



.Crl.A.No.689 of 2017.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

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DATED : 30.04.2024

CORAM :

THE HON'BLE MR. JUSTICE SATHI KUMAR SUKUMARA KURUP

Crl.A.No.689 of 2017

Jagadeesh @ Jagadeeswarar

... Appellant

Versus

State Rep. By
The Inspector of Police,
Kangeyam Police Station,
(Cr.No.214/2013)

...Respondent/Complainant

Criminal Appeal filed under Section 374 (2) of Cr.P.C., to set aside the conviction imposed in the Judgment dated 15.09.2017 made in Spl.S.C.No.19 of 2015 on the file of the learned Sessions Judge, Fast Track Mahila Court, Tiruppur.

For Appellant

: Mr. K. Shivakumar
Legal Aid Counsel

For Respondent

: Mr. G. V. Kasthuri
Additional Public Prosecutor

JUDGMENT

This Criminal Appeal had been filed to set aside the Judgment of conviction recorded by the learned Sessions Judge, Fast Track Mahila Court, Tiruppur, in Spl.S.C.No.19 of 2015, dated 15.09.2017.



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2. The learned Counsel for the Appellant, Counsel appointed by this Court as the learned Counsel for the Appellant did not appear on the date of hearing and the case was posted under the caption for dismissal on which date i.e., 26.04.2023, this Court had directed to issue summons and appear before this Court on 14.06.2023. On 14.06.2023, when the case came up for hearing, the Appellant/Accused did not appear. Therefore, the Respondent Police was directed to secure the Accused and produce the Appellant/Accused before this Court on 05.07.2023. On 05.07.2023, the Accused was produced before this Court and the Orders of the learned Judge who presided over this roster on 14.07.2024, the name of the learned Counsel for the Appellant was removed and the Registry was directed to nominate a Counsel from the High Court Legal Services Committee. Accordingly, Mr.Shivakumar, Legal Aid Counsel was nominated by the High Court Legal Services Committee attached to this Court.

3. On 05.07.2023, the Appellant/Accused was produced by the Inspector of Police, Kangeyam Police Station, the Accused does not have the resources to engage a Counsel. Therefore, this Court directed the Legal Services Committee attached to this Court to nominate a Counsel.

Accordingly, Mr.K.Shivakumar, Roll No.1554/01 was nominated as Legal Aid



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Counsel. The case was adjourned to 01.08.2023 and the Registry was directed to furnish the copies of the typed set on the learned Counsel for the Appellant nominated by the High Court Legal Services Committee. When the case came up for hearing on 01.08.2023, the learned Counsel for the Appellant requested to grant time for perusing the records and proceed with the Appeal. Accordingly, he had argued the case on 08.08.2023.

4. The brief facts, which are necessary for the disposal of this Criminal Appeal, are as follows:-

4.1. The Accused is residing along with his parents at Veeranampalayam within the jurisdiction of Kangeyam Police Station. The victim girl was aged 10 years at the time of occurrence, she was residing with her grandmother at Avinashipalayam. During her School vacation, the victim girl had come to her house at Veeranampalayam from the house of her maternal grandmother. The minor girl used to go to the house of the Accused to watch TV programme. On 01.06.2013 by around 15.00 hours, when the minor victim girl went to the house of the Accused and was watching TV programme, the Accused allowed her inside the house. He forcibly shut the mouth of the victim girl and lifted her dress and penetrated his male organ into the vagina, thereby committed sexual assault. Therefore, the Accused is liable to be prosecuted for

the offence under Section 376 of IPC and Sections 3 and 4 of the Protection of



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Children from Sexual Offences Act, 2012. The victim came out crying. The neighbours viz., Tamil Selvi and Saranya on seeing the victim girl had enquired her. The victim narrated the incident to Tamil Selvi and Saranya. Tamil Selvi had informed the mother of the victim on her mobile phone. The mother of the victim/P.W-2 had lodged a Complaint under Ex.P-2. Based on the Complaint of P.W-2 under Ex.P-2, P.W-7, the then Special Sub Inspector of Police, Kangeyam Police Station had registered the FIR under Ex.P-12 in Cr.No.214 of 2013. She had sent the original FIR and original Complaint to the Court of the learned Judicial Magistrate, Kangeyam and copies of the same were sent to the higher Officials of the Police Department including the P.W-9-Inspector of Police, Kangeyam Police Station. On receipt of FIR under Ex.P-12, P.W-9 proceeded with the investigation and visited the scene of occurrence in the presence of Witness P.W-4 and prepared the Observation Mahazar under Ex.P-3 and Rough Sketch under Ex.P-14. He also arrested the Accused and sent requisition letter to the learned Judicial Magistrate, Kangeyam requesting medical examination of the Accused and to get Potency Certificate from the duty Doctor at the Government Hospital. Also, he had requested the learned Judicial Magistrate, Kangeyam to subject the victim of sexual assault also to be examined by the Medical Officer at the Government Hospital. The Accused was medically examined by P.W-6. P.W-6 issued Potency Certificate regarding potency of the Accused under Ex.P-8. P.W-5 had medically examined the

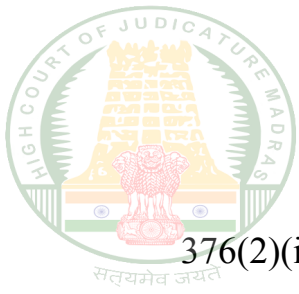


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victim regarding symptoms of sexual assault, she had collected vaginal swab of the victim for forensic examination and found the semen in the vaginal swab.

P.W-5 had issued Certificate under Ex.P-5 and final opinion under Ex.P-6 after receipt of Forensic Report. The final opinion by P.W-5 did not mention the finding of semen in the vagina but she clearly stated that the victim was subjected to sexual assault. The victim was also examined by P.W-8 who had issued Accident Register under Ex.P-13. She had forwarded the victim girl to be subjected to detailed examination before the Tiruppur Government Hospital. P.W-5 serving at Tiruppur Headquarters Hospital had examined the victim and issued Ex.P-5 and Ex.P-6. The Investigation Officer examined the victim girl recorded her statement and examined the mother of the victim girl/P.W-2, the neighbour who had informed the mother of the victim girl, the Witnesses for Observation Mahazar and Rough Sketch and the Doctors who had examined the Accused as well as victim and the Sub Inspector of Police who had registered the FIR. He had also obtained the Birth Certificate from the mother of the victim. On commencing of investigation, he had arrested the Accused, subjected him to medical examination and forwarded him to the learned Judicial Magistrate, Kangeyam.

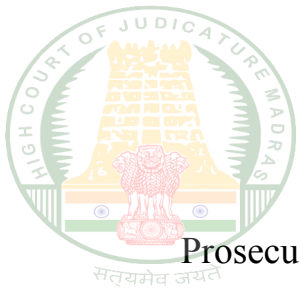
4.2. On completion of the investigation, P.W-9 filed final report of the investigation against the Appellant/Accused for the offences under Sections



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376(2)(i) of IPC and Sections 3 and 4 of the Protection of Children from Sexual Offences Act, 2012 before the learned Sessions Judge, Fast Track Mahila Court, Tiruppur. The learned Sessions Judge, Fast Track Mahila Court, Tiruppur, took cognizance of the offences under Sections 3 r/w. Section 4 and Section 5(m) r/w. Section 6 of the Protection of Children from Sexual Offences Act, 2012 and under Section 376(2)(i) of IPC.

4.3. The final report was taken on file as Special Sessions Case No. 19 of 2015. On appearance of the Appellant/Accused, copies were served on him as per Section 207 of the Code of Criminal Procedure. After hearing the learned Public Prosecutor and the learned Counsel for the defence/Accused, the learned Sessions Judge, Fast Track Mahila Court framed charges against the Accused for the offences under Sections 3 r/w. Section 4 and Section 5(m) r/w. Section 6 of the Protection of Children from Sexual Offences Act, 2012 and under Section 376(2)(i) of IPC. The Accused denied the charges and claimed to be tried. Therefore, trial was ordered. During trial the Prosecution examined 9 witnesses as P.W-1 to P.W-9 and marked 13 documents as Ex.P-1 to Ex.P-14. On completion of the Prosecution Witnesses, the Accused was examined under Section 313 Cr.P.C., regarding incriminating evidence against him. The Accused denied the incriminating against him. The Accused did not examine any witnesses. After hearing the arguments of the learned Counsel for the

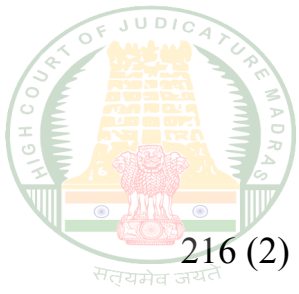


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Prosecution and Defence, the learned Sessions Judge, Fast Track Mahila Court, Tiruppur, by Judgment dated 15.09.2017 in Spl.S.C.No.19/2015 convicted the Accused for the offences 7 r/w. 8 of the Protection of Children from Sexual Offences Act, 2012 and sentenced him to undergo five years of Rigorous Imprisonment and pay a fine of Rs.5,000/- in default, to undergo six months of Rigorous Imprisonment. The period of detention from 02.06.2013 to 01.08.2013 was ordered to be set off under Section 428 Cr.P.C.

4.4. Aggrieved by the Judgment of conviction recorded by the learned Sessions Judge, Fast Track Mahila Court, Tiruppur, the Appeal has been preferred by the Accused.

5. The learned Counsel nominated by the High Court Legal Services Committee for the Appellant submitted that even though the trial Court framed charges for the offences under Sections 3 r/w. 4, 5 (m) r/w. 6 of the Protection of Children from Sexual Offences Act, 2012 and 376 (2) (i) IPC without reading and explaining the charges against the Accused, the trial proceeded. Therefore, it had prejudiced the trial. On assessment of evidence, the learned Sessions Judge, Fast Track Mahila Court had convicted the Accused for the offence under Section 7 r/w. 8 of the Protection of Children from Sexual Offences Act, 2012. This is against the procedure contemplated under Section



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216 (2) of Cr.P.C.

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6. Also, as per the case of the Prosecution, the child victim was coming out of the house of the Accused and crying which was seen by the neighbours viz., Tamil Selvi and Sathya. The said Tamil Selvi should have contacted the mother of the victim on mobile phone. Based on the information furnished by Tamil Selvi, the mother of the victim/P.W-2 had given a Complaint under Ex.P-12. The said Tamil Selvi had not been examined as a Prosecution Witness. She is the only witness who saw the victim/P.W-1 immediately after the alleged occurrence. The trial Court failed to note that the statement made by the victim was not at all corroborated by any of the Prosecution Witnesses. Though P.W-2 is the mother of the victim she was not an eyewitness, she was not at all present at the scene of occurrence at the time of occurrence. Therefore, the learned trial Judge ought not to have given due weightage to the evidence of P.W-2-the mother of the victim. P.W-2 is only an interested witness. The trial Court also failed to consider the fact that P.W-2 mother is an illiterate woman and Ex.P-2 was written by some other person. The person who wrote Ex.P-2 was not examined by the Prosecution before the trial Court. Except P.W-3, nobody knew the alleged occurrence. The victim as P.W-1 did not state in her deposition about informing the fact to P.W-3 about the alleged occurrence. The Prosecution has not examined and explained about



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the person/Tamil Selvi who was said to have furnished information to P.W-2 informant/mother of the victim/Complainant. Therefore, it is fatal to the case of the Prosecution. The deposition of victim/P.W-1, in her chief-examination is contrary to the deposition in the cross-examination, she states that Ex.P-2 was written by her uncle (scribe), the scribe was not examined as a witness by the Prosecution. The child victim/P.W-1 in her chief-examination stated that she and her mother along with some people had gone to the Police Station. The Police Officers were not in uniform. The witnesses viz., P.W-2, P.W-3 and P.W-4, in their deposition, had stated that the Police Officials who conducted enquiry were in their uniform. Therefore, it is a contradiction. The learned trial Judge had not considered the deposition of each of the witnesses. In totality, there are contradictions in the evidence of each of the witnesses which the trial Court failed to appreciate.

7. The learned Sessions Judge, Fast Track Mahila Court had only considered the examination-in-chief of the Prosecution Witnesses and had convicted the Accused which is against the principles of fair trial. The trial Court convicted the Accused based on the evidence of P.W-5 which is contradicted the statement recorded under Section 161 Cr.P.C., and documents under Ex.P-4 to Ex.P-6. Therefore, the Judgment of Conviction recorded by

<https://www.mhc.tr.tn.gov.in> the learned Sessions Judge, Fast Track Mahila Court, Tiruppur is perverse and



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is to be set aside.

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8. The evidence of P.W-5 and P.W-8 are contradictory to each other. P.W-8 who had examined P.W-1 initially stated that the hymen was absent and there was no bleeding, no vital injury was stated. P.W-8 had stated the child had not mentioned about the pain in her genital organ whereas P.W-5 had stated that the child victim informed her about pain in the genital organ. The learned Sessions Judge, Fast Track Court ought to have evaluated the evidence of P.W-5 and P.W-8 in their proper perspective. She had not done so. P.W-5 had exaggerated in her evidence before the Court from what she had recorded under Ex.P-4 to Ex.P-6. Also, the learned Sessions Judge failed to consider the fact that before registering the FIR, the Accused was fixed and arrested which was stated by P.W-4. P.W-4 had stated that he came to know that the Accused who raped P.W-1 was immediately caught hold and handed over to the Police. P.W-1 was tutored by the Prosecution. The trial Court failed to note that P.W-3 had stated that after receiving information about the case, the Police Officials came to the house when they were in the Police Station and the Police Officer brought the Appellant to the Police Station. The learned Sessions Judge, Fast Track Mahila Court failed to consider the deposition of P.W-2/mother of the victim that P.W-2 and P.W-1 went to the Police Station, the Accused was already under Police custody. Also, the learned Sessions Judge failed to



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consider the fact that as per the deposition of P.W-3 after giving a Complaint, Police Officials brought the Accused to the Police Station. P.W-9-Investigation Officer in his deposition had stated that the next day of occurrence, the Accused was arrested on 02.06.2013 at Jeeva Depot in Kangeyam. The deposition of the Prosecution Witnesses is contrary to each other. From the deposition of Prosecution Witnesses, the Court could not believe when was the Accused arrested. Still, the learned Sessions Judge, Fast Track Mahila Court convicted the Accused based on the examination-in-chief of the Prosecution Witnesses and not on the appreciation of the entirety of the evidence of the Prosecution Witnesses. Also, the learned Sessions Judge, Fast Track Mahila Court failed to consider the deposition of P.W-6 who had examined the Accused and had issued Ex.P-8. In Ex.P-8 clearly states that there was no sign of reason for sexual intercourse by the Accused. The learned Sessions Judge, Fast Track Mahila Court failed to consider the fact that the Investigation Officer/P.W-9 had not followed the mandatory provisions of examining and recording the statement of the victim under Section 164 of Cr.P.C., before the learned Judicial Magistrate.

9. In the light of the above circumstances, the learned Sessions Judge had misdirected herself confused herself and given a finding which is totally against the Charges framed before proceeding with the trial. The conviction is



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not in continuation of the charges already framed by the trial Court. The learned Sessions Judge had convicted the Accused for a different set of charges.

If the learned Sessions Judge had considered the fact that the earlier charges framed by the Court had not been proved but different charges as it appears from the evidence. The learned Sessions Judge ought to have framed fresh charges and issued notice to the Prosecution and the Accused to recall witnesses so that the learned Counsel for the Accused had the chance to cross-examine the Prosecution Witnesses regarding altered charges. That was not done. The learned Sessions Judge, Fast Track Mahila Court, Tiruppur had convicted the Accused for the offence under Sections 7 and 8 of the the Protection of Children from Sexual Offences Act, 2012 whereas the Charges were framed by the Court under Section 3 r/w. 4, 5 r/w. 6 of the Protection of Children from Sexual Offences Act, 2012 and Section 376 (2) (i) of IPC. Therefore, the Judgment of conviction and sentence of imprisonment imposed by the learned Sessions Judge are perverse and are to be set aside.

10. In support of his contention regarding the fact that no independent witnesses have been examined, the learned Counsel for the Appellant relied on the decision of this Court in the case of **P. Ganesan Vs. State [Crl.A.No.757 of 2019, dated 05.03.2021]**. The relevant portion is extracted as under:



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victim girl was not examined by the prosecution in this case. The another contradiction is with regard to who has preferred the complaint and who has written the complaint. During trial, only four witnesses were examined in this case, out of the four witnesses, the victim girl was examined as PW1; the mother of the victim girl was examined as PW2; the witness for Observation Mahazar was examined as PW3 who is none other than the friend of the father of the victim and not a resident of the said apartment and the Investigating Officer was examined as PW4. None of the independent witnesses were examined in this case. A reading of the materials placed, this Court finds that a false case has been put up against the appellant, but unfortunately, the Investigating Officer (PW4) has also not properly investigated the matter and trial Court has also failed to appreciate the evidence and also failed to consider the material contradictions and improvement in the prosecution witnesses and mechanically recorded the conviction and sentence on the ground of presumption and assumption and also on the ground of sympathy.”

11. Regarding framing of charges, he relied on the ruling of the High Court of Allahabad in the case of *Nepali Devi Vs. State of U.P. and others* reported in **2019 SCC OnLine All 4366** wherein it has been observed as under:

“3. It is correct that there is no allegation of putting on fire the residential premises of the complainant or Ramadhar though the complainant in her statement under [Section 161](#) Cr.P.C. has said that the miscreants/accused have put on fire the thatch of Ramadhar. Ramadhar's statement is not on record whose house is alleged to have been put on fire by the accused. However, at the stage of framing of charge, learned Judge is required to evaluate the evidence to find out prima facie case but he is not required to go in detail every statement or every evidence which has been collected by the Investigating Officer. Learned Sessions Judge after considering the version of the FIR and the statement of the other witnesses including the complainant was prima facie of the opinion that offence under [Section 436](#) IPC is not made out. If the complainant or the prosecution is of the view, during the course of trial, that some other offence(s) has/have also been committed by the accused, it is always open to him/her to file an application under [Section 216](#) Cr.P.C. to alter the charge(s).”

12. He also relied on the decision of the High Court of Karnataka in

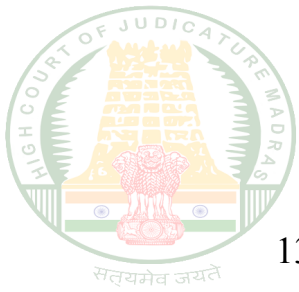


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the case of ***Sri Subramani Vs. State of Karnataka Kola Rural Police,***

Bangalore [Crl.A.No.2097 of 2018, dated 30.05.2023] in which the High Court set aside the conviction under the the Protection of Children from Sexual Offences Act, 2012 and 376 of IPC as the conviction was without any legal basis. The relevant portion of the judgment is extracted as under:

“37. ... ii) The another reason for interference on the trial Court judgment is when the Court found guilty for both the offence under Section 376 of IPC and either Section 4 or 6 of POCSO Act, the trial Court ought to have pass the sentence either under IPC or POCSO Act which is the greater punishment awarded in any one of the Act. In this regard, it is worth to mention the definition of Section 42 of the POCSO Act which is as under: "42. Where an act or omission constitute an offence punishable under this Act and also under any other law for the time being in force, then, notwithstanding anything contained in any law for the time being in force, the offender found guilty of such offence shall be liable to punishment only under such law or this Act as provides for punishment which is greater in degree." 38. On bare reading of Section 42, it empowers the Court to give alternative punishment, if the accused found guilty for the offence which are punishable with both the provisions of Section 376 of IPC as well as POCSO Act which is greater in decree. If the accused found guilty under Section 376 of IPC, if the punishment prescribed under Section 376 of IPC which is higher, then the Court required to pass higher sentence under IPC or if the sentence is prescribed in POCSO Act, if it is more than the sentence awarded in IPC then Court required to provide the higher punishment prescribed under the POCSO Act. Therefore, there was amendment in 2018 which under 42 now amendment. But here in this case, the trial Judge though found guilty for Section 376 of IPC and for POCSO Act, both the offence is nothing but committing a sexual assault on the minor victim girl. Therefore, the Trial Court required to award sentence in one penal provision either under IPC or under POCSO Act which is greater or higher sentence. But, the Trial Court cannot award double sentences for the same offence convicted which are punishable both under Section 376 of IPC and Section 6 of POCSO Act. The Court can find guilty in both the offences but punishment shall be awarded in any one of the offences which is greater in degree.”



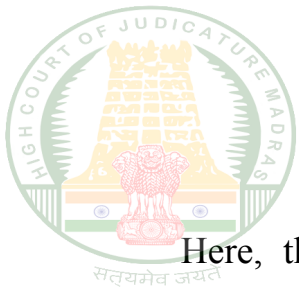
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13. The learned Additional Public Prosecutor, Mrs.G.V.Kasthuri, appearing for the State, by way of reply vehemently objected to the submission of the learned Counsel for the Appellant stating that as far as offence under the Protection of Children from Sexual Offences Act, 2012 concerned, it is the bounden duty on the part of the Court under Section 29 of the Act, to presume that the victim of sexual assault, particularly, the child victim speaking the truth. There may be discrepancies in the evidence of other witnesses. The same need not be considered by the Court. If the evidence of the victim is supported with the medical evidence naturally as per Section 29 of the Act, the Court has to convict the Accused.

14. Section 29 of the Protection of Children from Sexual Offences Act, 2012 is extracted as under:

“29. Presumption as to certain offences – Where a person is prosecuted for committing or abetting or attempting to commit any offence under sections 3,5,7 and section 9 of this Act, the Special Court shall presume, that such person has committed or abetted or attempted to commit the offence, as the case may be, unless the contrary is proved.”

15. If what had been claimed by the learned Counsel for the Appellant is to be accepted, invariably in all cases of sexual assault, there may be contradictions as there are no direct witness as in any other criminal case. The evidence of sexual assault is to be considered as a set apart from other cases.



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Here, the offenders commit crimes in isolate places so that there are no witnesses or evidence. Here, the victims are gullible innocent children.

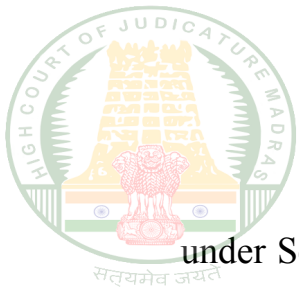
Misusing the trust of the children, in adults, by their criminal intention the adults by their physical prowess exploit the child victim and indulge in pervert sexual offence. Therefore, the offence regarding subjecting the child to sexual assault has to be viewed seriously by the Court. When the Court arrives at a conclusion that the deposition of the child victim is supported with the medical evidence even if the investigation is shoddy has to convict the Accused. Here, the victim was aged 10 years on the date of occurrence and the Accused was 19. It is to be noted that the victim was watching TV programmes in the neighbour's house, house of the Accused where the elders of the Accused were not at home. Using this peculiar circumstance, the Accused had victimized the child aged about 10 years, she came out crying and the neighbours viz., Tamil Selvi and Saranya had enquired about the same. The attempt of the learned Counsel for the Appellant to derail the trial stating that Tamil Selvi, who is alleged to have informed the mother of the victim was not examined is fatal to the Prosecution cannot be accepted as the mother of the victim had already stated that Saranya and Tamil Selvi who had seen the daughter/victim girl coming out crying at the house of the Accused, had informed the mother of the victim girl/P.W-2. When two names are mentioned out of whom one was not examined, that does not mean the case of the Prosecution is fatal. Also, it is



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pointed out that the scribe of the Complaint under Ex.P-12, as per the deposition of P.W-1, the uncle of P.W-1 had written down the Complaint. The non-examination of the scribe cannot be held fatal to the case of the Prosecution. It is the discretion of the learned Public Prosecutor before the trial Court when the Prosecution case has been proved through sufficient witnesses, the learned Public Prosecutor before the trial Court has discretion to curtail the witness. The evidence of the victim was corroborated by P.W-2 even though accepting P.W-2 was not before the place of occurrence at the time of occurrence still the person who had given the information was examined as P.W-3. It is true that Tamil Selvi was not examined. Tamil Selvi and Saranya both had enquired the child victim when she came out of the house of the Accused. On perusal of the Judgment of the learned Sessions Judge, Fast Track Mahila Court, Tiruppur, it is found that the learned Sessions Judge had on proper appreciation of evidence convicted the Accused.

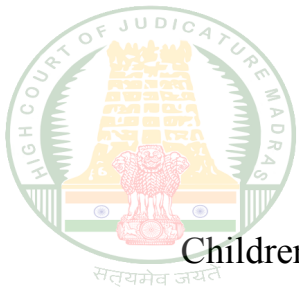
16. The submission of the learned Counsel for the Appellant that the charges were not properly framed. Therefore, there was confusion for the Accused regarding the charges framed by the trial Court and therefore that was prejudiced will not hold good as per Section 216 of Cr.P.C., the Court may on the perusal of the records of the final report, may frame charges. Also, the Court has the discretion to frame charges. Accordingly, charges were framed



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under Sections 3 r/w. 4, 5 (m) r/w. 6 of the Protection of Children from Sexual Offences Act, 2012 and in the alternative Section 376 (2) (i) of IPC is only proper. When the learned Judge is unable to consider which of the offences are made out as per the charge sheet. The learned Judge is within his/her power to frame appropriate charges. That cannot be considered as confusion. In the course of trial, the evidence was recorded in the presence of the Accused, on instructions of the Accused, the learned Counsel for the Accused had cross-examined the witnesses. Therefore, there is no prejudice caused to the Accused by the Court framing charges at the initial stage of trial. After the conclusion of the Prosecution Witnesses and on proper appreciation of evidence, the learned Judge found out that even though the charges framed under Section 3 r/w. 4, 5 (m) r/w. 6 of the Protection of Children from Sexual Offences Act, 2012 and Section 376 (2)(i) of IPC, the lesser offence is made out. Therefore, for the lesser offence, the learned Judge had convicted the Accused for which the Judgment cannot be treated as perverse.

17. The ruling cited by the learned Counsel for the Appellant will not help the Appellant in the above circumstances. In the reported ruling in Crl.A.No.2097 of 2018 of the High Court of Karnataka in ***Sri Subramani Vs. State of Karnataka Kolar Rural Police, Bangalore*** where the Court convicted the Accused for both the offences i.e., Indian Penal Code and the Protection of



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Children from Sexual Offences Act, 2012. Therefore, the conviction was set aside in Appeal. Here, the conviction is under the the Protection of Children from Sexual Offences Act, 2012 and not under 376 IPC. Even though the charges under Sections 3 r/w. 4, 5 (m) r/w. 6 of the Protection of Children from Sexual Offences Act, 2012 and Section 376 (2)(i) of IPC, the learned Sessions Judge had not convicted the Accused for those charges that attracts minimum punishment of 20 years whereas the Accused in this case was convicted for lesser offence of Section 7 r/w. Section 8 of the Protection of Children from Sexual Offences Act, 2012. The learned Sessions Judge, Fast Track Mahila Court had discussed the defence of the Accused and also quoted the rulings cited by the learned Counsel for the Appellant which reads as follows:

“14. The learned defense counsel argued that the victim girl has not stated anywhere either in her statement before the police or in her evidence before this court that the accused has penetrated his male organ into her vagina and has committed penetrative sexual assault on her. Hence, the learned defense counsel argued that the charge against the accused under sections 3 r/w. 4 and section 5 (m) r/w. 6 of the Protection of Children from Sexual Offences Act, 2012 stands not proved and in support of his arguments has cited the decision of the Hon'ble High Court of Madras reported in,

2016 (1) MLJ (Crl) 483

2016 (4) MLJ (Crl) 611

CDJ 2015 SC 520

CDJ 2017 SC 358

15. As per Section 7 of the Protection of Children from Sexual Offences Act, 2012 - “whoever with sexual intent touches the vagina, anus or breast of the child or makes the child to touch the vagina, penis, anus or breast of such person or any other person, or does any other act with sexual intent which involves physical contact without penetration is said to commit sexual assault.”



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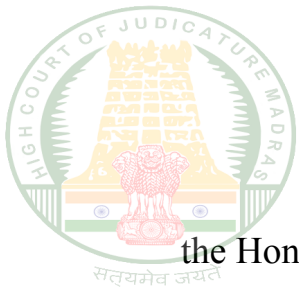
16. In this case, the victim though has not specifically stated that at the time of occurrence the accused penetrated his male organ into her vagina and committed sexual assault on her, she has clearly stated that the accused forcibly made her to lie down, laid over her and did something over her vagina which clearly attracts section 7 of the Protection of Children from Sexual Offences Act, 2012 2012.”

Therefore, for the lesser offence of Section 7 of the Protection of Children from Sexual Offences Act, 2012, the Accused was convicted, for which no prejudice was caused to the Accused. This can be illustrated as follows:

Even though the charges framed for the offence under Section 307 of IPC in the course of the trial what is available in the evidence attracts Section 326 or 325 of IPC. Even though charges are not framed under Section 326 or 325 of IPC, the learned trial Judge has the discretion to convict the Accused for a lesser offence even though no charges are framed specifically. There are available rulings of the Hon'ble Supreme Court on this point. Therefore, the conviction recorded by the learned Sessions Judge does not suffer any illegalities. The submission of the learned Counsel for the Appellant has to be rejected. The Appeal lacks merits and is to be dismissed.

18. The learned Additional Public Prosecutor had relied on the following rulings:-

18.1. In the case of **Ganesan Vs. State** reported in **2020 (10) SCC 573**



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the Hon'ble Supreme Court has held as follows:

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“A. Crimes Against Women and Children – Protection of Children from Sexual Offences Act, 2012 – Section 7 r/w. Section 8 – Conviction on sole testimony of victim – Permissibility of – Where testimony of victim is found reliable and trustworthy, reiterated, conviction on basis of her sole testimony is permissible – In instant case, victim PW 13 aged 15 yrs at time of deposition was matured and her testimony was found trustworthy, unblemished and her evidence was of sterling quality – Hence, conviction on basis of her testimony was justified – Criminal Trial – Witnesses – Sole/Solitary witness.”

18.2. In the case of ***Pool Singh Vs. State of Madhya Pradesh*** reported in (2022) 2 SCC 74 the Hon'ble Supreme Court had held as under:

“Held:

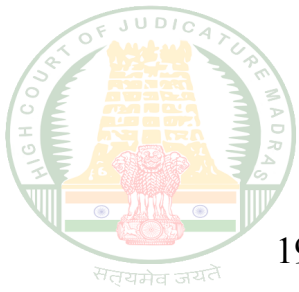
There can be a conviction on the sole testimony of the victim/prosecutrix when the deposition of the prosecutrix is found to be trustworthy, unblemished, credible and her evidence is of sterling quality.

As a general rule, if credible, conviction of the accused can be based on sole testimony, without corroboration. Sole testimony of the prosecutrix should not be doubted by the court merely on basis of assumptions and surmises.

Testimony of the victim is vital and unless there are compelling reasons which necessitate looking for corroboration of her statement, the courts should find no difficulty to act on the testimony of the victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable. Further, seeking corroboration of her statement before relying upon the same, as a rule, in such cases amounts to adding insult to injury.”

Point for consideration:

Whether the Judgment of conviction recorded by the learned Sessions Judge, Fast Track Court, Tiruppur made in Spl.S.C.No.19 of 2015, dated 15.09.2017 is to be set aside as perverse?



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19. On perusal of the records, it is found that the charges had been framed properly. The learned Sessions Judge had framed the charges had clearly explained the charges as per the complaint given by the mother of the victim which attracted the offence under Sections 3 r/w. 4 and 5 (m) (I) (I) r/w. 6 of the Protection of Children from Sexual Offences Act, 2012 and an alternative charge under Section 376 (2) (I) of IPC had also been framed. The charges had been clearly explained in Tamizh and recorded in Tamizh. Questions had been prepared in Tamizh. As per the charges framed on 07.09.2015. The same is reflected in the denial recorded by the learned Judge, Fast Track Court, Tiruppur. The Accused had denied the charges.

20. On perusal of the deposition of P.W-1/victim, it is found that she had spoken naturally as per the Complaint lodged by the mother of the victim/P.W-1. It is true that in the cross-examination suggestion was put to the victim that whether she used to go neighbour house to watch TV programme. She had admitted the suggestion that she used to visit other neighbour house also. She was asked about the programme on the alleged date of occurrence. She was unable to recollect the TV programme on the alleged date of occurrence. She had stated in the cross-examination that she went to the Police Station around 6.30 p.m., along with her mother, grandmother and maternal

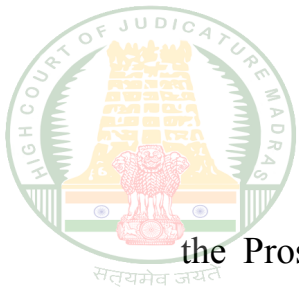
uncle. At that time, the Police Officers were not in uniform some were in civil



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dress. From their speech and discussions, she came to know that they were Police Officers.

21. As rightly pointed out by the learned Additional Public Prosecutor, the offence under the Protection of Children from Sexual Offences Act, 2012 differ from the offence under IPC . Therefore, if the evidence of the Prosecutrix inspires confidence of the trial Judge, the trial Judge shall convict the accused. She had clearly spoken that she was a neighbour of the Accused. When the Accused was alone at home the victim child went to the house of the Accused to watch TV and that she was not aware that the elders in the family of the Accused were not at home. Within five minutes of watching TV the Accused had locked the door, gagged her mouth and made her lie on the floor and the male organ thrust into the female organ. That much is available in the evidence of the victim/prosecutrix which attracts the offence under Section 7 and 8 of the the Protection of Children from Sexual Offences Act, 2012 as observed in the Judgment of the learned Sessions Judge. Therefore, the Judgment of the learned Sessions Judge, Fast Track Court, Tiruppur in Spl.S.C.No.19 of 2015 is not perverse. Further, as rightly pointed out by the learned Additional Public Prosecutor relying on the reported ruling in *(i) (2002) 2 SCC 74* in the case of *Pool Singh Vs. State of Madhya Pradesh* and *(ii) (2020) 10 SCC 573 in the case of Ganesan Vs. State*, if the evidence of



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the Prosecutrix inspires confidence of the Court, the Court can convict the Accused.

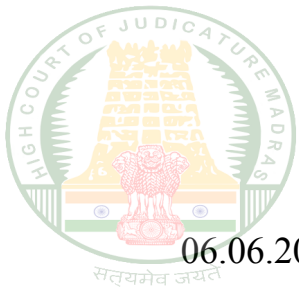
22. From the evidence of P.W-2, it is found that she was illiterate woman. In her cross-examination, she had stated that Tamil Selvi had only given information to her. Also, she had admitted that by the time, she went to the Police Station at 6.30 p.m., the Accused was secured. Along with his mother, Accused was present in the Police Station. P.W-3 had corroborated the evidence of victim of P.W-1 and P.W-2. In the cross-examination of P.W-2 had stated that the Accused is also a relative and the mother of the Accused has some animosity with P.W-3 Saranya. The suggestion of the defence that based on the instigation of P.W-3 Saranya, the case has been foisted against the Accused was denied by P.W-2. The defence of the Accused that on the instigation of P.W-3 Saranya and Tamil Selvi only the case had been foisted was denied by P.W-2 mother of the victim P.W-1. She had clearly stated that it is not a foisted case. By the time she came home it was '5' o' clock. When she was at her work place, on receiving information from Tamil Selvi, she rushed home. When she reached home still her daughter was crying. P.W-3 Saranya who had seen the victim/prosecutrix immediately after the occurrence had clearly deposed as witness. She was exhaustively cross-examined. She had clearly stated that she saw the victim girl coming out of the house and crying



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and the Accused following her. On her enquiry the victim/Prosecutrix/P.W-1

WEB COPY told her about the occurrence. Immediately Tamil Selvi contacted the mother of the victim P.W-2. She had admitted that the mother of the victim and the mother of the Accused are acquaintances and she came to the house of the Accused to chat with the mother of the Accused. P.W-3 Saranya, in her cross-examination had admitted that they went to the Police Station by around 7 o'clock. After registering the Complaint, the Police secured the Accused and came to the Police Station. Therefore, the suggestion that when the Complainant were in the Police Station, the Accused was also in the Police Station is cleverly put up question framed by the learned Counsel for the defence. It is not to be construed that the Accused was secured before ever Complaint was registered. She had denied the suggestion before ever registering the Complaint, the Accused was secured by the neighbours and handed over to the Police. P.W-4 is the Mahazar Witness to the rough sketch. P.W-5 had clearly stated that there was no external or internal injuries. She had explained that the vagina admits single finger. She was subjected to repeated intercourse it admits finger she had clearly explained that if repeatedly subjected to intercourse, it admits two fingers. The victim was subjected to medical examination on 02.06.2013 before P.W-5 in the Department of Gynaecology attached to the Tiruppur Government Hospital. The Forensic Report stated that the vaginal swab was received by the Forensic Lab only on



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06.06.2013 since there was no blood found on the vagina of the victim. There is no possibility of sexual assault denied by her only 10% of the victim without bleeding. Out of 100 cases, 10% may not have bleeding, it is to be noted that by the time, the victim was produced before P.W-5. She had clearly stated that within 24 hours of the incident the child was subjected to medical examination and she had clearly stated that before 12 hours victim was subjected to sexual intercourse. The child victim was found tired and suffering from pain in the genital organ. In the cross-examination, the explanation offered by P.W-5 indicated that the case of the Prosecution was proved. P.W-8 had examined the victim only in the Government Hospital and issued Accident Register. Therefore, she forwarded her to the detail medical examination to the Government Head Quarters Hospital, Tiruppur. Therefore, it cannot be considered as contradictions between two Doctors.

23. In the cross-examination of P.W-8, she had stated that the victim was found normal and on the examination of the genitals of the victim, hymen was found not intact and she had issued Accident Register mentioning in detail/Ex.P-13. Mucoid white discharge and no bleeding in the vagina. At the Government Head Quarters Hospital only 24 hours Lab facility are available. The same is not available in Kangeyam Government Hospital. Therefore, she forwarded the victim to District Headquarters Hospital where 24 hours Lab



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facility is available. Therefore, what was stated by the learned Counsel for the

Appellant that there are contradictions between P.W-5 and P.W-8 cannot at all be accepted. The Accident Register clearly stated that hymen absent, no external injury seen. P.W-5 had conducted detail examination and had issued Ex.P-4 to Ex.P-6. The evidence of P.W-1 corroborated by P.W-5 and P.W-8. Regarding the age of the victim, Ex.P-1 is the birth certificate wherein it is stated that 03.10.2002. The occurrence took place on 01.06.2013. Therefore, the victim was a child as per Section 2 of the Protection of Children from Sexual Offences Act, 2012. It is true that scribe of Complaint under Ex.P-2 was not examined and also Tamil Selvi the person who had informed P.W-2/mother of the victim about the occurrence was not examined. P.W-2 mother of the victim was not the witness to the occurrence, immediately to the occurrence, hearsay witness. Still she is the mother, she has enquired her daughter, the daughter had informed also. On returning home, on enquiries from her acquaintance. Therefore, the submission of the learned Counsel for the Accused that non-examination of the Tamil Selvi, the informant to the mother of the victim is fatal to the Prosecution cannot at all be accepted. If it is ordinarily under any of the Provisions of IPC, the submission of the learned Counsel for the Appellant can be accepted by the Courts of law. Here, is a case where the investigation requires Special skill apart from the other cases investigated by the Police Officer in the ordinary course of the investigation.



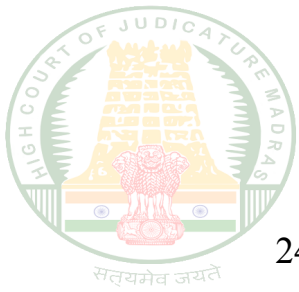
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Therefore, there are prone to be defects in the ordinary course of investigation by those who are not having sufficient skills or regarding the sexual assault of a child. Those facts cannot be taken advantage against the Prosecution. That is why, the Provision under Section 20 (9) of the Protection of Children from Sexual Offences Act, 2012 has been enacted casting duty on the Court to presume the deposition of the victim to be true. Also, in the same Provision, the burden to let in rebuttal evidence is granted to the Accused. Here, the Accused had not at all examined any of the witnesses thereby discharging the rebuttal evidence. Under those circumstances, the reliance placed by the learned Counsel for the Appellant/Accused in ***C.A.No.2097 of 2018*** in the case of ***Kalicharan Vs. State of U.P*** will not hold good. In the reported ruling of ***Kalicharan's case***, there was no specific charge against the Accused regarding murder committed by three persons with Lathi and sharp edged weapons whereas the Charge was against the specified Accused who is alleged to have shot the deceased. In the evidence, it was found out that the deceased died due to the attack by three persons with lathi and not by the bullet injury. Therefore, for the conviction against the Accused who belong to same family, mother and sons for using sharp edged weapon against the deceased without charge, Accused was convicted for the offences under Section 302 of IPC. Therefore, the Hon'ble Supreme Court had acquitted the Accused as they have been convicted based on the evidence during the trial for which there was no charge.



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The ratio of that case will not hold good regarding sexual offences particularly sexual offences committed on the victim minor child for which the reported ruling of the Hon'ble Supreme Court in ***Ganesan Vs. State*** applies. As per the reported ruling of the Hon'ble Supreme Court in ***(2002) 2 SCC 74 in the case of Phool Singh vs. State of Madhya Pradesh***, if the evidence of the Prosecutrix alone inspires confidence of the trial Court, conviction can be recorded. Regarding ruling cited by the learned Counsel for the Appellant in ***Crl.A.No.59 of 2019 in the case of Rajat Vs. State of Uttarkhand*** that was the case victim herself claimed that she was aged 20 years and she was already married. Therefore, the Protection of Children from Sexual Offences Act, 2012 is not attracted and it was found out to be consensual sex. Therefore, the Accused was acquitted. The ratio of that case is not applicable to the facts of the case before this Court. Here, is the case where the Accused was charged for the grave offence under Section 3 r/w. 4, 5 (m) r/w. 6 of the Protection of Children from Sexual Offences Act, 2012 which is a charge for penetrative sexual assault. Here by the evidence of victim, it was found out penetration had not taken place as was framed under Section 3 r/w. 4 and Section 5 (m) r/w. 6 of the Act on the lesser offence is attracted. Therefore, for the lesser offence under Section 5 (m) r/w. 6 of the Act, the learned Sessions Judge had convicted the Accused. Therefore, no prejudice is caused to the Accused.



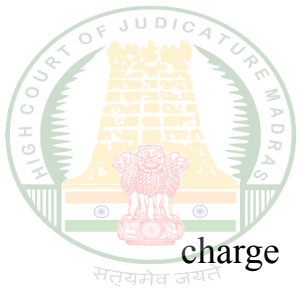
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24. As an illustration if the Court had framed charges under Section 326 of IPC and major charge is 307 of IPC is found out from the evidence.

Then, the learned trial Judge is expected to frame Charge under Section 307 of IPC and recall the witnesses to enable the Accused to cross-examine on the grave charge for the offence under Section 307 of IPC. Here, it is not the case, the conviction is regarding lesser offence. By way of illustration here it is similar to charge framed under Section 307 warranting punishment upto 10 years whereas the punishment recorded by the trial Court is under similar to offence under Section 325 of IPC lesser offence for which punishment is three years under IPC.

25. Similar to that, the offence under the Protection of Children from Sexual Offences Act, 2012, Trial Court had framed charges under Section 3 r/w. 4 of the Protection of Children from Sexual Offences Act, 2012 as alternate charge under Section 5 (m) r/w. 6 of the Protection of Children from Sexual Offences Act, 2012. Again as alternate charge under Section 376 (2) (i) of IPC whereas in the trial the victim's evidence along with Doctor evidence. P.W-5-Dr.Vidhubala evidence indicate commission of lesser offence under Section 7 of the Protection of Children from Sexual Offences Act, 2012.

Therefore, the argument of the learned Counsel for the Appellant, the Accused is prejudiced as he could not cross-examine the Prosecution Witnesses to the



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charge under Section 7 and 8 of the Protection of Children from Sexual Offences Act, 2012 cannot be accepted. The learned Counsel for the Accused had exhaustively cross-examined the witnesses. No prejudice is caused to the Accused by the Judgment of the learned Sessions Judge, Fast Track Mahila Court convicting the Accused for lesser charge under Section 7 of the Protection of Children from Sexual Offences Act, 2012. Therefore, the submission of the learned Counsel for the Appellant is rejected. The conviction recorded by the learned Sessions Judge, Fast Track Mahila Court is not found perverse. In the light of the above discussion, as rightly submitted by the learned Additional Public Prosecutor, the Appeal lacks merits and is to be dismissed.

26. In the light of the above discussions, the point for consideration is answered in favour of the Prosecution and against the Appellant/Accused. The judgment of conviction recorded by the learned Sessions Judge, Fast Track Mahila Court, Tiruppur in Spl.S.C.No.19 of 2015, dated 15.09.2017 is found proper.

27. The service of the learned Counsel nominated by High Court Legal Services Committee is appreciated as he has taken trouble to submit his arguments and citing ruling in support of his contentions. Even though the



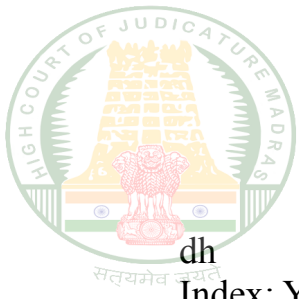
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learned Counsel nominated by the High Court Legal Services Committee had put in his best efforts are appreciated but the evidence available before the trial Court is otherwise. As pointed in the reported ruling. Therefore, the Appeal is dismissed. The High Court Legal Services Committee is directed to pay the remuneration to the Counsel nominated by High Court Legal Services Committee as per Rules.

In the result, ***this Criminal Appeal is dismissed.*** The judgment of conviction recorded by the learned Sessions Judge, Fast Track Mahila Court, Tiruppur in Spl.S.C.No.19 of 2015, dated 15.09.2017 is confirmed.

The learned Sessions Judge, Fast Track Mahila Court, Tiruppur, is directed to issue warrant to secure the Accused to detain him in prison to undergo the period of sentence in continuation of the judgment of conviction recorded in Spl.S.C.No.19 of 2015, dated 15.09.2017.

The Respondent Police/The Inspector of Police, Kangeyam Police Station, Tiruppur District, is directed to secure the Accused and produce him before the Court to undergo the period of sentence imposed by the learned Sessions Judge, Fast Track Mahila Court, Tiruppur, and confirmed in this Appeal.



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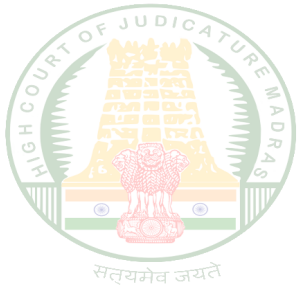
Internet: Yes/No

Speaking Order/Non-speaking Order

To

1. The Sessions Judge,
Fast Track Mahila Court,
Tiruppur.
2. The Inspector of Police,
Kangeyam Police Station,
Tiruppur District.
3. Appellant/Accused
through The Superintendent of Police,
Central Prison, Coimbatore.
4. The Public Prosecutor,
High Court, Madras.

<https://www.mhc.tn.gov.in/judis>



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SATHI KUMAR SUKUMARA KURUP, J.

dh

Judgment made in
Crl.A.No.689 of 2017

30.04.2024