





a. The appellant/first accused, Maria is the wife of PW.3/M.Babu. They got married during the year 2002 and out of the wedlock, they gave birth to two children and due to the drinking habit of PW.3, the matrimonial life between the appellant/first accused and her husband/PW.3 was not cordial and further PW.3 did not take care of the family. While so, the second accused/Ganesan, who is the relative of the neighbour of the appellant/first accused used to come to his relative's house and used to move freely with the children of the appellant/first accused and thereby, the appellant/first accused had developed illegal intimacy with him and thereby, the second accused/Ganesan became her paramour.

b. Later, the appellant/first accused had left the matrimonial home and married the second accused and they were living separately. On the complaint given by PW.3 to the police, the appellant/first accused and the second accused were separated by the police and the appellant/first accused was directed to live with PW.3/Babu. Because of that, the appellant/first accused nurtured enmity and ill feeling against the family of her husband/Babu.

c. PW.1 and PW.2 are sisters. PW.3 is the son of PW.2. PW.4, the victim, is the daughter of PW.1. PW.4 aged about 17 years had studied upto 6th standard and that she had developed a love affair with one Sathyaraj and she eloped with him to Pazhaveerkadu previously and on a complaint given by PW.1, she was secured and restored to her family. While so, the appellant/first accused, who was having a grudge against her husband and her family members had assured PW.4 that she would arrange for her (PW.4) marriage with one Sathyaraj. By making false representation and with a connivance of the second accused, she had taken PW.4 without the consent of her guardian PW.1 to Nagarcoil.

d. In such circumstances, PW.1 gave a complaint about the missing of her daughter/PW.4 to H6, R.K.Nagar Police Station. The complaint was registered by the Inspector of Police/PW.8 in crime No.624 of 2008 under the caption 'girl missing'. On 26.10.2008, PW.1 had given a further report, stating that the first and second accused had kidnapped her daughter/PW.4 with an intention to force or seduce her to illicit intercourse with the other person and based on further report, the case was altered from 'girl missing' to offence under Section 366A of IPC.

e. The original copy of the FIR was submitted to the learned XV Metropolitan Magistrate, George Town, Chennai and thereafter, the case was taken up for investigation by PW.10/Sheik Babu, the Inspector of Police of H6 Police Station. PW.10, thereafter



examined PW.1 and proceeded to the place of occurrence and in the presence of witnesses PW.5/Viji and PW.6 /Ramaiha had prepared the observation mahazar and rough sketch and thereafter, he made arrangements to send PW.9/Banumathy, Sub Inspector of Police to Nagarcoil to secure the accused and the victim and PW.9 went to Nagarcoil and secured the accused and the victim at Suseendram and on 06.11.2009, produced the appellant/first accused along with victim/PW.4 before PW.10. The appellant/accused was arrested at 9.00 a.m., and when she was enquired, she had voluntarily given a confession and it was recorded in the presence of the witnesses and on the basis of confession, cellphone and Pawn receipts were recovered under the cover of mahazar in the presence of same witnesses and thereafter, the victim was entrusted to her parents and the children who were secured by PW.9 were also entrusted to their father PW.3. After sending PW.4 for medical examination and after getting report from the doctor and recording their statements, the final report was filed before the learned XV Metropolitan Magistrate, George Town, Chennai.

3. The learned XV Metropolitan Magistrate, George Town, Chennai on receipt of the report, had taken up the case in PRC.No.67/2009 and on appearance of the accused, served copies of the records under Section 207 Cr.P.C and after perusing the records, arrived at the conclusion that the charges framed against the appellant/first accused were exclusively triable by the Court of Sessions and hence, committed the case to the Court of the Principal Sessions Judge, Chennai. The learned Principal Sessions Judge, on receipt of records and on presence of the accused, assigned the case as SC.No.295 of 2009 and made over the case to the trial Court for disposal, in accordance with law.

4. On receipt of the records and after hearing the accused, the trial Court, based on the materials, had framed charges against the accused for the offence under Section 366A of IPC and when the accused were questioned, they had denied the charges and sought to be tried. To bring home the the charges, the prosecution had produced 11 witnesses out, of 12 witnesses cited in the final report and 20 documents were marked as Exs.P1 to P20 and material objects MO.1 and MO.2 were marked on the side of the prosecution and no witnesses and documents were examined on the side of the defence.

5. The trial Court, based on the available materials, found the appellant/first accused and the other accused not guilty for the offence under Section 366A of IPC, but however, found the Appellant/A1 guilty for the offence under Section 363 of IPC, which is challenged in this appeal by the Appellant/A1.



6. This Court heard the learned counsel on either side.

7. PW.1, who is the complainant and the mother of the victim/PW.4 had deposed that she is working in the Government General Hospital, Chennai, as a Nurse and that she has two children, one boy and one girl/PW.4, who was aged about 17 years on the date of occurrence. She had further deposed that her daughter/PW.4 was missing from 23.10.2008 and that she had lodged a complaint with H6 Police Station for 'girl missing' and thereafter, she had given a further report stating that the appellant/first accused along with the other accused had kidnapped her daughter with an intention to use her for some business. She had further deposed that since she was having doubt on the second accused, she had informed the police and after interrogation of the second accused, the police had sent a women Sub Inspector of Police to Nagarcoil, who had secured the appellant/first accused and her daughter. Her further report was marked as Ex.P1 and the initial complaint given by her to the Police was marked as Ex.P2. She had further deposed that the appellant/first accused is her niece and daughter-in-law of her elder sister and that she had admitted in cross examination that her daughter/PW.4 had developed affair with one Sathyaraj and had eloped with him to Pazhaverkadu and on a complaint her daughter /PW.4 was secured and on the assurance and promise given by her to daughter that she would make arrangements to marry the said Sathyaraj, they were separated and her daughter was living with her.

8. PW.2/Deenammal is the elder sister of PW.1. She had deposed that the appellant/first accused is her brother's daughter and that she had married her son and that after marriage, she had developed illicit intimacy with the second accused and that the appellant/first accused had eloped with the second accused twice and thereafter, she was secured during the month of October of the previous year. She had further deposed that the appellant/first accused had taken away jewels from bureau and had taken PW.4, the victim/Rajitha without getting consent from her legal guardian. Further, after searching for PW.4, the complaint was lodged and suspecting that the second accused along with the first accused had kidnapped her, made a complaint and after interrogation of the second accused, the first accused and the children were secured. She had further deposed that during the incident, the victim/PW.4 was aged about 17 years. During the cross examination, she had admitted that the first and second accused had illicit intimacy and she came to know through her son/PW.3 and that she had admitted that the complaint was lodged on 26.10.2008.

9. PW.3/Babu is the husband of the appellant/first accused and son of PW.2. He had deposed that the appellant/first accused



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is his wife and that he knew that the second accused was having illicit intimacy with his wife and inspite of his warning, they had eloped one time and thereafter, on a complaint given to the police, on the intervention of police, she was secured before Deepavali, the previous year and thereafter, the appellant/first accused after taking the jewels had left the matrimonial home along with PW.4/Rajitha and her two children. He had further deposed that after giving a complaint, they were secured and the children were handed over to him by the Police. During cross examination he has denied that he used to suspect the character of the appellant/first accused. He had further admitted that PW.4, the victim is his cousin sister and that she had eloped with one Sathyaraj on a previous occasion.

10. PW.4 is the victim girl/Rajitha. She had deposed that PW.1 is her mother, PW.2 is her aunt, PW.3 is her brother and the appellant/first accused is her brother's wife and that she knew the second accused also. She had further deposed that the appellant/first accused had developed illicit intimacy with the second accused and that on 24.10.2008, while she was alone in her house and while PW.2 was not in the house the appellant/first accused had promised her that she would make arrangement to get her married to Sathyaraj and when PW.4 had refused, she had threatened her with needle and threatened to kill the children and thereby, she had gone with and they had proceeded to Egmore Railway Station and since there was a crowd they had gone to Koyambedu Mofussil bus stand and from there, the second accused had sent them in the Kanyakumari bus. Further, after reaching Kanyakumari they had gone to a hotel at Kanyakumari, stayed there for a week, visited the place in and around at Kanyakumari and thereafter, they had hired a house at Ashramam and stayed there. She had further deposed that while staying at the house in Ashramam, the appellant/first accused used to leave her children in the custody of her house and used to go to work. She further deposed that after receiving the jewels from her, the appellant/first accused had pledged the same through one Mr.Raj and by using the money, they were living there. She had further deposed that the appellant/first accused had contacted the second accused over phone to send PW.4 to Bombay and that meanwhile, the police came and secured them. During the cross examination she had stated that she was aged about 17 years and she had also admitted that she had affair with one Mr.Sathyaraj and that earlier they eloped and stayed at Pazhaverkadu for a day and that they had intercourse also. She had stated that she has not asked to arrange for marriage with Sathyaraj and she had admitted that Ganesan had not come along with them to Kanyakumari. She had admitted for having called Sathyaraj, from Kanyakumari but he did not make arrangement for marriage. She had also stated that she had visited the places in and around Kanyakumari for four days.



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11. PW.5/Viji was examined to prove the observation mahazar. He had deposed that he had signed blank papers in the Police Station and he did not know what were the contents of the documents and thereby, he was treated as hostile.

12. PW.6/Ramaiah was examined to prove the observation mahazar and he also turned hostile by stating the he has signed the paper on the request of the police.

13. PW.7/Anwar Basha was examined to prove the confession and seizure mahazar. He had deposed that on 06.11.2008, while he was in H6 Police Station, the Inspector of Police had interrogated the appellant/first accused and she had voluntarily given a confession statement and that he had attested the confession and on the basis of the confession the cellphone and the pawn tickets were surrendered by the appellant/first accused and that those material objects were seized in his presence and one Mr.Thangaraj had attested along with him. During the cross examination he had deposed that he did not read and he had deposed that after recording the statement given by the appellant/first accused only he had attested. He had admitted that he had signed in the police station and he had deposed that he was not having enmity against the accused.

14. PW.8 is the Investigating Officer, who had conducted the preliminary examination. He had deposed that on 26.10.2008 PW.1 had given a complaint stating that her daughter Rajitha/PW.4 was found missing from 24.10.2008 and on receipt of such complaint, he had registered a case in crime No.624 of 2008 under the caption 'girl missing' and that the FIR was placed for further investigation before the Inspector of Police. He had further stated that based on the further report given by PW.1, the case was altered to one offence under Section 366A IPC.

15. PW.9/Banumathi is the Sub Inspector of Police. She had deposed that while she was working in H1 Police station she had on the request of H6 Police Station accompanied the men police officer to Nagarcoil to secure the victim girl on 04.11.2008 and that on 05.11.2008 they had found the appellant/first accused along with her two children and the victim/PW.4 at Suseendaram and after securing them they were produced before R.K.Nagar Police station on 06.11.2008 along with the special report. The special report was marked as Ex.P15. During the cross examination, she had deposed that she was not aware of anything about the complaint and that she had conceded that she had not interrogated anyone.

16. PW.10 is the Investigating Officer/Mr.Sheik Babu. He had deposed that on 03.11.2009 while he was working as Inspector of

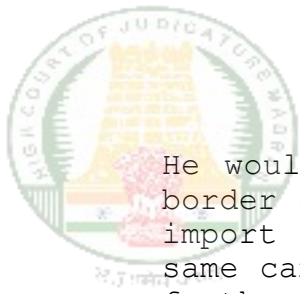


Police of R.K.Nagar Police station, a case in crime No.624 of 2008 was registered for woman missing on the complaint of PW.1 and on the basis of the subsequent report, the case was altered into Section 366A IPC and that the alteration report was submitted to the jurisdiction Magistrate and that thereafter, he proceeded to the scene of occurrence and prepared observation mahazar and rough sketch in the presence of PW.5 and PW.6 and thereafter, requested PW.9 to accompany the men officer to secure the accused and the victim girl along with her two children. After they were secured, the children of the accused were handed over to the husband of the accused namely PW.3 and the appellant/first accused in the presence of the witnesses recorded the voluntary confession statement given by her and the cellphone and pawn ticket were recovered under mahazar in the presence of witnesses and on the basis of the confessional statement, second accused was also arrested and the accused were produced before the jurisdictional Court. He had further deposed that after producing the victim for medical examination through the Court and after getting report and the statement of doctor and on completion of investigation, the final report was submitted to the learned XV Metropolitan Magistrate, George Town, Chennai.

17. The trial Court based on the evidence let in convicted the appellant/first accused as stated above and acquitted the second accused.

18. The learned counsel appearing for the appellant/first accused would vehemently assail the judgment of the trial Court, stating that the learned trial Judge erred in convicting the appellant/first accused without any legal evidence. He would further submit that the prosecution failed to prove the age of the victim that the victim was a minor and that she was enticed or taken away from her legal guardian without consent of such guardian.

19. The learned counsel for the appellant/first accused would submit that a bounden duty is cast on the prosecution to prove the charges against the appellant/first accused beyond all reasonable doubt, namely (i) A duty is cast on the prosecution to prove that the victim is a minor (below 18 years of age), whereas no legal evidence has been let in by the prosecution to prove that the victim was below 18 years (ii) The prosecution has failed to prove the ingredients for the charge of kidnapping and no evidence has been let in to prove that the victim was taken or enticed by the appellant/first accused. He would further submit that taking into consideration the entire evidence of the prosecution, it is seen that the victim was a close relative of the appellant/accused and she was a consenting and willing party to go along with the appellant/first accused.



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He would further submit that when the victim was in the age of border of attaining majority and was capable of knowing the full import of what she was doing and went on her own accord, the same cannot make out any offence under Section 363 IPC. He would further submit that when no legal evidence has been let in by the prosecution to prove the age of the victim, the trial Court ought to have relied on Ex.P20, medical report wherein the age of the victim has been stated as 17 years and in such circumstances, the Hon'ble Apex Court as well as the Hon'ble High Court in number of cases had held that it cannot be taken as an accurate determination and that had sufficient margin has to be given in favour of the appellant/first accused, taking into consideration the totality of the facts and circumstances attended to the case of the prosecution. He would further submit that admittedly, it is the case where the victim is stated to have already eloped with one Sathayaraj and that on a complaint earlier given by PW.1/her mother, she was secured and that she was handed over custody to her mother. It is the admitted case of PW.1 and PW.4 that PW.1 had promised and assured the victim that she would get her married to Sathayaraj after some time. Admittedly, since it was not arranged, the victim was having a grudge against her mother for having not arranged her marriage with her lover Sathayaraj and in such circumstances, the victim had willfully gone along with the appellant/first accused, who is none other than her cousin and sister in law and in such circumstances, the judgment of the trial Court has to be set aside. He would further submit that none of the witnesses at Suseendram have been examined to prove that the victim was kept under illegal confinement or detention or abduction. It is the admitted evidence of PW.4 that she was moving freely and that the appellant/first accused used to go to job leaving her in the house along with her two children and that she had moved around Kanyakumari along with the other persons visiting tourist spots on four occasions. Further, it is her own admission that she had called her boy friend Sathayaraj over phone from Kanyakumari.

20. The learned counsel for the appellant/first accused would further submit that the evidence of PW.4 is exaggerated and self contradictory in nature. While taking into consideration, the evidence of PW.4 she is a matured girl and a month prior to the occurrence, she had eloped with one Sathayaraj and on a complaint given by PW.1, a case was registered and she was brought back home. The further evidence of PW.4 that she had accompanied the appellant/first accused since she was threatened and that the appellant/first accused had taken her on the promise of getting her married to Sathayaraj and the further evidence that the appellant/first accused had threatened with a needle to kill her children are self contradictory in nature and are unbelievable. It is the evidence of PW.4 that while she was along with the appellant/first accused they had gone around



Kanyakumari to several picnic spots.

21. In support of the above submissions, the learned counsel for the appellant would rely on the decision reported in 1965 AIR (SC) 942 in S.Varadarajan Vs.State of Madras.

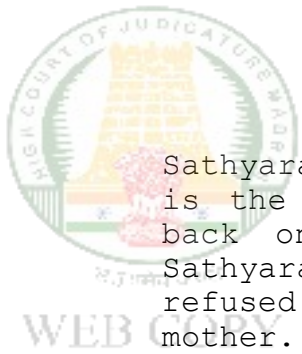
22. Per contra, the learned Additional Public Prosecutor would submit that though the charges were framed for the offence under Section 366A of IPC, the trial Court having found no material against the second accused had acquitted him, whereas, finding that the victim was aged about 17 years and that she had been enticed and taken away from her lawful guardian had rightly convicted the appellant/first accused. He would further submit that the evidence of PW.1 to PW.4 is cogent and clear that the victim was taken from the lawfully guardianship of her mother.

23. I have given careful consideration to the rival submissions of the learned counsel on either side and also perused the materials placed on record.

24. Now, what is to be seen is as to whether the prosecution has proved its case beyond all reasonable doubts, by letting in legal evidence and whether the trial Judge is right in convicting the appellant/first accused.

25. Now analysing the evidence in this case, the appellant/first accused is none other than the daughter of the brother of PW.1 and PW.2 and she has been given in marriage to PW.3. PW.4, the victim is the daughter of PW.1. The appellant/first accused and PW.1 to PW.4 are close relatives, the appellant/first accused is not only the niece of PW.1 and PW.2, but, she is also the daughter-in-law of PW.2 having married PW.3 son of PW.2.

26. As per the evidence, due to the drinking habits of PW.3 and not taking care of the appellant/first accused and her children, there was a matrimonial dispute between PW.3 and the appellant/first accused. The further evidence is that the appellant/first accused is stated to have developed illicit intimacy with one Ganesan/second accused and have left the matrimonial home. Thereafter, on a complaint given by PW.3 to the police, the appellant/first accused was made to live with PW.3 and thereby, there was misunderstanding between the appellant/first accused and PW.1 to PW.3. Further through the evidence of PW.1 to PW.4 it is admitted that the victim PW.4 had a history of elopement and she had prior to one month had eloped with one Sathyaraj and on a complaint given by PW.1, PW.4, the victim was secured and handed over custody to her mother/PW.1. PW.4 had admitted that while she had eloped with the said



Sathyaraj, she had been subjected to sexual intercourse and it is the admitted evidence of PW.4 that her mother brought her back on the assurance that she will get her married with Sathyaraj at a later point of time. Whereas, the mother had refused to do so due to which she was antagonized with her mother.

27. Though no legal evidence had been let in on the side of the prosecution to prove the age of PW.4/victim, Ex.P20 had been marked through PW.10. While analyzing Ex.P20, the doctor, who had issued the certificate, had stated that the age of the victim girl was aged 17 years. Further, while particularly analyzing the evidence of PW.4/victim girl and the other witnesses, none of the witnesses have stated that the appellant/first accused had taken PW.4 by enticement.

28. Now taking into consideration, the first complaint given to the police by PW.1, which was marked as Ex.P2, it is seen that PW.1 had stated about the earlier elopement of her daughter and the police securing her on the complaint given by her and that PW.1 had convinced her daughter and brought back her at home and she was at home. Further she had stated that on 24.10.2008, she had gone to duty leaving her daughter at home and when she had come back her daughter was not at home and she had on enquiry heard that her daughter had taken her cloths and gone along with the appellant/first accused and that after search being unable to find her daughter, she had given a complaint on 26.10.2008, based on which, a case for girl missing was registered. Thereafter, an exaggerated complaint has been given later as if the appellant/first accused kidnapped her daughter along with A-2/Ganesan and that she had committed theft of Rs.50,000/- and 10 sovereigns of jewels from her house. Only based on the further statement given by PW.1 on 03.11.2008, the case has been altered to one under Section 366A of IPC. However, as per Ex.P20, the investigation report regarding sexual offences in column 15 in the history it has been stated as hereunder:-

"Alleged to have run out of the house for two times with two different people in the last two moths. First time with Sathyaraj on 22.09.2008, came back on 23.09.2008. Second time with Maria (relative) on 24.10.2008 came back after a week. Alleged to have sexual intercourse with Sathyaraj with willingness on 22.09.2008 at 8.30 p.m., in Sathyaraj's friend's house."

29. The above recording had been made based on the information given by the victim herself. A reading of the recording of history states that the victim was alleged to have run out of the house for two times with two different people in



the last two months and that the appellant/first accused had eloped on 22.09.2008 and had come back on 23.09.2008 and in the second time, she had stated to have gone with the appellant/first accused on 24.10.2008 and she had stated to have come back after a week. If that is so, the victim would have been brought back before 31.10.2008 and it creates a reasonable doubt that only after securing the appellant/first accused and the victim/PW.4, the case had been altered into one for offence under Section 366A of IPC. Further, no person had been examined at Suseendram to show that the victim was in the custody of the appellant/first accused, whereas admittedly PW.4 had moved to several places in public, while she was in the company of the appellant/accused.

30. From the evidence and the conduct of PW.4, it can be clearly inferred that the victim proceeded with the appellant/first accused to various places freely without raising any objections, resistance or hue and cry, and it could be safely concluded that the victim was a willing party to go freely with the appellant/first accused.

31. If that is so, the next question which needs to be answered is whether the act of the appellant/first accused in taking her even with consent to various places amounts to offences under Section 366A of IPC.

32. In this case, the age of the victim girl plays a vital role. As stated earlier, the prosecution has failed to prove the age of the victim by letting in legal evidence. Though it is stated that the victim/PW.4 had studied upto 6<sup>th</sup> standard, the respondent police did not take any steps to prove her age by legal evidence. As per Ex.P20, the age was stated to be 17 years.

33. It is relevant to refer to the case, S.Varadarajan Vs.State of Madras reported in 1965 AIR (SC) 942, wherein, the Hon'ble Apex Court has held that if the girl who is in the border of attaining majority and capable of knowing full import of what she is doing went on her own accord, the same cannot make out any offence under Section 363 of IPC.

34. Applying the above said principle to the facts and circumstances of the present case, while analyzing the evidence of PW.4, it can be inferred that PW.4 who is none other than the cousin/sister-in-law of the appellant/first accused had willingly gone along with the appellant/first accused to various places and in the opinion of this Court with aid of the above referred judgment (S.Varadarajan Vs.State of Madras reported in 1965 AIR (SC) 942, no offence under Section 366A of IPC would be attracted against the appellant/first accused.



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35. Further, the Hon'ble Apex Court has held that when there is a doubt with regard to the correct age of the prosecutrix. The benefit of the aforesaid doubt, naturally, must go in favour of the accused.

36. This Court in Suramani & others Vs.State by Inspector of Police, Erode District reported in 2011 (4) MLJ (Crl) 62, has held as follows:-

"11. Now the question is, whether PW.2 was taken against her wish or she was a consenting party to go with the first accused.

12. In this regard, I have carefully gone through the evidence of PW.2. During cross-examination, she has clearly admitted that at several places when she was in the company of first accused, there were general public and even there were some known people, but, she did not raise any alarm, hue and cry or any resistance. Apart from that, even before the occurrence, PW.2 went to PW.10/Dr.Mangayarkarasi, at Nillakottai and obtained the age certificate showing that she was more than 19 years. This shows that she prepared herself to go along with first accused. Therefore, from the conduct of PW.2, it is clear that she proceeded along with the first accused to various places freely without raising any objection, resistance of hue & cry and therefore, it can be safely concluded that she was a willing party to go with the first accused."

37. Applying the above said principle, this Court had acquitted the accused for the offence under Section 363 of IPC.

38. Further, in the case of Sunil Vs.State of Haryana, (2010) 1 SCC 742, the Hon'ble Apex Court has held as follows:-

"26.....In a criminal case, the conviction of the appellant cannot be based on an approximate date which is not supported by any record. It would be quite unsafe to base conviction on an approximate date."

39. In the case on hand, in view of the evidence on record and the principle laid down in the above mentioned cases, this Court is of the considered view that the prosecution has failed to prove beyond all reasonable doubt that the victim/ PW.4 was less than 18 years of age at the time of incident. In view of



the same, this Court has to conclude that the appellant/first accused is entitled to be given the benefit of doubt, thereby, entitling her for acquittal.

40. In the result, this Criminal Appeal is allowed. The impugned judgement of conviction and sentence passed in S.C.No.295 of 2009 by the learned Additional District and Sessions Judge, (Fast Track Court No.3), Chennai, dated 19.01.2010 is set aside. The appellant/first accused is acquitted from all the charges and the fine amount, if any paid by her is directed to be returned. The bail bond, if any, executed by the Appellant/first accused, shall stand cancelled.

Sd/-  
Assistant Registrar(CO)

//True copy//

Sub Assistant Registrar

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To

- 1.The Additional District and Sessions Judge,  
(Fast Track Court No.3), Chennai.
  2. The XV Metropolitan Magistrate,  
No.XV, George Town, Chennai
  3. The Chief Metropolitan Magistrate,  
Egmore, Chennai.
  4. The Superintendent,  
Central Prison, Puzhal, Chennai
  5. The Inspector of Police,  
H6, R.K.Nagar Police Station, Chennai-81.
  - 6.The Public Prosecutor, High Court of Madras.
  - 7.The Section Officer, Criminal Section, High Court of Madras.
- +1cc to M/s.Nathan and Associates, Advocate SR.No.49040

Crl.A.No.144 of 2010

BS (CO)  
GMY (02/08/2019)