence under Section 372 and 376 r/w 109 of IPC.

11. Again on 25.06.1998, one Selvam, a person involved in flesh trade came to the house of P.W.1. He gave a sum of Rs.5,000/- to the accused - Vijayasanthi and wanted to send P.W.1 with him for prostitution with one Panchatcharam. But, the accused Vijayasanthi did not disclose the same truly to the victim. Instead, she took her in a car driven by Selvam telling her that they were going for purchasing cloths. In the said car, a person by name Panchatcharam was also travelling. The car was proceeding towards Mahabalipuram. After some time, P.W.1 asked the Accused Vijayasanthi as to why the car was proceeding towards Mahabalipuram. For that, she told P.W.1 that if she conceded to the sexual desires of Panchatcharam, he himself would get cloth for her. When Panchatcharam put his hand on her shoulder, P.W.1 raised hue and cry. Thereafter, when Panchatcharam asked the Accused Vijayasanthi as to whether she

did not tell P.W.1 about the purpose. she answered in the negative. Thereafter, she was again brought back to her house.

12. On 26.06.1998, P.W.1 escaped from the house of the 2nd Accused Vijayasanthi fearing for further sexual assault by the accused. She went to the house of her friend at Ambattur and stayed there for about 3 days. Thereafter, she came to Tambaram bus stand and got into a bus. A woman by name Sakunthala was sitting by her side. P.W.1 was weeping. When Sakunthala enquired as to what had happened, P.W.1 narrated the events. Then, Sakunthala took her to police on 04.08.1998 where P.W.1 preferred a complaint to the Inspector of Police, Kodambakkam Police Station. Ex.P.1 is the complaint. In the said complaint, she narrated all the events right from 29.05.1998. To be precise, she vividly narrated about all the four occurrences on 29.05.1998, 05.06.1998, 14.06.1998 and 17.06.1998 respectively. Based on the said complaint, P.W.7, the then Sub Inspector of Police attached to Kodambakkam Police Station, registered a case in Crime No.1915 of 1998 for offences under Sections 342, 372, 376, 354 and 506 of IPC. Ex.P.3 is the FIR. He forwarded both the complaint and the FIR to the jurisdictional Magistrate and then handed over the case records to P.W.11 for investigation.

13. P.W.11, the then Inspector of Police took up the case for investigation, examined P.W.1, P.W.2 [younger sister of P.W.1], P.W.3, an employee in the proprietary concern owned by Ganesan, P.W.4 - a resident of an apartment where P.W.1 was residing, P.W.5 - Panchatcharam referred to above, P.W.6, the husband of P.W.1 and other witnesses and recorded their statements. On 05.08.1998, he arrested the accused Suryakumar and Vijayasanthi and sent them for judicial remand. He made a request for conducting medical examination for P.W.1 and Suryakumar. P.W.10 examined Suryakumar on 06.08.1998 and gave opinion that he was capable of performing sexual intercourse with a woman. One Dr. Kamala Anantharaman, the professor of Forensic Science, Madras Medical College examined P.W.1 on 05.08.1998 and gave opinion that P.W.1 had accustomed to sexual intercourse. There were no external injuries found. The hymen in the vaginal cavity was found ruptured. The vaginal cavity freely allowed two fingers to enter. From these, Dr.Kamala Anantharaman opined that P.W.1 had undergone sexual intercourse. Dr. Kamala Anantharaman also found scars on the body of P.W.1. Since Dr. Kamala

Anantharaman was unable to appear before the court and depose, one Dr.R.Selvakumar [P.W.12] was examined who has deposed about the said facts.

14. On completing the investigation, P.W.11 rightly laid four separate charge sheets. The first charge sheet is in

respect of the alleged occurrence on 29.05.1998. The learned Metropolitan Magistrate took cognizance on the said report in C.C.No.7708 of 1999 [renumbered as S.C.No.451 of 2000 on the file of the learned Principal Sessions Judge, Chennai] for offence under Section 354 and 354 r/w 109 of IPC.

15. The 2nd charge sheet was in respect of the alleged occurrence on 05.06.1998 against the accused Ganesasn and two other accused namely Suryakumar and the accused Vijayasanthi. The charges are under Sections 354 of IPC against accused Ganesan and under Section 324 of IPC against the others. The learned Magistrate took cognizance on the said final report in C.C.No.7707 of 1999 [renumbered as C.C.No.8 of 2000 on the file of the learned Principal Sessions Judge, Chennai.]

16. Third charge sheet is in respect of the alleged occurrence on 14.06.1998 against Suryakumar and the accused Vijayashanthi. The charges are under Section 376 of IPC against Mr.Suryakumar and under Sections 376 r/w 109 and 372 of IPC against the accused Vijayasanthi. The learned Metropolitan Magistrate took cognizance on the same in P.R.C.No.7706 of 1999 [relating to S.C.No.448 of 2000].

17. The 4th charge sheet is in respect of the alleged occurrence on 17.06.1998 against Suryakumar and the accused Vijayashanthi. The charges are under Section 376 against Mr.Suryakumar and under Section 372 and 376 r/w 109 of IPC against the accused Vijayasanthi. The learned Metropolitan Magistrate took cognizance of the same in P.R.C.No.7709 of 1999 [relating to S.C.No.451 of 2000].

18. Thereafter, the learned Magistrate by two separate proceedings committed the cases in P.R.C.Nos.7706 and 7709 of 1999 since some of the offences were triable exclusively triable by the court of sessions. The case in P.R.C.No.7706 of 1999 was taken on file in S.C.No.448 of 2000 and the case in P.R.C.No.7709 of 1999 was taken on file in S.C.No.451 of 2000 by the Principal Sessions Judge, Chennai. Then, the learned Principal Sessions Judge made over these two cases to the file of the Additional Sessions Judge [Mahila Court], Chennai, for trial.

19. Finally, the trial court rendered a common judgement dated 05.12.2003 in all the four cases namely in C.C.Nos.8 and 9 of 2000 and S.C.Nos.448 and 451 of 2000. The trial court considered the evidences in common and convicted the accused in S.C.Nos.448 and 451 of 2000 and S.C.No.451 of 2000.

20. At the outset , I have to state that under Section 219 of Cr.P.C. there can be joinder of charges in respect of three

offences of the same kind committed within a year. But, in this case, the offences said to have been committed by these accused on four different occurrences would not fall within the ambit of Section 219 of Cr.P.C. In these cases, rightly, there was no joint trial by charging the accused together in respect of all four occurrences. The trial court had rightly conducted four separate trials. When that be so, the evidence let in one case in respect of one occurrence cannot be made use of against the accused in the other case. But the trial court has committed very serious illegality in considering the evidences in all cases together and in delivering a common judgement. In my considered opinion, delivering a common judgement in respect of four different occurrences making out four different offences on four different occasions and at four different places is illegal and the same is a procedure unknown to criminal law. Therefore, on this account, the entire judgement of the trial court is vitiated.

21. In this regard, we may refer to the judgement of the Hon'ble Supreme Court in *Nathi Lal v. State of U.P.*, 1990 Supp SCC 145 : 1990 SCC (Cri) 638 wherein the Hon'ble Supreme Court has laid down the following dictum:-

"Each case must be decided on the basis of the evidence which has been placed on record in that particular case without being influenced in any manner by the evidence or arguments urged in the cross case. But both the judgments must be pronounced by the same learned Judge one after the other."

22. The said judgement of the Hon'ble Supreme Court relates to counter cases. The Hon'ble Supreme Court has held that both the cases, which are counter cases relating to the same occurrence, should be tried by the same judge in the following manner:-

"We think that the fair procedure to adopt in a matter like the present where there are cross cases, is to direct that the same learned Judge must try both cross cases one after the other. After recording of evidence in one case is completed, he must hear the arguments and then he must reserve the judgment. Thereafter he must proceed to hear the cross case and after recording all the evidence he must hear the arguments but reserve the judgement in that case. The same learned Judge must thereafter dispose of the matters by two separate judgements. In deciding each of the cases, he can rely only on the evidence recorded in that particular case. The evidence recorded in the cross case cannot be looked into. Nor can the judge be influenced by whatever is argued in the cross case. Each case must be decided on the basis of the evidence which has been placed on record in that particular case without being influenced in any manner by the evidence or arguments urged in

the cross case. But both the judgements must be pronounced by the same learned Judge one after the other."

24. From the above, it is crystal clear that fair trial as guaranteed under Article 21 of the Constitution of India should be afforded to. In simple terms, the evidence, both oral and documentary, let in one case is not evidence in the other case and, therefore, the same cannot be considered for any purpose in the other case. Similarly, as laid down by the Hon'ble Supreme Court, there cannot be a common judgement delivered in two or more cases, even in respect of cross cases arising out of a single occurrence and in respect of each case there has to be a separate judgement. But, unfortunately, in the case on hand, the trial court has not followed the said procedure. As I have already stated, the trial court has recorded the evidence in one case and substituted the same in the other case. This procedure is illegal. Thereafter, the trial court has delivered a common judgement considering the evidence in common in respect of the other cases also. Rendering of a common judgement that too considering the evidences in common itself is illegal. For these reasons, I have no hesitation to hold that the common judgement delivered in all the four cases is vitiated.

25. Yet another serious procedural lapse which this court has noticed is, the way in which this case, involving offences which are not exclusively triable by Court of Sessions, came up for trial before the Additional Sessions Judge, Mahila Court, Chennai. As we have already noticed, though the learned Additional Sessions Judge has stated in the common judgement that this case came to be tried on having been committed by the Magistrate, it is factually incorrect as there was no committal order passed by the learned Metropolitan Magistrate as reported by the Principal Sessions Judge. It is needless to point out that under Section 193 of Cr.P.C., no court of sessions shall take cognizance of any offence as a court of original jurisdiction unless the case is committed to it by a Magistrate under the Code of Criminal Procedure except as otherwise expressly provided in the Code of Criminal Procedure or by any other law for the time being in force. A close reading of Section 193 of Cr.P.C. would make it abundantly clear that Judicial Magistrate can commit a case, if it has been expressly provided either in the Code of Criminal Procedure or in any other law for the time being in force.

26. At this juncture, it is brought to the notice of the Court that the accused one Ganesan (A1) in C.C.No.8 of 2000 who has been convicted for the same cause of action was acquitted from charges by the Judgment of this Court made in CrI.A.No.1922 of 2003 dated 28.04.2011.

27. Having regard to the right guaranteed under Article 21

of the Constitution which is one of the most cherished fundamental rights under the Constitution of India and keeping in mind the principles stated by the Hon'ble Supreme Court in the above judgements, if we analyse the facts of the present case, in my considered opinion, it would not be in the interest of justice to remit the case for retrial, for P.W.1, who is the sole witness, on whose evidence the prosecution depends upon, has turned hostile when she was recalled later on disowning her evidence let in by way of chief examination at the first instance. It is found in the records that P.W.1 has married P.W.6 and has settled down in her life. As it is pointed out by the learned counsel, since she has already disowned the allegations made by her in the chief examination, even if the case is remitted back at this stage and she is examined, the prosecution cannot expect her to depose to substantiate the charges. Assuming that she now changes her mind and deposes against the accused, since her earlier evidence can be used to contradict her, there would be no purpose served. In these circumstances, remitting the case for re-trial will only add to the work load of the trial court and result in utter wastage of precious time of the court. In such circumstances, I deem it not necessary to remit the case for retrial. In view of the above, the accused are entitled for acquittal and accordingly the appeals deserve to be allowed.

28. To sum up the legal issues involved in the case:-

(i) No Court of Sessions shall take cognizance of any offence unless the case has been committed to it by the jurisdictional Magistrate.

(ii) The Court of Sessions has no power to direct a Magistrate to commit any case to his file nor can a Court of Sessions withdraw a case from a Magistrate to his file.

(iii) If any of the offences in a given case is exclusively triable by a Court of Sessions then, the legal duty of the Magistrate is to commit the case to the Court of Sessions for trial as provided in Section 209 of Cr.P.C.

(iv) In cross cases, where one of the cases involves offences exclusively triable by a Court of Sessions and in the other case none of the offence is exclusively triable by a Court of Sessions, then, as provided in Section 323 of Cr.P.C. the jurisdictional Magistrate should commit both the cases for trial to the Court of Sessions.

(v) On such committal of cross cases arising out of the same occurrence, the Sessions Court shall scrupulously follow the procedure laid down by the Hon'ble Supreme Court in *Nathi Lal v. State of U.P.*, 1990 Supp. SCC 145.

(vi) In any other case involving offences which are not exclusively triable by a Court of Sessions and if it appears to the jurisdictional Magistrate that for any of the grounds enumerated under Section 407 (1) of Cr.P.C. that the case needs

to be tried by a Court of Sessions, the learned Magistrate shall submit a report to the High Court and on such report the High Court may order for committal of such case to the Court of Sessions for trial and thereupon on committal, the Sessions Court shall try the same as per Chapter XVIII of the Code of Criminal Procedure.

(vii) In any event, the trial court shall not record common evidence or substitute the evidence recorded in one case as evidence in the other case and shall not consider the evidence recorded in one case in the other case.

(viii) In no case, the trial court shall deliver a common judgement in two or more cases [vide Nathi Lal's case cited supra].

(ix) In respect of the cases where trial has not already commenced before the Court of Sessions without the case being committed, the accused shall be at liberty to raise objection at the earliest opportunity or else, the court shall follow the dictum laid down in State of Madhya Pradesh v. Bhooraji and others, 2001 Cri.L.J. 4228 (1).

(x) In respect of cross cases, for each case there has to be a separate public prosecutor to conduct the prosecution.

29. Further, it is stated that the court was impelled to acquit the accused with pains because of the serious lapses and substantive illegalities committed by the courts below. Therefore, Relying on the same Judgment dated 28.04.2011, this Court impels to acquit the 2nd accused namely P.Suryakumar [A2] of the charges.

30. In the result, the criminal appeal is allowed; the conviction and sentence imposed on the appellant by the trial court are set aside; the appellant is acquitted of the charge. Fine, if any, paid by the appellant shall be refunded to him. The bail bonds executed by the appellants shall stand discharged.

Sd/-

सत्यमेव जयते Assistant Registrar (CS-III)

//True copy//

Sub Assistant Registrar

vum
To

1. The Principal Sessions Judge, Chenani.
2. The Additional Sessions Judge,
Mahila Court, Chennai.

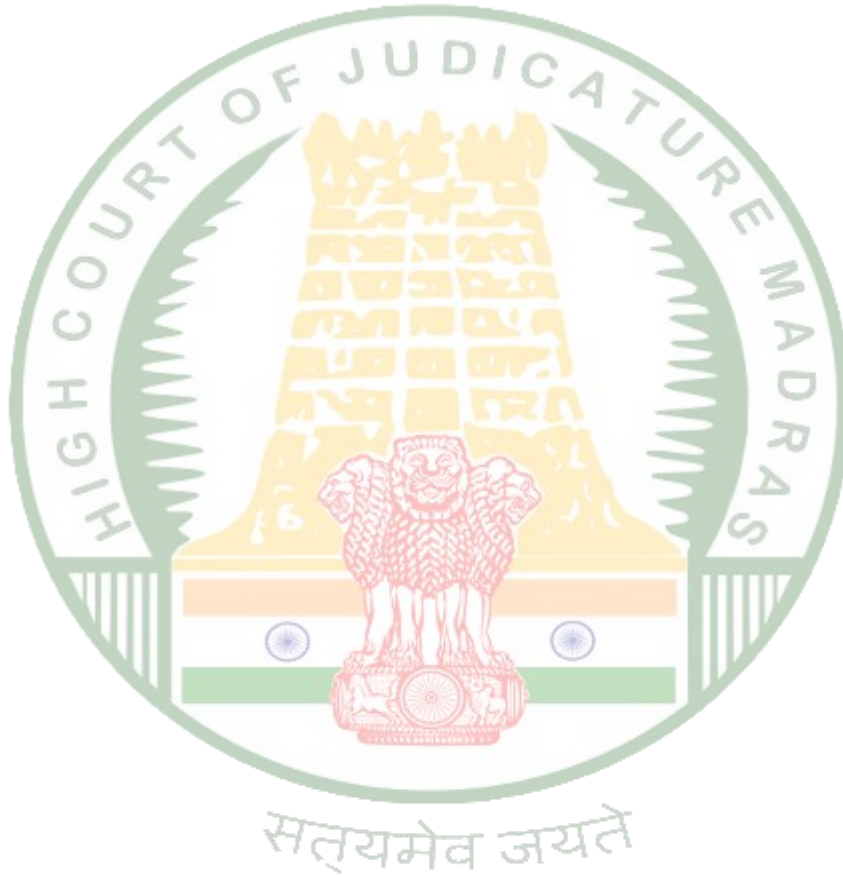
3.The Inspector of Police,
R-2, Kodambakkam Police Station,
Chennai.

4. The Public Prosecutor, High Court, Madras.

5. The Superintendent, Central Prison, Puzhal, Chennai.

Crl.A.No.457 of 2004

KK (CO)
GMY (14/02/2019)



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