

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 19.03.2021

CORAM

THE HONOURABLE MR.JUSTICE P.VELMURUGAN

Crl.A.No.497 of 2020

Mohandoss

... Appellant

-Vs-

The state Rep. by,
Inspector of Police,
All Women Police Station,
Vellore. (Tiruvalam Police Station),
Crime No.202/2017.

... Respondent

PRAYER: Criminal Appeal filed under Section 374(2) of Code of Criminal Procedure, to set aside the judgment of conviction and sentence imposed on the appellant in Spl.S.C.No.30/2018, on the file of the Fast Track Magalir Neethimandram (Sessions Court Vellore) by judgment dated 20.11.2019 and allow the appeal.

For Appellant : Mr.C.Samivel,
Legal Aid Counsel

For Respondent : Ms.T.P.Savitha,
Government Advocate [Crl. Side]

JUDGMENT

This Criminal Appeal has been filed against the conviction and sentence imposed by the learned Sessions Judge, Fast Track Magalir Court (Sessions Court), Vellore in Special S.C.No.30 of 2018, dated 20.11.2019.

2.The respondent Police have registered a case in Crime No.202 of 2017, for offence under Sections 366(A), 506(i) and Section 6 of Protection of Children from Sexual Offence Act, 2012, against the appellant on the complaint (Ex.P1) given by the father of the victim child (PW1). After completing investigation, the respondent police altered the Sections into 363, 366 and Section 6 r/w 5(1)(m) of the Protection of Children from Sexual Offence Act as per Alteration Report (Ex.P10) and laid a charge sheet before the learned Sessions Judge, Fast

Track Magalir Court (Sessions Court), Vellore and the same was taken on file in Special S.C.No.30 of 2018.

3.After completing the formalities under Section 207 Cr.P.C., since there was a prima facie material to frame charge against the appellant, the learned Sessions Judge, framed charges under Sections 366, 506(i) and Section 5(m) r/w 6 of the Protection of Children from Sexual Offence Act, 2012.

4.After completing the trial and hearing the arguments advanced on either side and also considering the oral and documentary evidence, the learned trial Judge found the appellant guilty and convicted and sentenced as follows:-

- For offence under Section 366 IPC, the appellant to undergo 7 years Rigorous Imprisonment and to pay a fine of Rs.1,000/-, in default to undergo one month Rigorous Imprisonment.
- For offence under Section 5(m) r/w 6 of the Protection of Children from Sexual Offence Act, 2012, the appellant to undergo 10 years Rigorous Imprisonment and to pay a fine of Rs.5,000/-, in default to undergo three months Rigorous Imprisonment.
- For offence under Section 506(i) IPC, the appellant to undergo 1 year Rigorous Imprisonment.

5.Challenging the above said Judgment of conviction and sentence, the appellant has filed the present appeal before this Court.

6.Despite giving sufficient opportunity to the learned counsel for the appellant, he failed to argue the matter. Hence, this Court by order dated 10.03.2021 cancelled the vakalath and directed Registry to appoint Legal Aid Counsel and accordingly, Mr.C.Samivel has been appointed as Legal Aid Counsel for the appellant from the Legal Services Authority.

7.The learned counsel for the appellant would submit that there are material contradictions between the prosecution witnesses, the trial Court failed to consider the same. The learned counsel would further submit that there was two days delay in lodging the complaint (Ex.P1), for which, the father of the victim child (PW1) did not give proper explanation. In this case, only after deliberation and discussion with the neighbours and family members, the father of the victim child (PW1) lodged the complaint (Ex.P1). If at all, the father of the victim child (PW1) knew about the alleged sexual assault made by the appellant, soon after the occurrence he should have lodged the

complaint against him, but he did not do so. Hence, it creates serious doubt on the case of the prosecution. Prior to the alleged occurrence i.e., on 30.07.2017, there was civil dispute between the appellant and the father of the victim child (PW1). In order to take vengeance, the father of the victim child (PW1) foisted a false case against the appellant. The learned trial Judge without analysing the same, had passed the judgment of conviction.

8.The learned counsel for the appellant would further submit that after the occurrence, the victim child (PW2) was taken to the Government Primary Health Centre, Serkadu, where the Doctor (PW4) examined the victim child and found that there was swelling and reddish in colour in her private part and also oozing of blood and hence, she referred to Adukamparai Government Medical College and Hospital, Vellore and issued Medical Certificate (Ex.P5) to that effect. Hence, the victim child was admitted in Adukamparai Government Medical College and Hospital, Vellore, where the Doctor one Sivagami gave treatment to the victim child. But during trial, the prosecution failed to examine the Doctor Sivagami and also the medical records issued by her, despite showing her as one of the witness in the charge sheet. Hence, the non examination of the Doctor Sivagami would lead to great suspicion on the part of the prosecution and the learned trial Judge failed to consider the same. Since the Doctor (PW4) referred the case to Higher Medical Institution, the learned trial Judge ought not to have convicted the appellant based on the Medical Certificate (Ex.P5) issued by the Doctor (PW4). Further, the Doctor (PW5) who gave Potential Test Certificate to the appellant was examined by the prosecution, but wilfully failed to examine the Doctor Sivagami, who gave treatment to the victim child and also her medical records.

9.The learned counsel for the appellant would further submit that according to the prosecution, the father of the victim child (PW1) has stated that on 30.07.2017, at about 02.00 p.m., he started search of his daughter (PW2), at that time, one Swetha told him that his daughter was at the house of the appellant. The said Swetha, who is an independent witness, who had claimed that she saw the victim child at the house of the appellant, was not examined by the prosecution, which is fatal to the case of the prosecution. Further, PW3 one Ramachandran who was examined as witness for the Observation Mahazar (Ex.P4), deposed that the signature in the Observation Mahazar (Ex.P4) was obtained by the Police as a proof for conducting awareness programme in the village and the same was obtained at Serkadu Bus Stop. Hence, the prosecution failed to prove genuineness of the Observation Mahazar and Rough Sketch (Exs.P4 & P8). The Doctor (PW4), who gave treatment to the victim child on 31.07.2017, at about 10.30 a.m., has stated that there was

oozing of blood in the private part. As per the prosecution, the alleged occurrence had taken place at about 02.00 p.m., on 30.07.2017, after 18 hours the victim child was taken to the Government Primary Health Centre, Serkadu and the Doctor (PW4) found the oozing of blood. It is highly impossible that there was oozing of blood continuously till the victim child admitted in the Hospital. Therefore, the alleged injuries was not caused on 30.07.2017 as alleged by the prosecution and the appellant is not reason for the same. There are material contradictions and discrepancies in the evidence of the prosecution witnesses and documents and therefore, the prosecution has failed to establish its case beyond reasonable doubt and the benefit of doubt should have been extended to the appellant.

10.The learned counsel for the appellant would further submit that as far as the offence under Section 366 of IPC is concerned, the father of the victim (PW1) has not stated that her daughter was kidnapped by the appellant and he himself stated that when her daughter was playing outside, the appellant took her to his house on the pretext of giving chocolate and committed the offence. Therefore, the question of kidnap would not arise in this case and the learned trial Judge failed to consider the same and wrongly convicted and sentenced the appellant under Section 366 IPC.

11.Except examination of the father of the victim child and her daughter (PW1 & PW2), no independent or private witness was examined by the prosecution to prove the charges framed against the appellant. Hence, the judgment of the trial Court is liable to be set aside and warrants interference of this Court.

12.Ms.T.P.Savitha, Government Advocate (Crl. Side) appearing on behalf of the respondent Police would submit that at the time of occurrence, the age of the victim child was 4 years and the appellant was aged about 52 years and he is a neighbour. When the victim child was playing near the house of the appellant, he took her to his house on the pretext that he would give chocolate and committed aggravated penetrative sexual assault. On 30.07.2017, at about 02.00 p.m., the victim child was found missing outside and the father of the victim child (PW1) was informed by one Swetha that her daughter was near the house of the appellant. When PW1 went to the house of the appellant, the door was closed outside and when he called her daughter, he saw the appellant holding his daughter in one hand and pulling her from the bedroom. In another armpit, he was holding the inner wear of the victim. When PW1 questioned the same, the appellant told that the victim attended nature's call, hence he washed her inner wear. Subsequently, the father of the victim child took her daughter (PW2) to house, at that time she informed about the occurrence and also to her mother. By the time, the wife of

the appellant requested not to reveal the sexual assault to anyone and not to take the victim child to the Hospital. Even if takes the victim child to Hospital, not to say the actual happenings. Thereafter, the victim child was taken to the Government Primary Health Centre, Serkadu and since there was swelling and oozing of blood in the private part, the Doctor (PW4) referred to Adukamparai Government Medical College and Hospital, Vellore. The victim child was admitted in Adukamparai Government Medical College and Hospital, Vellore and the father of the victim child gave the complaint (Ex.P1) to the respondent Police, who registered the case and on completion of investigation filed the charge sheet against the appellant. To prove the charges framed against the appellant, the prosecution totally examined 8 witnesses, out of which the victim child was examined as PW2.

13.The Doctor, who gave treatment to the victim child in the Government Primary Health Centre, Serkadu was examined as PW4. The Doctor (PW4) has stated that she examined the victim child on 31.07.2017 at about 10.30 a.m., and found that there was swelling in the private part and reddish in colour and also oozing of blood and issued the Medical Certificate (Ex.P5) and therefore, referred to Adukamparai Government Medical College and Hospital, Vellore for further treatment. Thereafter, the victim child was produced before the learned Judicial Magistrate No.II, Vellore for recording the statement under Section 164 Cr.P.C., which was recorded and marked as Ex.P3. The statement of the father of the victim child (PW1) was marked as Ex.P2. In order to prove the age of the victim child (PW2), the copy of the Birth Certificate was marked as Ex.P9. As per the Birth Certificate (Ex.P9), the date of birth of the victim child is 04.08.2013 and the date of occurrence is 30.07.2017 and hence, at the time of occurrence, the age of the victim child was 4 years. Therefore, the victim is a child which comes under the definition of Section 2(1)(d) of the Protection of Children from Sexual Offence Act, 2012. Since the victim child was below the age of 12 years at the time of occurrence and she was subjected to aggravated penetrative sexual assault, the learned trial Judge framed charges under Section 5(m) r/w 6 of Protection of Children from Sexual Offence Act, 2012.

14.From the evidence of the victim child (PW2) and her father (PW1) and the Doctor (PW4), who gave treatment to the victim child and from the statement of PW1 & PW2 recorded under Section 164 Cr.P.C., (Exs.P2 & P3), the Medical Certificate (Ex.P4) and the Birth Certificate of the victim child (Ex.P9), the prosecution has clearly established the case that the appellant is the person, who has committed the aggravated penetrative sexual assault on the victim child. The learned trial Judge had rightly appreciated the entire evidence and

materials and had come to the conclusion that the appellant has committed the offence against the victim child and the appeal is liable to be dismissed.

15. Heard the learned counsel appearing for the appellant and the learned Government Advocate [Crl. Side] appearing for the respondent Police and also perused the materials available on record.

16. The case of the prosecution is that on the date of occurrence, the victim child who was examined as PW2 during trial, was aged about 4 years and was studying 1st std. On 30.07.2017, the mother of the victim child went to attend funeral ceremony of her relative. On the same day, there was a temple festival time in the Village and the father of the victim child (PW1) went to the temple along with her daughter (victim child) and after returning to home at about 01.00 p.m., they went to the relative house of one Kannappan. When the father of the victim child (PW1) was speaking to Kannappan, the victim child had gone outside and playing with her friends. At about 02.00 p.m., the victim child was found missing outside and PW1 was informed by one Swetha that her daughter was near the house of the appellant. When PW1 went to the house of the appellant, the door was closed outside and when he called her daughter, he saw the appellant holding his daughter in one hand and pulling her from the bedroom. In another armpit, he was holding the inner wear of the victim child. When PW1 questioned the same, the appellant told that the victim child attended nature's call, hence he washed her inner wear. At that time, PW1 noticed the victim child was having chocolate and when he questioned the same, the appellant informed that she asked him to buy a chocolate, hence, he gave a chocolate. Thereafter, PW1 took her daughter and when they were going to house, the victim child informed that when she was playing, the appellant gave a chocolate and took her to his house and put her to bed and removed her inner wear and put his private part into her private part and also put his private part into her mouth and committed the aggravated penetrative sexual assault. After reaching home, the victim informed the happenings to her mother and subsequently, the father and mother of the victim child had gone to the house of the appellant to question about the incident. The wife of the appellant informed that not to tell about the happenings to her and that she did not know the appellant and she had gone to the backside of the house and sat down. When the mother of the victim child took her daughter to the Government Primary Health Centre, Serkadu, the wife of the appellant intervened and told not to take her to the hospital. Thereafter, the mother of the victim had gone to the Government Primary Health Centre, Serkadu. Since there was bleeding in the private part of the victim, the Doctor (PW4) referred to

Adukamparai Government Medical College and Hospital, Vellore. Thereafter, the victim child was taken to Adukamparai Government Medical College and Hospital, Vellore and the complaint (Ex.P1) was given to the respondent Police.

17. Based on the complaint (Ex.P1) given by the father of the victim (PW1), an FIR in Crime No.202 of 2017 was registered for offence under Sections 366(A), 506(i) and Section 6 of Protection of Children from Sexual Offence Act, 2012 against the appellant. After completing investigation, the respondent police laid a charge sheet before the learned Sessions Judge and the same was taken on file in Special S.C.No.30 of 2018.

18. During the trial, on the side of the prosecution, as many as 8 witnesses were examined as PW1 to PW8 and 10 documents were marked as Exs.P1 to P10 and no material object was exhibited. After completing the evidence of prosecution witnesses, when incriminating circumstances were culled out from the prosecution witnesses put before the accused, he had denied as false. On the side of the defence, no oral witness, but one documentary evidence was marked.

19. After considering the evidence on record and hearing on either side, the learned Sessions Judge, by judgment dated 20.11.2019 in Special S.C.No.30 of 2018, convicted and sentenced the appellant as stated above.

20. This Court, being an Appellate Court, is a fact finding Court, which has to necessarily re-appreciate the entire evidence and give an independent finding. Accordingly, this Court appreciated the entire evidence and materials available on record to give independent finding.

21. In order to prove the case of the prosecution, the prosecution has examined 8 witnesses, out of which, the victim child was examined as PW2. A reading of the evidence of PW2, it is seen that at the time of occurrence, the victim child was aged about 4 years and she was studying 1st std. She has stated in her evidence that the appellant took her to his house on the pretext that he would give chocolate and put her on bed and removed her inner wear and put his private part into her private part and also put his private part into her mouth and committed the aggravated penetrative sexual assault.

22. A reading of the evidence of the father of the victim child (PW1), on 30.07.2017, it is seen that there was a temple festival time in the village and the father of the victim child (PW1) went to the temple along with her daughter (victim child) and after returning to home at about 01.00 p.m., they went to

relative's house Kannappan. When the father of the victim child (PW1) was speaking to Kannappan, the victim child had gone outside and playing with her friends. At about 02.00 p.m., the victim child was found missing outside and PW1 was informed by one Swetha that her daughter was near the house of the appellant. When PW1 went to the house of the appellant, the door was closed outside and when he called her daughter, he saw the appellant holding his daughter in one hand and pulling her from the bedroom. In another armpit, he was holding the inner wear of the victim child. When PW1 questioned the same, the appellant informed that the victim child attended nature's call, hence he washed her inner wear. At that time, PW1 noticed the victim child was having chocolate and when he questioned the same, the appellant informed that she asked him to buy a chocolate. Thereafter, PW1 took her daughter and when they were going to house, the victim child informed that when she was playing, the appellant gave a chocolate and took her to his house and put her on bed and removed her inner wear and put his private part into her private part and also put his private part into her mouth and committed the aggravated penetrative sexual assault. When the mother of the victim child took her daughter to the Government Primary Health Centre, Serkadu, the wife of the appellant intervened and told not to take her to the hospital. The victim child was admitted in the Government Primary Health Centre, Serkadu, where the Doctor (PW4) conducted medical examination and issued the Medical Certificate which was marked as Ex.P5. Thus, the evidence of the victim girl (PW2) corroborated the evidence of her father (PW1).

23. The Doctor (PW4) in her evidence has deposed that she examined the victim child and found there was swelling and reddish in colour in her private part and also oozing of blood and opined that the victim girl was subjected to sexual assault and she referred to Adukamparai Government Medical College and Hospital, Vellore. The victim child was produced before the learned Judicial Magistrate No.II, Vellore for recording the statement under Section 164 Cr.P.C. The learned Judicial Magistrate No.II, Vellore has recorded the statement of the victim child and also the statement of her father (PW1) and during trial, the same were marked as Exs.P2 & P3. Though the statement under Section 164 Cr.P.C., is not a substantive piece of evidence, it can be used either for corroboration on the side of the prosecution and contradiction on the side of the defence. A combined reading of the evidence of the Doctor (PW4) and the Medical Certificate (Ex.P5) coupled with the evidence of the victim child (PW2) and her father (PW1), it could be seen that the victim child (PW2) was subjected to aggravated penetrative sexual assault and the appellant is the reason for the same. Further, the statements of the victim child and her father (Exs.P2 & P3) corroborated their evidence and also corroborated

the evidence of the Doctor (PW4) and the Medical Certificate (Ex.P5) .

24.The learned counsel for the appellant contended that the Doctor Sivagami, who gave treatment to the victim child in Adukamparai Government Medical College and Hospital, Vellore and one Swetha who saw the victim child near the house of the appellant were not examined by the prosecution and further contended that there was a delay of two days in lodging the complaint (Ex.P1), for which the father of the victim child (PW1) has not given proper explanation and prior to the occurrence, there was previous enmity between the appellant and the father of the victim child due to civil dispute.

25.As far as the delay in lodging the complaint is concerned, normally the offence like this nature, the parents of the victim child would think about the future of her child and also the reputation of the family and thereafter, only they would lodge the complaint. The father of the victim child in his evidence has stated that on the date of occurrence i.e., on 30.07.2017, he and his wife had gone to the house of the appellant to question about the sexual assault and thereafter, returned to home. Since the date of the occurrence was on Sunday, the parents of the victim child decided to go to Hospital on the next day. During the night hours on 30.07.2017, the victim child was murmuring due to serious pain in her private parts. On the next day i.e., on 31.07.2017, the victim child was admitted in the Government Primary Health Centre, Serkadu, where the Doctor (PW4) examined the victim child and referred to Adukamparai Government Medical College and Hospital, Vellore. Thereafter, the victim child and her mother returned to home and informed the same to the father of the victim child. On 31.07.2017 night hours also, the victim child was suffered serious pain in her private part. On the next day i.e., on 01.08.2017, unable to tolerate the incident, the father of the victim child went to the house of the appellant and questioned the happenings, at that time, the wife of the appellant requested him not to create any problem and pacified him. Thereafter, the victim child was admitted in Adukamparai Government Medical College and Hospital, Vellore where information was sent to the respondent Police and the Head Constable (PW6) attached to the respondent Police went to the Hospital, received the complaint (Ex.P1) from the father of the victim child (PW1). Therefore, it is nothing wrong that the complaint has been given in two days later and mere delay is not sole ground for disbelieve or discard the evidence of the victim child (PW2).

26.As far as non examination of the Doctor Sivagami who gave treatment to the victim child in Adukamparai Government Medical

College and Hospital, Vellore is concerned, soon after the occurrence, the victim child was taken to the Government Primary Health Centre, Serkadu where the Doctor (PW4) examined the victim child and found that there was swelling in her private part and was oozing of blood and made an entry in the Medical Certificate (Ex.P5) that the victim child was subjected to sexual assault. Since the evidence of the Doctor (PW4) and Medical Certificate (Ex.P5) revealed that the victim child was subjected to sexual assault, the non examination of the Doctor Sivagami who gave treatment in Adukamparai Government Medical College and Hospital, Vellore would no way affect the case of the prosecution.

27.As far as non examination of the independent witness Swetha who saw the victim child nearby the house of the appellant is concerned, since the evidence of victim child, her father and the Doctor (PW4) and the statements of the father of the victim child and the victim child recorded under Section 164 Cr.P.C., (Exs.P2 & P3) and the Medical Certificate (Ex.P4) revealed that the appellant is the person who has committed the aggravated penetrative sexual assault on the victim child, mere non examination of the said Swetha would not fatal to the prosecution case.

28.As far as the previous enmity due to civil dispute between the appellant and the father of the victim child (PW1) is concerned, the appellant neither examined any witness nor marked any document in order to substantiate his defence. Hence, the above contentions raised by the learned counsel for the appellant are not acceptable.

29.In order to prove the age of the victim child, her birth certificate was marked as Ex.P9. As per the Birth Certificate (Ex.P9), the age of the victim child on the date of occurrence was only four years.

30.Therefore, a combined reading of the evidence of the father of the victim child (PW1), the victim child (PW2), the Doctor (PW4) and the complaint (Ex.P1), the statements recorded under Section 164 Cr.P.C., (Exs.P2 & P3), the Medical Certificate (Ex.P5) and the Birth Certificate (Ex.P9) of the victim child, who was aged about 4 years at the time of occurrence, this Court safely comes to the conclusion that the appellant has committed the aggravated penetrative sexual assault on the victim child (PW2). Since the offence committed by the appellant against the child aged below 12 years, the commission of offence falls under Section 5(m) of the Protection of Children from Sexual Offence Act, 2012, which is punishable under Section 6 of the Protection of Children from Sexual Offence Act, 2012. Therefore, the learned trial Judge rightly

convicted the appellant under Section 5(m) r/w 6 of the Protection of Children from Sexual Offence Act, 2012 and sentenced minimum sentence of 10 years and the same are hereby confirmed.

31.As far as the offence under Section 506(i) IPC is concerned, the victim child in her evidence has stated that the appellant while committing the sexual assault he threatened her not to reveal the incident to anyone, otherwise he would take away her life. The father of the victim child (PW1) while examination in chief has confirmed the same. Hence, the appellant has committed the offence under Section 506(i) IPC and the learned trial Judge rightly convicted and sentenced the appellant and the same are hereby confirmed.

32.As far as the offence under Section 366 IPC is concerned, the evidence of the victim child and her father (PW1 & PW2) is that when the victim child was playing outside, the appellant took her to his house on the pretext that he would give chocolate and committed the aggravated penetrative sexual assault. Therefore, the question of kidnapping would not arise in this case. The learned trial Judge without considering the same, wrongly convicted the appellant under Section 366 IPC and hence, the conviction and sentence for offence under Section 366 IPC are liable to be set aside and, are set aside.

33.For the reasons stated above, this Criminal Appeal is Partly Allowed. The trial Court is directed to secure the appellant to undergo remaining period of sentence, if he is outside.

34.The counsel who appointed by the Legal Services Authority from the legal aid panel for the appellant is entitled for fees as per rule.

Sd/-

Assistant Registrar(CS-VII)

//True Copy//

Sub Assistant Registrar

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To

1.The Sessions Judge,
Fast Track Magalir Court (Sessions Court),
Vellore.

2.The Inspector of Police,
All Women Police Station,
Tiruvalam Police Station,
Vellore.

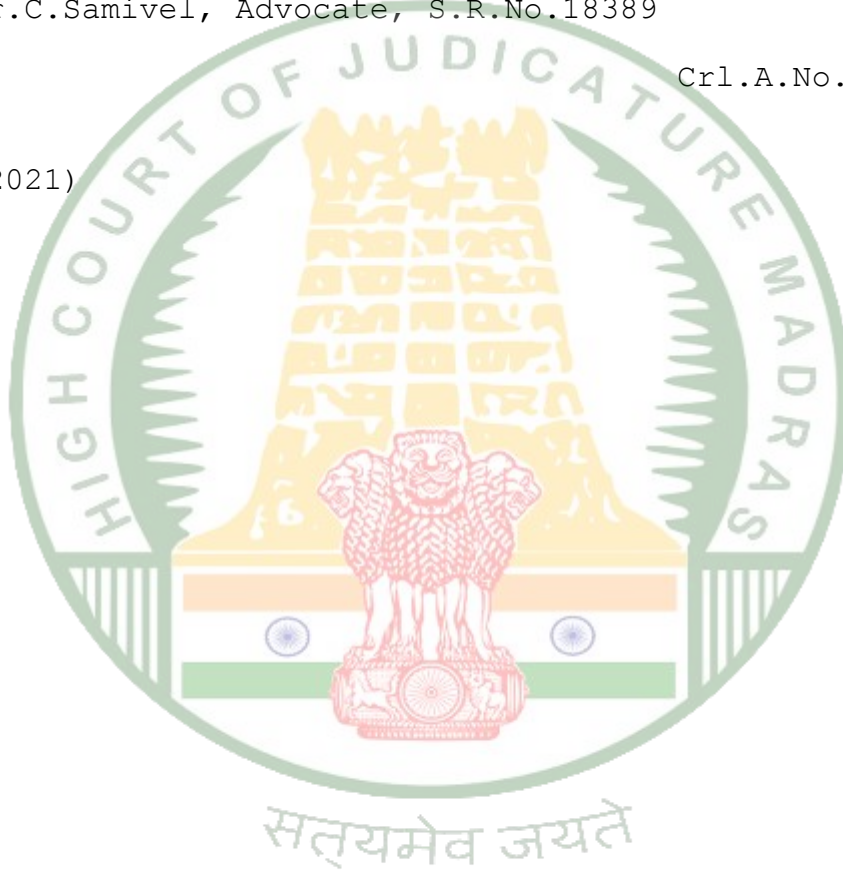
3.The Secretary,
High Court Legal Services Committee,
ADR Building, Chennai-600 104.

4.The Public Prosecutor,
High Court, Madras.

+1cc to Mr.C.Samivel, Advocate, S.R.No.18389

Cr1.A.No.497 of 2020

AJS (CO)
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