



Crl.A(MD) Nos.403 of 2016 and 2 of 2018

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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on: 31.08.2023

Pronounced on: 26.09.2023

CORAM:

THE HONOURABLE MR.JUSTICE **P.DHANABAL**

CRIMINAL APPEAL(MD)No. 403 of 2016
and
CRIMINAL APPEAL(MD)No.2 of 2018

Crl.A(MD) No.403 of 2016

Subramani

.. Appellant

Vs.

The Inspector of Police
All Women Police Station,
Karaikudi,
Sivagangai District

...Respondent

PRAYER : Criminal Appeal is filed under Section 374 of Cr.P.C to call for the records relating to the judgment in S.C. No.61 of 2013 dated 01.09.2016 on the file of the District Fast Track Mahila Court, Sivagangai and set aside the same.

For Appellant

: Mr.C.Susikumar

For Respondent

: M/s.M.Aasha
Government Advocate(Crl.Side)



Crl.A(MD) Nos.403 of 2016 and 2 of 2018

Crl.A(MD) No. 2 of 2018

Aathan

.. Appellant

Vs.

The Inspector of Police
All Women Police Station,
Karaikudi,
Sivagangai District

...Respondent

PRAYER : Criminal Appeal is filed under Section 374 of Cr.P.C to call for the records relating to the judgment in S.C. No.61 of 2013 dated 01.09.2016 on the file of the District Fast Track Mahila Court, Sivagangai and set aside the same.

For Appellant : Mr.C.Susikumar

For Respondent : M/s.M.Aasha
Government Advocate(Crl.Side)

COMMON JUDGMENT

These Criminal Appeals have been filed against the judgment and conviction passed in S.C. No.61 of 2013 dated 01.09.2016 on the file of the District Fast Track Mahila Court, Sivagangai.

2. Criminal Appeal (MD) No.403 of 2016 was filed by the first accused and the Criminal Appeal (MD) No.2 of 2018 was filed by the second accused. Originally four persons were arrayed as accused



before the trial Court and the trial Court has convicted the first and second accused for the offences under Sections 5 r/w.6 of POCSO Act and sentenced them to undergo 10 years rigorous imprisonment and to pay a fine of Rs.5000/- each in default to undergo six months rigorous imprisonment. The third and fourth accused were convicted for the offences under Sections 317 of IPC and Section 19(1)r/w.21(1) of POCSO Act and sentenced to undergo two years rigorous imprisonment and to pay a fine of Rs.1000/- each in default to undergo three months rigorous imprisonment for the offence under Section 317 of IPC and sentenced to undergo two months rigorous imprisonment for the offence under Section 19(1)r/w.21(1) of POCSO Act and the sentences shall run concurrently.

3. The case of the prosecution is that the victim is aged about 12 years. The fourth accused is the father of the victim and the third accused is the second wife of the fourth accused. The first and second accused are third parties but they are known to third and fourth accused. Before two months from the date of complaint the first accused committed penetrative sexual assault on the victim and the second accused has taken the victim to the nearby field and had committed penetrative sexual assault. The third and fourth accused have not taken care of the victim and when the said penetrative



assault was brought to the knowledge of the third and fourth accused they have not taken any action and thereby the accused had been charged for the above said offences.

4. Thereafter the matter was brought to the knowledge of the Child Welfare Committee and Social Welfare Officer and they preferred complaint/Ex.P.1 and based on that complaint First Information Report/Ex.P.11 was registered. Thereafter P.W.24 examined the witnesses and filed final report. After filing of final report copies were furnished to the accused under Section 207 of Cr.P.C. Thereafter the Special Court has framed charges as against the first and second accused for the offence under Section 5r/w.6 of POCSO Act and the third and fourth accused for the offence under Section 317 of IPC and Section 19(1)r/w.21(1) of POCSO Act and the charges were read over and explained to the accused and the accused denied the charges. Thereafter in order to prove the charges levelled against the accused before the trial Court P.W.1 to P.W.25 were examined and marked Exhibits Ex.P.1 to P.17 and one material object was marked. On the side of the defence no witnesses were examined and no documents were marked.

5. After completion of prosecution evidence the accused were



examined under Section 313(1) (b) of Cr.P.C with regard to incriminating evidence found as against them and they denied the evidence. Thereafter the trial Court passed judgment by convicting the first and second accused for the offences under Sections 5 r/w.6 of POCSO Act and sentenced them to undergo 10 years rigorous imprisonment and to pay a fine of Rs.5000/- each in default to undergo six months rigorous imprisonment. The third and fourth accused were convicted for the offences under Sections 317 of IPC and Section 19(1)r/w.21(1) of POCSO Act and sentenced to undergo two years rigorous imprisonment and to pay a fine of Rs.1000/- each in default to undergo three months rigorous imprisonment for the offence under Section 317 of IPC and sentenced to undergo two months rigorous imprisonment for the offence under Section 19(1)r/w.21(1) of POCSO Act.

6. As against the judgment and conviction passed by the Fast Track Mahila Court, Sivagangai the first accused preferred appeal in Crl.A(MD) No.403 and 2016 on the following grounds:

a) the judgment and conviction passed by the trial Court is against law, weight of evidence, facts and probabilities of the case.



b)The learned Judge ought to have considered that neither the victim or other witnesses had not mentioned the specific time and date of occurrence.

c) the learned Judge ought to have considered that as per the version of prosecution the petitioner and the second accused are committed the offence in different place and different dates they cannot prosecute together. It is not permissible by law.

d) the learned Judge ought to have considered that it is admitted by P.W.24 earlier complaint has been lodged and police visited and enquire the victim. But earlier complaint was suppressed by the prosecution.

e) the learned Judge ought to have considered that P.W.2 had particularly admitted that there is a dispute between P.W.7 who is a uncle of the victim and his father in regarding the house dispute and the said P.W.7 frequently made quarrel with A4.

f) the learned Judge ought to have considered that P.W.2 particularly admitted in her cross examination that she is having resentment with the petitioner since he informed to the accused no. 2



and 3 that she stolen money from his house.

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g) the learned Judge ought to have considered that P.W.2 on her own statement clearly stated that she did not sustain any injury during the offence.

h) the learned Judge ought to have considered that P.W.2 particularly admitted in her cross examination that she answered the questions as per police instruction and also by her uncle instructions, since they promised that they will recover the house from her father and handed over to her.

i) the learned Judge ought to have considered that P.W.7 is the hearsay evidence. He particularly deposed in his statement that the victim has stolen money from her house and the accused no. 3 and 4 continuously warned her.

7. As against the judgment and conviction passed by the Fast Track Mahila Court, Sivagangai the second accused preferred appeal in Crl.A(MD) No.2 of 2018 on the following grounds:

a) the judgment and conviction passed by the trial Court is



against law, weight of evidence, facts and probabilities of the case

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b)The learned Judge ought to have considered that neither the victim or other witnesses had not mentioned the specific time and date of occurrence.

c) the learned Judge ought to have considered that as per the version of prosecution the petitioner and the second accused are committed the offence in different place and different dates they cannot prosecute together. It is not permissible by law.

d) the learned Judge ought to have considered that it is admitted by P.W.24 earlier complaint has been lodged and police visited and enquire the victim. But earlier complaint was suppressed by the prosecution.

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f) the learned Judge ought to have considered that P.W.2



particularly admitted in her cross examination that she is having resentment with the petitioner since he informed to the accused no. 2 and 3 that she stolen money from his house.

g) the learned Judge ought to have considered that P.W.2 on her own statement clearly stated that she did not sustain any injury during the offence.

h) the learned Judge ought to have considered that P.W.2 particularly admitted in her cross examination that she answered the questions as per police instruction and also by her uncle instructions, since they promised that they will recover the house from her father and handed over to her.

i) the learned Judge ought to have considered that P.W.7 is the hearsay evidence. He particularly deposed in his statement that the victim has stolen money from her house and the accused no. 3 and 4 continuously warned her.

8. Since both the appeals are arising out of same judgment, both the appeals were heard together and this Court is inclined to pass common judgment.



8.1. The learned counsel appearing for the appellants would contend that the prosecution has failed to prove the charges levelled against the accused beyond reasonable doubts and the foundational facts have not been proved by the prosecution and the victim was tutored by the police. There is no specific date mentioned in the charge sheet. As against A1 and A2, charges are not arising out of the same occurrence and even according to the prosecution, the occurrence took place on different dates and different places and thereby clubbing of accused and the charges are also fatal to the case of prosecution. Already there was civil dispute between A4 and the maternal uncle of the victim. Further P.W. 1 in her evidence categorically admitted that as per the instructions given by the police and her uncle she deposed before the trial Court and therefore the entire prosecution is highly doubtful. As per the evidence of P.W. 24 earlier complaint was lodged and the police visited the spot and enquired the victim and the same was not brought to the knowledge of the trial Court and the same was suppressed and thereby the appellants are entitled for acquittal. P.W.7 also admitted that there is a dispute between P.W7 and the fourth accused who is the father of the victim. It is an admitted fact that the victim stayed in the house of P.W.7 for the last 10 days prior from the date of complaint thereby



she was tutored by him.

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8.2.The complaint was not given by the victim and the complaint was given by the Social Welfare department officials. As per the complaint the first and second accused committed sexual assault . As per the statement of the victim recorded under Section 164 (5) of Cr.P.C the victim has not stated anything about the sexual assault and the said statement has been marked as Ex.P.17. In the said statement there is no whisper about the penetrative sexual assault made by the accused, but as per the statement there is no penetrative sexual assault made by the accused. The victim in her evidence also during cross examination stated that at the instigation of her aunt Revathy and uncle Solai and police people she narrated the occurrence before the Court and further she stated that she was tutored by them that she could get the house from her father. Therefore the evidence of P.W.2 is unbelievable, thereby the prosecution failed to prove the charges levelled against the accused. Further the second accused could not had penetrative sexual assault due to his physical condition and as per the evidence of doctor he can't do sexual activities and Ex.P.6 clearly shows his inability and thereby the above discrepancies have not been considered by the trial Court and wrongly convicted the accused and hence the



appellants are entitled for acquittal by allowing this appeal. On behalf of the appellants they also filed written arguments.

9. The learned Government Advocate(Crl.Side) appearing for the respondent would contend that in this case the fourth accused is the father of the victim girl and the third accused is the second wife of the fourth accused and the third and fourth accused abandoned the victim girl and further A1 and A2 had committed penetrative sexual assault as against the victim and when the same was informed to A3 and A4 but they have not taken any action. As per the evidence of P.W.1 he has given complaint and based on that complaint First Information Report has been registered. P.W.2 also in her evidence deposed that the incident had happened to her and she is the victim and she categorically deposed about the sexual assault made by A1 and A2. Other witnesses have also deposed about the abandonment of P.W.2 by third and fourth accused and the victim used to sleep outside the house and the taking advantage of the same, A1 and A2 committed penetrative sexual assault towards P.W.2. Medical test was also conducted for victim and the statement of the victim was also recorded under Section 164(5) of Cr.P.C. before the learned Magistrate and the investigation officer also investigated the case in a proper manner and filed final report. The prosecution has proved



the prima facie case and thereby the presumption under section 29 of POCSO Act in favour of the prosecution the accused has to prove the contrary under Section 29 of the POCSO Act and thereby the trial Court has convicted the accused for the above said offences. The trial Court has examined witnesses P.W.1 to P.W.25 and marked exhibits Ex.P.1 to Ex.P.17 and one material object and thereby the prosecution has clearly proved the charges levelled against the accused and thereby the trial Court has rightly convicted the appellants and thereby the appeals are liable to be dismissed.

10. Upon hearing both sides and perusing the judgement of the trial Court and grounds of appeal the point for determination in these appeals are :

a) whether the prosecution proved the charges levelled against the appellant/first accused in Crl.A.No.403 of 2016 for the offence under Section 5 r/w.6 of POCSO Act?

b) whether the prosecution proved the charges levelled against the appellant/second accused in Crl.A.No.2 of 2018 for the offence under Section 5 r/w.6 of POCSO Act?

11. Admittedly in this case there is no contravention with regard to the age of the victim and she is a child. According to



prosecution the victim was aged about 12 years but no sufficient evidence adduced to prove that the victim was below 12 years. The trial Court also after analysing the evidence came to conclusion that the victim was below 12 years and accused also not disputed that the victim was child on the date of occurrence. According to the prosecution case the victim was subjected to penetrative sexual assault by A1 and A2. When the victim was laying in front of her house the first accused committed penetrative sexual assault and the second accused had taken the victim to the nearest field and committed penetrative sexual assault. The first contention raised by the accused is that the alleged offence committed on different dates, different place, by different persons, whileso the charges were framed jointly, joint trial also conducted which affect the root of the case. In this context it is relevant to refer Section 223 of Cr.P.C, which reads as follows:

“223. What persons may be charged jointly –

The following persons may be charged and tried together, namely:—

- (a) persons accused of the same offence committed in the course of the same transaction;*
- (b) persons accused of an offence and persons accused of abetment of, or attempt to commit, such offence;*
- (c) persons accused of more than one offence of the same*



kind, within the meaning of section 219 committed by them jointly within the period of twelve months;

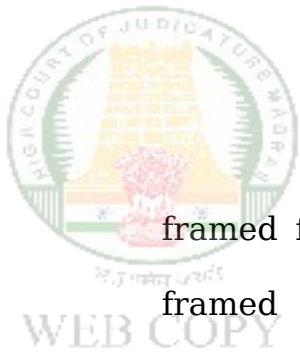
(d) persons accused of different offences committed in the course of the same transaction;

(e) persons accused of an offence which includes theft, extortion, cheating, or criminal misappropriation, and persons accused of receiving or retaining, or assisting in the disposal or concealment of, property possession of which is alleged to have been transferred by any such offence committed by the first-named persons, or of abetment of or attempting to commit any such last-named offence;

(f) persons accused of offences under sections 411 and 414 of the Indian Penal Code (45 of 1860) or either of those sections in respect of stolen property the possession of which has been transferred by one offence;

(g) persons accused of any offence under Chapter XII of the Indian Penal Code (45 of 1860) relating to counterfeit coin and persons accused of any other offence under the said Chapter relating to the same coin, or of abetment of or attempting to commit any such offence; and the provisions contained in the former part of this Chapter shall, so far as may be, apply to all such charges:

Provided that where a number of persons are charged with separate offences and such persons do not fall within any of the categories specified in this section, the Magistrate may, if such persons by an application in writing, so desire, and if he is satisfied that such persons would not be prejudicially



framed for distinct offences. But in this case, no separate charges framed against each accused, and in a single charge, both the accused were charged under section 5 r/w. 6 of POCSO Act. Now it is relevant to refer the section 218 of Cr.P.C reads as follows:

218. Separate charges for distinct offences -

(1) For every distinct offence of which any person is accused there shall be a separate charge and every such charge shall be tried separately: Provided that where the accused person, by an application in writing, so desires and the Magistrate is of opinion that such person is not likely to be prejudiced thereby the Magistrate may try together all or any number of the charges framed against such person
(2) Nothing in sub-section (1) shall affect the operation of the provisions of sections 219, 220, 221 and 223

14. Therefore from the reading of the above section it is clear that for every distinct offence of which any person is accused there shall be separate charge and every such charge shall be tried separately, provided when the application filed by the accused in writing, the Magistrate is of the opinion that such person is not likely to be prejudiced thereby the Magistrate may try together all or any number of charges proved against such person and nothing in sub Section(1) shall affect the operation of the provisions of Sections 219, 220, 221 and 223 of Cr.P.C . This case on hand does not fall under Sections 219, 220, 221 and 223 of Cr.P.C and the joinder of persons and joinder of charges are not according to procedure established by the law. Therefore the joinder of persons, joint trial



and joinder of charges will vitiate the entire proceedings. Further the learned counsel for the appellant relied on the judgement of this Court in the case of ***Ganesh.vs. The Inspector of Police, R-2, Kodambakkam Police Station, Chennai in Crl.A.Nos. 263 of 2011, 57 of 2004***, wherein it is held as follows:

“30. 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 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”

In the said case, separate trial was conducted and evidence was recorded in one case, was relied by the Trial court for other cases, however joinder of charges and joinder of persons cannot be permitted except in the procedures laid down under the Cr.P.C.

15. In this case the accused have been jointly tried for two



separate offence taken place on two different place on two different dates. Therefore this case will not fall within the procedures established under Cr.P.C. Therefore the entire trial is vitiated.

16. Now coming to the point whether the prosecution proved the charges as against the appellants. In this case, P.W.2 is the victim in this case and P.W.1 has given complaint and based on the complaint First Information Report has been registered. In the complaint there is no reference about the place, date and time. Further P.W.1 is not the eye witness and she only stated about the lodging of complaint and enquiry made by her. The above said enquiry proceedings have not been brought to the trial Court and further P.W.2 who is the victim in her evidence stated that A3 and A4 used to sleep inside the house and she used to sleep outside the house. At that time, initially the first accused bite her lips and touch her. After two days he committed penetrative sexual assault and then the second accused also taken her into field and committed penetrative sexual assault but the same P.W.2 in her cross examination admitted that there was dispute between her aunt Revathy and Uncle Solai who was examined as P.W.7. Further she stated that “தற்போது என்னுடைய அப்பாவும் என்னுடைய சித்தியும் அந்த வீட்டில் இல்லை. வெளியில் குடியிருந்து வருகிறார்கள். என்னுடைய மாமா சோலையும்



என்னுடைய அத்தை ரேவதியும் சொல்லிக்கொடுத்த மாதிரிதான் நான்

சொல்லியிருக்கிறேன்". Therefore from the cross examination of P.W. 2 it is revealed that A3 and A4 have vacated the house. P.W. 7 and his wife are residing in the above said property. Therefore the evidence of P.W.2 is highly doubtful and it does not inspire the confidence to this Court.

17. Further the prosecution has examined P.W. 3 who is District Child Protection Officer and as per his evidence he examined the victim and he deposed about the occurrence but no statement was recorded and he is not an eye witness to the said occurrence. P.W.4 is also the District Child Protection Officer and he is also not an eye witness to the said occurrence. P.W.2 victim herself has made contradictory statement with regard to the manner of occurrence. The statement of the victim was recorded under Section 164 (5) by the learned Magistrate and the same was marked as Ex.P.17. In the Ex.P.17 nothing incriminating revealed as against the accused. As per the prosecution case the accused A1 and A2 committed penetrative sexual assault as against the victim but in the first statement of the victim recorded by the Magistrate no any allegation as against the first accused regarding penetrative sexual assault. Per contra it reveals that the second accused touched her private part and hugged



her. Therefore the evidence of P.W.2 is not trust worthy. All the other witnesses are not eye witnesses and P.W.6 is the independent witness and she deposed about the harassment made by A3 and A4 and she deposed that the A2 penetrated his private part on the mouth of the victim but no were either in the evidence or other witnesses stated about the same, therefore the evidence of P.W.6 creates serious doubts. She had exaggerated in her evidence, therefore the evidence of P.W. 6 is not reliable one. So far as evidence of P.W 7 is concerned he is the maternal uncle of the victim and he is not an eye witness and he is a hearsay witness and he is the main reason to lodge this complaint and as per the defence there is a dispute with regard to the residential house in which A3 and A4 were residing. After the death of the mother of the victim A4 married A3.P.W7 also admitted in the evidence that now he along with his wife were residing in the house of A3 and A4 . Therefore defence theory that there is dispute regarding house is probalized through evidence

18. As per evidence of Doctor/ P.W.19 she examined victim and issued certificate Ex.P.3, which reads as follows:



- a) As per vaginal examination of victim girl admits 2 fingers, hymen is not intact*
- b) No injury made out on the vagina of victim girl except for torn and heated hymen. A heated scar of 5x2cm seen on right inner thigh*
- c) Hymen is not intact as per vaginal examination admits two fingers*

19. But during cross examination she stated that there are so many reasons for rupture of hymen and therefore the medical evidence alone is not sufficient to prove the prosecution case when the evidence of P.W.2, victim is highly doubtful.

20. Further prosecution has examined Doctor/ P.W.21 who examined A2 and he deposed before the trial Court that he examined A2 and stated that A2 is unfit for sexual intercourse and he issued certificate Ex.P.6, which read as follows:

"No erection was seen during examination, penis burnished skin could not be retracted, not circumcised. Both sides of scrotum are swollen and hard of size, 18cmx10cmx10cm noted right side inguinal hernia noted.



The above examined person is not fit for sexual intercourse."

21. Therefore from the evidence of P.W.21 it is clear that A2 is not fit to have sexual intercourse, thereby the prosecution theory that the second accused committed penetrative sexual assault towards victim is highly doubtful and un believable.

22. Further P.W.25 investigation officer has not investigated the case in a proper manner and he prepared rough sketch at the house of the victim but according to prosecution the occurrence took place in two different places one in front of the house of the victim and another in the field near to the house of P.W.2. Whiles the investigation officer failed to investigate the case and failed to prepare mahazhar and rough sketch where the occurrence took place in the fields. Further as per evidence of P.W.24, earlier complaint was lodged and the police visited the spot and enquired the victim, but the same was not brought to the knowledge of the trial Court. This also creates serious doubt over the prosecution case.

23. Further there is a property dispute between A4 and P.W.7



in that aspect the investigation officer failed to investigate the case.

Therefore the prosecution failed to prove the charges levelled against the accused and the prosecution evidences are filled with doubts and thereby the accused is entitled for benefit of doubts.

24. The trial Court has elaborately discussed about the evidence adduced on the side of the prosecution and failed to consider the above said aspects and wrongly convicted the accused. The single charge was framed as against A1 and A2 for the offences under sections 5 r/w. 6 of POCSO Act, without mentioning the date, time and place, but the trial Court convicted the accused for the offences under section 6 of POCSO Act. However the trial Court failed to consider the discrepancies and that the evidence of P.W.2 is tutored over and thereby the prosecution failed to prove the foundational facts for the commission of offence. In POCSO cases the identity of the victim could not be revealed but the trial Court has mentioned the name of the victim. As per Section 33(7) of the POCSO Act the identity of the victim could not be revealed in the court proceedings but unfortunately the trial Court has not followed the procedures.

25. It is true, as per Sec. 29 of POCSO Act, there is a



presumption as against the accused when he is facing trial for the offences u/s 3,5,7 and 9 that he only committed the offence unless the contrary is proved. But the prosecution has to prove the prima facie case and foundational facts regarding the occurrence. But the available evidences are not sufficient to prove the foundational facts regarding the commission of offence. It is well settled law that the prosecution case can be demolished through cross-examination and in all cases, the accused need not examine the witnesses. In this case, the prosecution failed to establish the prima facie case and thereby presumption U/s 29 of POCSO Act would not arise. Therefore, there is no sufficient evidence adduced by the prosecution to prove the commission of offence and thereby the accused are entitled for acquittal.

26. Therefore the charges levelled against the accused have not been proved by the prosecution in accordance with law and the accused are entitled for acquittal and the judgment and conviction passed by the trial Court are unsustainable and liable to be set aside.

27. In the result,



Crl.A(MD) Nos.403 of 2016 and 2 of 2018

a) the Criminal Appeal in Crl.A(MD) No.403 of 2016 is allowed and the judgment and conviction passed by the Fast Track Mahila Court, Sivagangai in S.C. No.61 of 2013 dated 1.9.2016 are set aside and the appellant/first accused is acquitted from the charges under Section 5 r/w.6 of POCSO Act and he be set at liberty subject to other cases if any. The bail bond, if any, executed by the appellant shall stand cancelled and fine amount, if any, paid by him is ordered to be refunded to him.

b) the Criminal Appeal in Crl.A(MD) No.2 of 2018 is allowed and the judgment and conviction passed by the Fast Track Mahila Court, Sivagangai in S.C. No.61 of 2013 dated 1.9.2016 are set aside and the appellant/second accused is acquitted from the charges under Section 5 r/w.6 of POCSO Act and he be set at liberty subject to other cases if any. The bail bond, if any, executed by the appellant shall stand cancelled and fine amount, if any, paid by him is ordered to be refunded to him.

26.09.2023

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1. The District Fast Track Mahila Court, Sivagangai
2. The Inspector of Police
All Women Police Station, Karaikudi,
Sivagangai District
3. The Section Officer,
Criminal Records,
Madurai Bench of Madras High Court,
Madurai.
4. The Additional Public Prosecutor
Madurai Bench of Madras High Court,
Madurai



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P.DHANABAL, J.

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