



BAIL SLIP

Kanagaraj, S/o. Rajendra Kumar, aged 26 years was released on bail vide court order dated 21.09.2016 in CRL.MP(MD).No.4895 of 2016 in CRL.A.(MD).No.220 of 2016.

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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on : 27.04.2021

Pronounced on : 03.09.2021

CORAM:

THE HONOURABLE MR. JUSTICE **SATHI KUMAR SUKUMARA KURUP**

Crl.A.(MD) No.220 of 2016

Kanagaraj
S/o. Rajendra Kumar

..Appellant/Accused

Versus

The State rep by
The Inspector of Police
All Women Police Station South
Madurai.
(Crime No.3 of 2009)

..Respondents/Complainant

This Criminal Appeal is filed under Section 374 (2) of the Code of Criminal Procedure to set aside the Judgment of conviction and sentence passed in S.C.No.227 of 2010 dated 17.05.2016 on the file of the learned District and Sessions Judge(Mahila), Fast Track Mahila Court, (Mahalir Neethi Mandram) Madurai.

For Appellant : M/s. A. S. Rajeswari
for Mr.M.Jegadesh Pandian
For Respondent : Mr. K. K. Ramakrishnan
Additional Public Prosecutor

JUDGMENT

(The case has been heard through video conference)

This Criminal Appeal has been filed against the judgment of conviction and sentence passed in S.C.No.227 of 2010 dated 17.05.2016 on the file of the learned District and Sessions Judge, Fast Track Mahila Court, Madurai.

2.The case of the prosecution is that the prosecutrix was a popular TV personality compering programmes in the private TV channel. She was also known for her visits to the Sai Baba Temple at Madurai, the



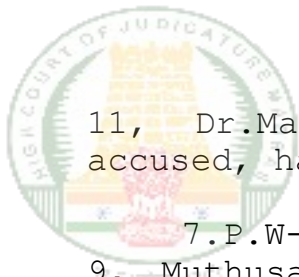
accused befriended her and declared his love to her. In due course of time, they became lovers. On the strength of the bond of love, they had spent time together. The accused by misusing their relationship used to receive money whenever he needs the same, the prosecutrix had pledged her jewels and obtained money to pay the accused. Also, she had purchased a Two Wheeler, namely, Bajaj Pulsar (Black Colour) bearing Registration No.TN 58 U 2887 from the Bajaj Dealer at Madurai.

3.In the course of said relationship, the accused indulged in sexual intercourse with the prosecutrix at her residence. When her mother was not at home, she had sexual intercourse with the accused on the ground that the accused promised to marry her. When she became pregnant, she insisted the accused to marry her. The accused took her to his parents house. The accused hails from Namakkal, whereas, he was residing at Madurai. He brought his parents to his house at Madurai. The accused brought the prosecutrix to his house at Madurai and introduced her to his parents as his lover and he wanted to marry her. After exchanging pleasantries, when the prosecutrix was about to leave the house, the mother of the accused wanted to know the caste of the prosecutrix. She replied that she belonged to Thevar community.

4.The accused promised to visit the prosecutrix's house along with his parents seeking the prosecutrix's hands as his bride from the elders in the family of the prosecutrix, but did not turn up on the date he mentioned. On her query through mobile with the accused, the accused evaded a direct answer. Subsequently, on repeated query from the prosecutrix, he informed her that his parents are not amenable to the marriage as she is from a different community, Thevar and threatened her that he shall withdraw from their relationship. This forced her to give a complaint under Ex.P1 to the respondent police.

5.Based on complaint of the prosecutrix under Ex.P1, P.W-12, Geetha Ramani, Sub-Inspector Police, had registered the FIR under Ex.P3. The original FIR under Ex.P3 and the original complaint under Ex.P1, were sent to the Court of the learned Judicial Magistrate, Madurai. The copies of the FIR and complaint were sent to the higher Officials of P.W-12, Geetha Ramani.

6.On receipt of the copy of the FIR under Ex.P3 and the complaint under Ex.P1, P.W-14, Nirmala, Inspector of Police, had proceeded with the investigation. She had examined the witnesses, P.W-2 to P.W-7. She had arrested the accused and forwarded the accused and the prosecutrix along with the police escorts to undergo medical examination. Accordingly, both were sent to medical examination and in this regard, a report was obtained under Ex.P2. P.W-11, Dr.Mahalakshmi, who examined the prosecutrix, had issued medical report under Ex.P2, was examined and the statement of P.W-



11, Dr.Mahalakshmi and P.W-13, Dr.Selvaraj, who examined the accused, had issued Ex.P4, were recorded.

7.P.W-14, Nirmala, Inspector of Police, had also examined P.W-9, Muthusamy, Constable, who had accompanied the accused to the Government Rajaji Hospital, Madurai and P.W-8, Geetha, Head Constable, who had accompanied the prosecutrix to the Government Rajaji Hospital at Madurai for medical examination and obtained medical examination report of the prosecutrix. After completion of the investigation, she had laid final report before the Court of the learned Judicial Magistrate, Madurai.

8.On receipt of the final report filed by the Inspector of Police, P.W-14, the learned Judicial Magistrate, Madurai had taken cognizance of the final report filed under Section 173 of the Code of Criminal Procedure, for the offences under Sections 376, 406 and 417 of IPC granting copies to the accused and examining the accused regarding his economical status to engage a counsel for himself to prosecute the case. Since the offences alleged against the accused are triable by Court of Sessions, the case was committed to the Court of the learned Principal District and Sessions Judge, Madurai.

9.Being the offence triable by the Court of Sessions, the learned Judicial Magistrate, Madurai had committed the case of the accused to the Court of the learned Principal District and Sessions Judge, Madurai. On receipt of records from the Court of the learned Judicial Magistrate, Madurai, the Principal District and Sessions Judge, Madurai had made over the case to the file of the learned Special Judge, Fast Track Mahila Court, Madurai. On appearance of the accused before the learned trial Judge/Special Judge, Fast Track Mahila Court, Madurai, the learned trial Judge had framed charges under Sections 376, 406 and 417 of IPC against the accused. The accused was questioned regarding framing of charges. The accused denied the charges and claimed to be tried. Therefore, the trial was ordered.

10.The prosecution had examined the witnesses, P.W1 to P.W14 and marked the documents, Ex.P1 to Ex.P4.

11.P.W-1 is the prosecutrix. She had spoken about her getting acquainted with the accused and this acquaintance being developed as friendship subsequently turned as lovers resulting in the accused having intercourse with her on the pretext of promising to marry her.

P.W-2, Vijaya, is the sister of the prosecutrix. She had deposed regarding the acquaintance developed between the prosecutrix and visit of the accused to the house of the prosecutrix.

P.W-3, Usha is the neighbour of prosecutrix in her house at Samayanallur and she is the well-wisher of the prosecutrix for more than 6 years.



P.W-4, Jeyalakshmi is also the acquaintance and family friend of the prosecutrix residing nearby the house of the prosecutrix.

P.W-5, Mahendran, is also a neighbour, acquaintance and well-wisher of the prosecutrix's family.

P.W-6, Rajeswaran, had also spoken about being an acquaintance, family friend and well-wisher of the family of the prosecutrix.

P.W-7, Ramamoorthy, a staff of the Bajaj Dealer at Avaniyapuram, Madurai, had spoken about the purchase of the two wheeler.

P.W-8, Geetha, Head Constable had spoken about accompanying the Prosecutrix to the hospital regarding medical examination of the Prosecutrix as per the orders of the learned Judicial Magistrate, Melur.

P.W-9, Muthusami, Constable had spoken about accompanying the accused to the hospital regarding medical examination of the accused as per the orders of the learned Judicial Magistrate, Melur.

P.W-10, Hemalatha, is the Head Constable of the respondent police. She had spoken about accompanying the prosecutrix under the orders of the learned Judicial Magistrate reporting to the Government Rajaji Hospital, Madurai and taking her back from the hospital to her residence.

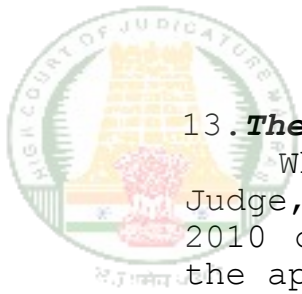
P.W-11, Mahalakshmi, is the Doctor, who examined the prosecutrix and issued Ex.P2-report of the medical examination of the prosecutrix.

P.W-12, Geetha Ramani, Sub Inspector of Police who had registered the FIR under Ex.P3.

P.W-13, Selvaraj, is the Doctor, who examined the accused and issued potency certificate under Ex.P4.

P.W-14, Nirmala, is the Inspector of Police, the Investigation Officer in this case. She had spoken about conducting the investigation and laying of the final report of the investigation before the Court of the learned Judicial Magistrate, Madurai.

12.P.W-2 to P.W-6 had corroborated the evidence of P.W-1, prosecutrix. After closing the evidence of the prosecution, the accused was questioned regarding the incriminating evidence available against him. The accused denied the incriminating evidence and stated that he has defence witness. The accused had not examined any witnesses. The arguments were heard and the learned trial Judge had, on appreciation of the evidence, convicted the accused for the offence under Section 376 of IPC and acquitted the accused for the offence under Section 406 and 417 of IPC. On conviction by the learned trial Judge under Section 376 of IPC, the accused had preferred this appeal seeking to set aside the judgment of conviction and sentence imposed by the learned trial Judge dated 17.05.2016.



13. The point for consideration

Whether the judgment passed by the learned Sessions Judge, Fast Track Mahila Court, Madurai, in S.C.No.227 of 2010 dated 17.05.2016 is to be set aside as perverse and the appellant/accused is to be acquitted?

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14.As per the submissions of the learned counsel appearing for the appellant/accused, the appellant/accused is alleged to have acquainted the prosecutrix only in the month of January 2009 and she had preferred the complaint on 17.04.2009 under Ex.P1 and FIR was registered on 21.04.2009, under Ex.P3. As per the evidence of the prosecutrix, the accused had promised to marry her and obtained her consent and had sexual intercourse with her and subsequently, refused to marry her. Therefore, she had lodged the complaint under Ex.P1 and based on which, the police had registered the FIR under Ex.P3.

15.The evidence of the prosecutrix is unbelievable as per the submission of the learned counsel for the appellant/accused. It is alleged in her evidence that she had suffered miscarriage/abortion at the instance of the accused on three times. If she had acquainted with the accused only in the month of January 2009 and the FIR was registered in the month of April, there is no possibility for her suffering three abortions. As such, her evidence is unbelievable. She is aged more than 20 years. The accused is aged is 20 years. Therefore, she has maturity and her indulgence in sexual intercourse is on perverse and therefore, the ingredients of Section 375 of IPC to attract punishment under Section 376 of IPC are not maintainable. While so, the learned trial Judge had misdirected himself and convicted the accused for the offence under Section 376 which is not maintainable as no ingredients under Section 375 were made out.

16.The learned Additional Public Prosecutor, Thiru.K.K.Ramakrishnan had submitted that the consent in this case was obtained by fraud by the accused. The prosecutrix had consented based on the relationship that she is a lover and he promised to marry her and he insisted to have sexual intercourse prior to the marriage. The prosecutrix had purchased a two-wheeler (Bajaj Pulser) in her name and gifted it to the accused and also she had advanced money whenever he sought monetary help amounting to Rs.2,00,000/- on several occasions. This had been stated in the complaint under Ex.P1 as well as in the FIR under Ex.P3 as well as in her statement under 161 Cr.P.C. and in her evidence. The learned Additional Public Prosecutor also invited attention of this Court to the evidence of P.W-1, wherein, she deposed that she had been in relationship with the accused for two years and the complaint is only with regard to developments that had taken place between January to April during which period, dispute between them arose when he refused to marry her. She had registered the complaint only at the third abortion. She felt that she has been deceived since the



accused was refusing to marry, which had prompted her to lodge the complaint under Ex.P1. The witnesses P.W-1 to P.W-4 had cogently spoken about the same even though they were not direct witnesses to the sexual intercourse, but they were witnesses to the occurrence prior to and subsequent to the relationship between the accused and the prosecutrix. In her cross-examination though made minor contradictions, but the witnesses had withstood the cross examination and supported the prosecution case. The appellant had picked up the words from here and there from the cross examination to suit his convenience and if the accused is let free, it is sure he will indulge in similar offence where women of the society is not safe. Therefore, the State has a responsibility to keep off the members of the society who are eager on the prowl behind the young women of marriageable age in the pretext of "love and marriage" and after their act, using them as use and throw material. In the present case, also the accused had indulged in use and throw the prosecutrix, in which case, the Court cannot remain indifferent to the pain and sufferings caused to a young woman aged about 20 years on the date of the occurrence. After extracting materials, like two-wheeler and money and having sexual pleasure with an young woman, attempting to wriggle out from the case on the slightest pretext of the legal loop-holes that had caused either in the investigation process or in the trial procedure in the Court.

17.The learned Additional Public Prosecutor pointed out that the attack of the learned counsel for the accused stating that the charge as framed by the Court below did not mention the promise to marry. Therefore, the offence under Section 376 IPC as framed by the Court had not been proved by the prosecution. Therefore, the accused is entitled to acquittal, does not hold water and the learned Additional Public Prosecutor relied on the explanation to Section 90 of IPC wherein if the consent is obtained by misrepresentation or fraud that consent cannot be treated as consent. Here the conduct of the accused as gathered in the evidence before the Court gives out a clear picture of the accused with an ulterior motive enjoying the pleasure of the relationship with the young woman of marriageable age and under the guise of love and marriage, had indulged in pre-marital sex and attempted to ditch her after the accomplishment of sexual pleasure and gaining materials and money from her. This cannot be condoned by the Court of law. Victims of sexual assault are reluctant to appear before the Court for fear of the social stigma as well as the accused wriggling out from the legal steps initiated by the prosecutrix and getting emboldened to tease the victim. Therefore, the Court shall be careful while dealing with the cases of this nature. Therefore, the learned Additional Public Prosecutor, Thiru. K.K.Ramakrishnan relied upon the judgment of the Hon'ble Supreme Court in **Anurag Soni Vs. State of Chhattisgarh**, reported in **2019 13 SCC 1**,

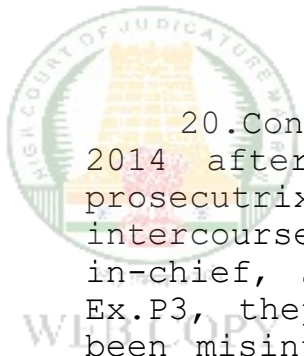


A. Penal Code, 1860—Ss.375 Secondly, 376 and 90—Rape or consensual sex—Involuntary consent—Consent under misconception of fact—Promise to marry, whether false—Presumption that prosecutrix did not consent, when arises under S. 114-A, Evidence Act, 1872—In present case, held, prosecution has been successful in proving that from the very inception, promise given by the appellant accused to marry the prosecutrix was a false promise and from the very beginning there was no intention of accused to marry prosecutrix—Thus, her consent can be said to be a consent on misconception of fact as per S. 90 IPC--Hence, conviction for rape, confirmed—However, given the facts and circumstances of the case, sentence reduced to 7 yrs' R1 from 10 yrs' R1, the minimum sentence that was prescribed at the time of the offence was committed.

18.Also the learned Additional Public Prosecutor placed reliance on Section 114 (A) of the Indian Evidence Act, regarding the presumptions to be drawn in cases of sexual assault, which reads as under:

"114 (A). Court may presume existence of certain facts. —The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case."

19.The learned Additional Public Prosecutor also relied upon the evidence of the Doctor wherein she had stated that there were white markings on the abdomen of the prosecutrix which proves that she had undergone abortion it had been misinterpreted by the accused as though she begotten child and in the cross examination, it was suggested to her that she had prior relationship and through that she had a child. This is the plight of the victims of sexual assault as the aggressor teases the victim in Court using defense of immorality on the victim. This conduct of the accused/aggressor cannot be condoned by the Court of law. The learned Trial Judge had acquitted the accused from the charge under Section 417 of IPC on the ground that if the accused is convicted for 417 of IPC, 376 of IPC is not attracted. Same is the case to Section 406 of IPC. In the evidence of P.W-1, she had clearly stated that the vehicle was purchased in her name. No documents were marked regarding the same but the evidence of one Ramamurthy/P.W-7 is the proof of the claim that two-wheeler bearing Registration No.TN-58-U-2887 was purchased by prosecutrix on 11.03.2009, therefore, offence under Section 406 of I.P.C. have not been proved, the accused was acquitted from offence under Section 406 of IPC.



20.Considering the fact that the trial commenced in the year 2014 after about five years from the date of occurrence, the prosecutrix was unable to mention the days on which she had intercourse with the accused. She had clearly, in her examination-in-chief, stated that prior to the registration of the case under Ex.P3, they were in a relationship for two years. That fact had been misinterpreted by the learned Counsel for the accused in the cross examination. Therefore, in the light of reported rulings relied on by him, the learned Additional Public Prosecutor sought indulgence of the Court to reject the arguments of the learned counsel for the appellant/accused and dismiss the appeal as having no merits and to confirm the conviction of the accused.

21.On perusal of the judgment of the learned Trial Judge, it is found that out of three charges framed by the learned Trial Judge, the accused was convicted only for the offence under Section 376 of IPC and he was acquitted from the charge under Section 417 of IPC and also from the charge under Section 406 of IPC as the prosecution has not marked any documents regarding the money that was obtained from the prosecutrix who paid the accused on various days after pledging her jewels. Also the proof regarding the purchase of vehicle was proved through P.W.7 even though he had supported the claim that the prosecutrix purchased a two-wheeler bearing Registration No.TN-58-U-2887 on 11.03.2009. Therefore, the offence under Section 406 of IPC having not been proved, the accused was acquitted from the offence under Section 406 of IPC but the offence committed by the accused under Section 376 of IPC had been proved through the evidence of PW.1 coupled with the evidence of the Dr.Mahalakshmi/P.W.11 and the test report of the prosecutrix issued by P.W-11 under Ex.P2. The fact of accused being potent had been proved by the prosecution through P.W-13-Dr.Selvaraj and issuance of potency certificate under Ex.P4. On perusal of the evidence of the witnesses P.W-1 prosecutrix, P.W-2 - Vijaya, P.W-3 - Usha, P.W-4 - Jayalakshmi, P.W-5 - Mahendran, P.W-6 - Rajeswaran, P.W-7-Ramamurthy, who are all independent witnesses, but closely associated with the prosecutrix. P.W-2 is the own sister of the prosecutrix, P.W-3 and P.W-4 are neighbours. They had supported the prosecution case regarding the relationship and the long acquaintance of the accused with the prosecutrix. On perusal of the judgment by the learned Trial Judge, this Court is of the view that nothing is found perverse. P.W-6-Rajeswaran had in his evidence, stated that the sister of the prosecutrix had informed him and asked him to go to the house of the prosecutrix as there had been issues between them. By the time he reached there, he found the front door locked from outside detaining the accused and the prosecutrix inside the house.

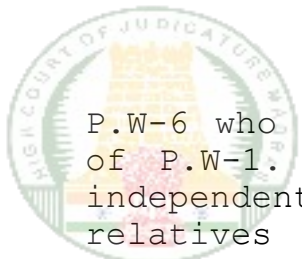
22.The learned Trial Judge had clearly discussed the evidence and also the reported rulings of the Hon'ble Supreme Court in support of the prosecution case and rejected the arguments of the



learned counsel for the defense that the accused had not committed offence and arrived at a clear conclusion that the accused had committed the offence under Section 376 of IPC.

23. On perusal of the evidence of P.W.1, it is found that in her evidence, she had clearly mentioned that after the registration of the case the accused was arrested and lodged in Prison. The mother of the accused contacted the prosecutrix informing her that they will conduct the marriage of the accused with the prosecutrix and they had obtained a notary public affidavit to convince the prosecutrix. Accordingly, she had met the accused in Prison and the accused also promised to marry her on being enlarged on bail. Therefore, she had arranged for bail to the accused. That shows her affinity towards the accused and her innocence had been exploited by the parents of the Accused. After release on bail, the accused escaped and contacted her. He asked her to talk in such a way as though provoking for sexual pleasures. This messages was recorded on his mobile and shared with his friends which had prompted the acquaintances to contact the prosecutrix and seek sexual pleasures from her. The said conduct of the accused is highly condemnable and if these sorts of activities are not taken care of by the Courts, this accused will surely indulge in similar offences thereby endangering the safety of women, teenage girls as well as the early youth having repercussions in society. Therefore, it is high time to nip it in the bud as rightly pointed out by the learned Additional Public Prosecutor. As there had been defects in framing of the charges, the charge ought to have been under the pretext of love and promise to marriage. The accused had indulged in sexual intercourse with the prosecutrix having obtained consent by deceit, but the charge had been framed in such a way as though the accused was in contact with the prosecutrix only from the month of January 2009 and had indulged in sexual intercourse. For the errors committed by the Court in framing charge, the prosecutrix cannot be made victim and accused be let off. During the course of arguments, the learned Additional Public Prosecutor pointed out that the accused had notice of the offence from Ex.P1 marked in the Court as well as the FIR under Ex.P3. Also he was put on notice under Section 313 of Cr.P.C. about the proceedings regarding the incriminating evidence available against him. Therefore, he cannot claim that he had been prejudiced due to the wrong framing of charge and that cannot be a ground for acquittal.

24. The sum and substance of the prosecution case is that the accused acquainted the prosecutrix and using the relationship, had sexual intercourse under the pretext of marrying her, also taking advantage of the relationship, he had obtained material favours of two-wheeler Bajaj Pulser which is designed for men and not for women and she had purchased it in her name. There had been in her evidence that she had accompanied the accused on two wheeler to various places and the same had been spoken by other witness viz., P.W-2 to

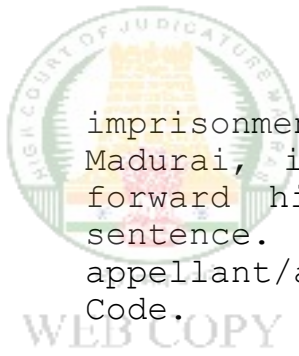


P.W-6 who are the acquaintance and neighbours. P.W-2 is the sister of P.W-1. Therefore, the accused cannot claim that there are no independent witnesses. In offences of this nature, only close relatives come in support of the prosecution case. Third parties who are not related to the victim will not come forward in support of the case of this nature. Therefore, the defense of the accused that there are no independent witnesses also has to be rejected. As per the various rulings of the Hon'ble Supreme Court regarding offences of sexual assault, if the evidence of the prosecutrix inspires confidence, the accused can be convicted. Here, the learned Trial Judge had convicted the accused, having satisfied with the evidence available before the learned Trial Judge regarding the charge under Section 376 of IPC and had let out the accused from the offence under Section 417 of IPC as both charges are contradictory to each other. Similarly, the accused was acquitted for the offence under Section 406 of IPC on the ground that there are no documents regarding the misappropriation of the amounts from the prosecutrix by the accused. As rightly pointed out by the learned Additional Public Prosecutor placing reliance on the decision reported in **2019 13 SCC 1** (cited supra), the sentence of rigorous imprisonment of ten years alone is reduced/modified. Consequently, it is reduced to seven years.

25. Regarding the disposal of appeals, the Hon'ble Supreme Court had observed that if the Trial Judge had arrived at a finding of fact based upon proper appreciation of evidence as per the provisions of the Indian Evidence Act, the finding arrived by the learned Trial Judge shall not be disturbed by the Appellate Court even though on the same set of evidence the Appellate Court arrives at a just opposite view, the same shall not be forced on the finding of the Trial Judge. This is because, the Trial Judge had the advantage of appreciating the demeanour of the witnesses and the accused whereas that benefit is not available to the Appellate Court. The Appellate Court has the discretion to consider all the materials that are available before the Trial Court and on that basis the appellate Court shall dispose of the appeal. By the said proposition of law, the finding arrived by the learned Sessions Judge, Fast Track Mahila Court, Madurai, is not found perverse. Therefore, the same does not warrant interference.

26. In the light of the above discussion, the point for consideration is answered against the appellant/accused and in favour of the prosecution. The finding of guilt and the judgment of conviction recorded by the learned Trial Judge is not found to be perverse.

In the result, this Criminal Appeal is partly allowed. The conviction is confirmed. The sentence of 10 years of rigorous imprisonment awarded by the learned Sessions Judge, Fast Track Mahila Court, Madurai, is reduced to 7 years of rigorous



imprisonment. The learned Sessions Judge, Fast Track Mahila Court, Madurai, is directed to issue warrant to secure the accused and forward him to the Prison to undergo the remaining period of sentence. The period of detention already undergone by the appellant/accused is set off under Section 428 of Criminal Procedure Code.

Sd/-

Assistant Registrar (CS-III)

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/ /2021

Sub Assistant Registrar(CS)

To

1. The District and Sessions Judge (Mahila),
(Mahalir Neethi Mandram)
Madurai.
2. The Sessions judge,
Fast Trck Mahila Court,
Madurai.
3. The Superintendent,
Central Prison,
Madurai.
4. The Chief Judicial Magistrate,
Madurai.
5. The Inspector of Police
All Women Police Station South
Madurai.
6. The Additional Public prosecutor,
Madurai Bench of Madras High Court, Madurai
7. The Section Officer, Criminal .Section(2C)
Madurai Bench of Madras High Court, Madurai

+2 CC to M/s.M.JAGADEESH PANDIAN, Advocate (SR-28163[F] dated 03/09/2021)

Crl.A.(MD) No.220 of 2016
03.09.2021

SMV(CO)
KB(28.09.2021) 11P 10C