

Crl.A.No.736 of 2022

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 16.11.2022

CORAM

THE HONOURABLE MR. JUSTICE P.VELMURUGAN

CRL.A.No.736 of 2022

and

Crl.M.P.No.10140 of 2022

Ezhi @ Ezhilarasan

.. Appellant

Now he is in Central Prison
Trichy and his C.P.No.22765

.Vs.

State rep by
The Inspector of Police,
All Women Police Station,
Perambalur District.
Crime No.15 of 2017.

.. Respondent

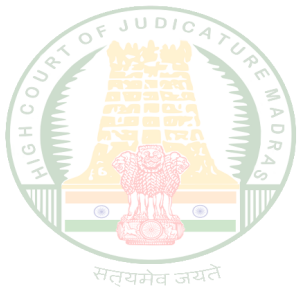
Criminal Appeal filed under Section 374(2) of Code of Criminal Procedure to set aside the conviction passed by the learned Sessions Judge, Mahila Court, Perambalur dated 24.10.2018 and acquit the appellant.

For Appellant : Mr.K.Shivakumar,
Legal Aid Counsel

For Respondent : Mr.S.Sugendran
Additional Public Prosecutor

J U D G M E N T

This Criminal Appeal has been filed against the judgment of conviction and sentence dated 24.10.2018 passed by learned Sessions Judge, Mahila Court, Perambalur in Spl.S.C.No.7 of 2018.



Crl.A.No.736 of 2022

2. The case of the prosecution is that the *de-facto* complainant is the mother of the victim girl. The victim was aged about 16 years and studying in XII standard at the time of occurrence. On 15.09.2017 at about 03:30 pm, when the *de facto* complainant went to work, the accused/appellant herein came to her house and forcibly had sexual intercourse with the victim girl and also threatened her with dire consequences. Hence, the victim girl did not whisper anything about that alleged incident to her mother or any body. Again on 17.09.2017, at about 04:00 pm, the accused came to the house of the victim girl and tried to have sexual intercourse with her, at that time, the sister of the victim entered into the house and on seeing her, the accused escaped from the house immediately. Subsequently, P.W.2/victim girl alleged to have informed about the incident that had taken place on 15.09.2017 to P.W.1/*de-facto* complainant. P.W.2/victim girl had further stated that she was bleeding, while using the rest room. Then, she was rushed to the Government Hospital, Perambalur for treatment and thereafter, the *de-facto* complainant registered a case against the appellant in Crime No.15 of 2017.

3. On the complaint given by the *de-facto* complainant/P.W.1, the



Crl.A.No.736 of 2022

respondent/Police registered a case in Crime No.15 of 2017 for the offences under Section 450 IPC and Section 6 of 'The Protection of Children from Sexual Offences Act, 2012' [hereinafter referred to as 'POCSO Act' for the sake of convenience] and Section 506(i) IPC. After investigation, the respondent/Police altered the charges against the appellant for the offences under Section 450 IPC and Section 5(l) r/w 6 of the POCSO Act and Sections 506(i) and 375(6) r/w 376 IPC. Thereafter, the respondent/Police laid a charge sheet before the learned Sessions Judge, Mahila Court, Perambalur for the offences under Sections 450 and 506(i) IPC and Section 3(a) which is punishable under Section 4 of the POCSO Act. When questioned, the accused denied the allegation. However, based on the materials, the trial Court framed the aforementioned charges against the appellant.

4. In order to prove its case before the trial Court, on the side of the prosecution, as many as 16 witnesses were examined as P.W.1 to P.W.16 and 13 documents were marked as Exs.P1 to P13.

5. After examining the prosecution witnesses, the incriminating circumstances culled out from the evidence of the prosecution witnesses were put before the accused and he was questioned under Section 313



Crl.A.No.736 of 2022

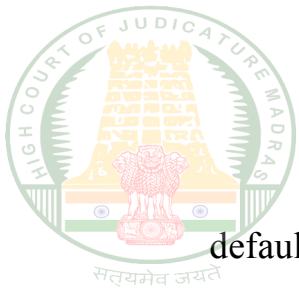
Cr.P.C., wherein he denied all the incriminating circumstances as false and pleaded not guilty. On the side of the defence, no oral evidence was adduced and no documentary evidence was produced.

6.1 The Court below, after hearing the arguments advanced on either side and also considering the materials available on record, found that the appellant is guilty of the charged offences and he was convicted and sentenced as follows :

(i) for the conviction under Section 450 IPC he was sentenced to undergo rigorous imprisonment for a period of three years and to pay a fine of Rs.3,000/-, in default, to undergo simple imprisonment for a period of one year;

(ii) for the conviction under Section 506(i) IPC he was sentenced to undergo rigorous imprisonment for a period of one year and to pay a fine of Rs.2,000/-, in default, to undergo simple imprisonment for a period of six months ;

(iii) for the conviction under Section 3(a) which is punishable under Section 4 of POCSO Act he was sentenced to undergo rigorous imprisonment for a period of ten years and to pay a fine of Rs.5,000/-, in



Crl.A.No.736 of 2022

default, to undergo rigorous imprisonment for further period of three years;

(iv) the trial Court ordered that the sentences imposed on the appellant shall run consecutively and the period of detention already undergone by the appellant was directed to be set-off under Section 428 Cr.P.C.

7. Challenging the said conviction and sentences, the appellant is before this Court.

8.1 The learned Legal Aid Counsel appearing for the appellant submitted that there are two versions regarding the age of P.W.2. Further, there are different versions and testimonies of prosecution witnesses pertaining to the factual circumstances of the case. He further submitted that the statement of the prosecutrix would have obtained within 24 hours from the time of occurrence or receipt of the complaint by the prosecution, however, in the present case, there was an inordinate delay in getting statement from the victim under Section 164 Cr.P.C., which violates the statutory provisions of Section 164(A) Cr.P.C and the inordinate delay has not been properly explained by the prosecution. P.W.14-Doctor, who examined the victim has clearly stated that there was



Crl.A.No.736 of 2022

no external injuries found on the victim. The age of the victim girl was determined as between 14 to 15 years without any conclusive proof and the age of the victim has not been ascertained in the manner known to law either by producing the authenticated documents or by the authenticated test. Therefore, the prosecution has not proved that the victim is a child, who had not completed the age of 18 years. P.W.11/Headmaster of the School, in which the victim was studied, has stated that at the time of admission, the Birth Certificate was not produced before the school. The School Certificate has been marked as Ex.P5. Therefore, the evidence of P.Ws.11 and 14 were not sufficient to prove the age of the victim that she had not completed the age of 18 years and she was a child, who comes under the definition of POCSO Act. Once the age of the victim has not been proved, the alleged offence under POCSO Act would not attract. In order to bring an offence under POCSO Act, it is the prime duty of the prosecution to prove the age of the victim as the victim has not completed the age of 18 years, i.e she is a child under the definition of POCSO Act. However, the prosecution miserably failed to prove the same and unfortunately the trial Court also failed to appreciate the same and erroneously arrived at the conclusion



Crl.A.No.736 of 2022

that the victim was a child based on the documents Exs.P5 and P6.

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8.2 He further submitted that as far as the commission of alleged offence is concerned, there are material contradictions between the evidence of P.W.2/victim and P.W.14/Doctor and medical certificate/Ex.P7 and that contradictions would go to the root of the case of the prosecution. The victim was tutored by her parents and her evidence is not natural. Further, there is no independent eye witness to the said occurrence and all the witnesses are hearsay witnesses. The conviction has been recorded by the trial Court with un-corroborative evidence of the interested witnesses, who are the victim and her relatives.

8.3 He further submitted that there are suppression of material facts and even the evidence of P.Ws.1 and 3 are contradictory to each other about the occurrence dated 17.09.2017. P.W.1 has suppressed the instant material fact that she had knowledge about the incident and instituted a complaint only on 19.09.2017. After deliberation, the *de-facto* complainant registered a complaint against appellant on 19.09.2017 and the delay in preferring the complaint has not been properly explained by the prosecution. As per the prosecution, P.W.2 had suppressed the alleged sexual assault from P.Ws.1 and 3, which clearly proved that the



Crl.A.No.736 of 2022

said act was either consensual or concocted by the prosecution. The evidence of the prosecution witnesses are contradicted with each other, therefore, the said contradictions are treated as material contradictions. The learned Magistrate, one who recorded the previous statement from the victim under Section 164 Cr.P.C, was not examined, therefore, the statement under Section 164 Cr.P.C has not been substantiated. PW-14/Doctor, who examined the victim, has also not recorded any findings as to the presence of spermatozoa on the private part of the victim or any sign of pregnancy as alleged by the prosecution that the victim was subjected to sexual assault. He further submitted that there are different versions pertaining to the non-recovery of clothes of the victim by the respondent/Police and the appellant was also subjected to medical examination only on 09.10.2017 after an unexplained delay of 20 days. Further, the appellant is already under the imprisonment for nearly four years and the same has also to be considered by this Court, while deciding this appeal. The prosecution has not seized or produced the material objects such as clothes of the appellant and the Birth Certificate of victim. There is no independent witness, who accompanied P.W.2 to the hospital and none of the witnesses have any personal



Crl.A.No.736 of 2022

knowledge that the appellant had committed penetrative sexual assault on the victim. In the absence of such important material facts, the entire prosecution case that the appellant had committed the offence under POCSO Act does not hold water at all. When two views are possible, the view favouring to the accused must be taken and the benefit of doubt should be given to the accused. The most of the prosecution witnesses turned hostile and they have not supported the prosecution case. Subsequently during trial, even the prosecutrix did not support the prosecution case. The non-existence of the injuries on the private part of the prosecutrix also creates a doubt whether the appellant had committed penetrative sexual assault on the victim. It is settled proposition of law that the charges are to be proved with certain explicit evidence to warrant legal conviction and no innocent person can be held guilty on pure moral conviction. Therefore, the prosecution has not proved its case beyond all reasonable doubt and the benefit of doubt should be extended in favour of the appellant. Hence, the judgment of conviction and the sentence passed by the trial Court is liable to be set aside and the appeal may be allowed.

9. The learned Additional Public Prosecutor appearing for the



Crl.A.No.736 of 2022

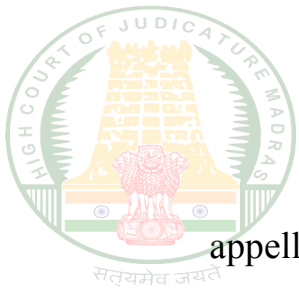
respondent submitted that as per Ex.P5/School Certificate and Ex.P6/Transfer Certificate, the date of birth of the victim is 22.01.2001, whereas, the occurrence had taken place on 15.09.2017. Therefore, at the time of occurrence, the victim was aged about 16 years and she was a child comes under the definition of POCSO Act. He further submitted that P.W.2/victim and P.W.3/sister of the victim are eye witnesses to the said occurrence. While deposing, P.W.2/victim girl has deposed that the appellant had committed penetrative sexual assault on her and threatened her not to reveal the said incident to anyone. The evidence of P.W.2 is corroborated with the evidence of P.W.1/mother of the victim. Further, P.W.3/sister of the victim clearly deposed that on one Sunday she went to the School for attending special class, at that time, P.W.2 was alone in her house and when she came back to her house, the appellant was present in her house and talking with P.W.2. When she enquired about the same, the appellant threatened her and immediately left from the place. Subsequently, she informed the same to her mother. Thereafter, on enquiry, P.W.2 revealed the said incident to her mother and sister. In Schools, the girl children were advised by their teachers that if any untoward incident regarding any sexual assault or any woman



Crl.A.No.736 of 2022

harassment happened them in the house or any known place and the same should be informed to Child Help Line number 1098. Since the victim was suffered with the incident, on the advice of P.W.3, the mother of the victim informed the said incident to P.W.5, who is one of the members of the Child Help Line, over phone on 19.09.2017 at about 7.45 p.m. Subsequently, on their advice P.W.1 preferred a complaint before the respondent/police and thereafter, the victim was subjected to medical examination. The Doctor/P.W.14 who examined the victim girl, has clearly stated that the victim was subjected to penetrative sexual assault and her hymen was not intact. PW-14 further stated that there was no internal injuries found on the private part of the victim and there was no forceful sexual assault and to that effect she gave the medical report/Ex.P7. Therefore, the evidence of P.W.2/victim, P.W.3/sister of the victim, P.W.1/mother of the victim are corroborated with the evidence of P.W.14/Doctor and Ex.P7/medical report. Therefore, the prosecution laid a charge sheet against the appellant for the charged offences and after trial the appellant was convicted and sentenced by the trial Court. There is no merit in the appeal and the same is liable to be dismissed.

10. Heard the learned Legal Aid Counsel appearing for the



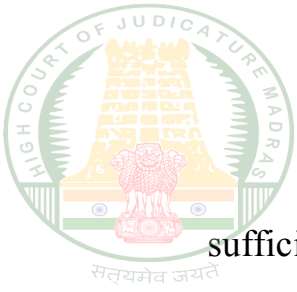
Crl.A.No.736 of 2022

appellant and the learned Additional Public Prosecutor appearing for the respondent and also perused the materials available on record.

11. This Court, being an Appellate Court, is a final Court of fact finding, which has to necessarily re-appreciate the entire evidence and give an independent finding. Accordingly, this Court has re-appreciated the entire oral and documentary evidence produced before this Court.

12. Admittedly, as per the prosecution, at the time of occurrence the victim was aged about 16 years had subjected to penetrative sexual assault by the appellant and a complaint has been registered against the appellant. After investigation the respondent/Police laid a charge sheet against the appellant for the offence under Section 450 IPC as the appellant had trespassed into the house of the victim and 506(i) IPC as the appellant threatened the victim and her sister and he was also charged under Section 3 which is punishable under Section 4 of POCSO Act. After trial, the trial Court convicted and sentenced the appellant.

13. The main contention raised by the learned Legal Aid Counsel appearing for the appellant is that the age of the victim was not proved by the prosecution in the manner known to law. Further, the documents viz., Ex.P5/School Certificate and Ex.P6/Transfer Certificate are not



Crl.A.No.736 of 2022

sufficient to prove the age of the victim and she was not subjected to

Radiology test to ascertain her correct age. However, on a perusal of the evidence of victim, who was examined as P.W.2 on 21.08.2018, it is seen that she has clearly deposed that at the time of occurrence she was aged about 16 years and now she is 17 years. Further to prove the age of the victim, the prosecution has produced Ex.P5 and Ex.P6 which were collected from the School where the victim had studied and the same were marked through P.W.11/Headmaster. Both Ex.P5 and Ex.P6 the date of birth of the victim has been mentioned as 22.2.2001, whereas, the occurrence had taken place on 15.09.2017. Therefore, it is clear that at the time of occurrence, the victim was 16 years and she had not completed the age of 18 years. Therefore, at the time of occurrence she was a child under the definition of Section 2(1)(d) of POCSO Act.

14. Section 34 of the POCSO Act stipulates that if any question regarding the age of a person arises, it shall be determined by the Special Court when any offence is committed by a child under this Act such child shall be dealt with under the provisions of the Juvenile Justice (Care and Protection) Act, 2015. As per the Juvenile Justice Act, the date of Birth Certificate from the School of a Matriculation or the equivalent



Crl.A.No.736 of 2022

certificate issued by the competent authority, can be taken for fixing the age of the child and such document is presumed to be genuine. No doubt, the said presumption is a rebuttable presumption, then it is for the defence to rebut the presumption in the manner known to law. In the case on hand, the prosecution has proved the age of the victim by producing Ex.P5/School Certificate and Ex.P6/Transfer Certificate, which were issued by the Headmaster of the School in which the victim studied, are genuine and the date of birth mentioned in the documents is also genuine. Therefore, this Court finds that the Special Court rightly arrived at the conclusion that the victim was a child and she comes under the definition of 2(1)(d) of POCSO Act. This Court, being an Appellate Court, as a final Court of fact finding while re-appreciating entire oral and documentary evidence found that the age mentioned in Ex.P5 and Ex.P6 are genuine and the presumption under Section 94(ii) of the Juvenile Justice Act has not been rebutted by the appellant. In the absence of any Birth Certificate or equivalent certificate issued by any competent authority, then the prosecution has to go for Radiology test or Ossification test on the victim. However, in the case on hand, to prove the age of the victim, the prosecution has produced School Certificate



Crl.A.No.736 of 2022

and Transfer Certificate of the victim, in which, the date of birth of

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victim is mentioned and during trial, the victim also stated that she was aged about 16 years at the time of occurrence and the same was corroborated with the evidence of the mother of the victim/P.W.1. Therefore, this Court finds that the age of the victim at the time of occurrence was only 16 years and she has not completed 18 years. Therefore, at the time of occurrence she was a child under the definition of Section 2(1)(d) of POCSO Act.

15. As far as the commission of offence under Section 450 IPC is concerned the prosecution examined the victim as P.W.2 and she has clearly narrated that on 15.09.2017 after returning from the school between 3.00 to 3.30 p.m., she was doing her home work, at that time the appellant entered into her house from the back side entrance and when she questioned about the same, he locked the house and pulled her down and removed her dress and had committed wrong things. Then the victim became unconscious and the appellant left her house. After she recovered from unconsciousness, she went to rest room and found that there was lossing of blood from her private part. She further deposed that the appellant also threatened her not to reveal the said incident to

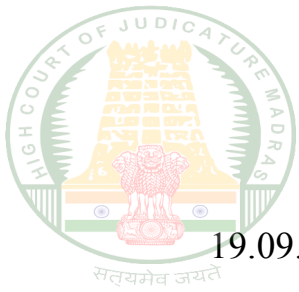


Crl.A.No.736 of 2022

anybody and therefore she did not inform the same to her mother. Once again on 17.09.2017, the accused came to her house and asked the victim that whether they can do the same thing like they did on the other day and she refused. At that time, her sister entered into the house and after seeing her sister, the appellant immediately threatened them not to reveal the same to anybody, otherwise he would kill them and left from that place. Therefore, they did not inform to her mother. On 19.09.2017 since the victim had a pain on her hip, on enquiry, she revealed the act committed by the appellant to her mother, who in turn, informed the same to P.W.5/member of the Child Help Line. The evidence of the victim was corroborated by the evidence of P.W.1, P.W.3 and P.W.5.

16. Further, P.W.5 clearly deposed that on 19.09.2017 the mother of the victim telephoned her at 7.45 a.m and informed the said incident. Therefore, she went to the house of the victim at about 8.15 hours and when she went there, she was informed that the victim had already left to Government Hospital, Perambalur. Then she went to the hospital and gathered information from the victim and she helped to lodge a complaint before the respondent/Police.

17. P.W.6/Village Panchayat President has deposed that on



Crl.A.No.736 of 2022

19.09.2017 when he was in the house, the mother of the victim informed him that the appellant misbehaved with the victim and when the same was questioned by her, the appellant beaten her and she requested to enquire about the same. On enquiry, he came to know about the said occurrence and also know that the sister of the victim telephoned to the Child Help Line and his evidence also corroborated with the evidence of P.Ws.1, 2, 3 and 5. P.W.1, 5 and 6 are only hearsay witnesses. However, from the evidence of P.W.2 and P.W.3 the prosecution has proved that the appellant entered into the house of the victim in the absence of adult members and hence, the offence committed by the appellant falls under Section 450 IPC. This Court while re-appreciating the entire evidence, finds that the prosecution had proved the said charge from the evidence of P.W.2 and P.W.3, which was subsequently corroborated by the hearsay witnesses P.Ws.1, 5 and 6.

18. As far as Section 506(i) IPC is concerned as already stated that the victim/P.W.2 and her sister/P.W.3 are the eye witnesses to the said occurrence. P.W.2 has stated that on 15.09.2017 when she was alone in her house, the appellant entered into her house and had committed penetrative sexual assault on her and also threatened her with dire



Crl.A.No.736 of 2022

consequences, if she revealed the same to any body and hence, she did not inform the said incident. On 17.09.2017 again the appellant came to the house of the victim when she was alone in the house, at that time P.W.3 entered into the house and on seeing her sister, the appellant immediately threatened them not to reveal the same to anybody, otherwise he would kill them and thereafter, left from the place. Therefore, from the evidence of P.Ws.2 and 3 the prosecution proved that the appellant threatened the victim and her sister with dire consequences. Subsequently, the same was corroborated with the evidence of hearsay witnesses P.W.1 and P.W.5. Therefore, this Court finds that the prosecution has proved the charge against the appellant for the offence under Section 506(i) IPC.

19. As far as penetrative sexual assault which falls under Section 3 (a), which is punishable under Section 4 of POCSO Act is concerned on the side of prosecution totally 16 witnesses were examined, out of which, the victim was examined as P.W.2 and she clearly deposed that when she was alone in her house the appellant had committed penetrative sexual assault on her and her deposition was corroborated with her previous statement recorded by the learned Magistrate under Section 164 Cr.P.C



Crl.A.No.736 of 2022

and the said statement was also marked as Ex.P2. Though there are minor

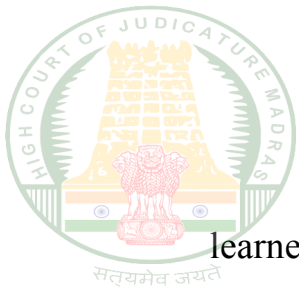
discrepancies in the previous statement and subsequent deposition of P.W.2, the same will not affect the case of the prosecution. Since the victim was a child and the appellant trespassed into the house of the victim in the absence of adult members and had committed sexual intercourse it comes under the definition of POCSO Act. The Doctor/P.W.14 had deposed that there was no forceful penetrative sexual assault. Even though with the consent of the victim girl the appellant had committed penetrative sexual assault, the alleged act committed by the appellant falls under Section 3(a) which is punishable under Section 4 of POCSO Act. Since the victim was a child and she has not completed the age of 18 years, the consent or non-resistance or non-protest are immaterial. Even if the victim girls yield for some extent for the offence committed by the culprits, since she is a child under the definition of 2(1)(d) of POCSO Act, consent is immaterial. Therefore, in the case on hand, the medical records shows that the victim was subjected to penetrative sexual assault even though there were no symptoms of forceful sexual assault, which shows that the victim has not protested the appellant. Once the Court finds that the victim is a child, the offence



Crl.A.No.736 of 2022

committed by the appellant falls under the POCSO Act. From the evidence of P.W.2 and P.W.14 and Ex.P7, the prosecution has proved that the victim was subjected to penetrative sexual assault. Further the subsequent contact of the appellant was proved by P.W.3, who also saw the appellant along with the victim on 17.09.2017. Once it is found that the victim was a minor and subjected to penetrative sexual assault by the appellant, as already stated that consent or non-resistance or non-protest are immaterial, therefore, the act committed by the appellant falls under Section 3(a), which is punishable under Section 4 of POCSO Act.

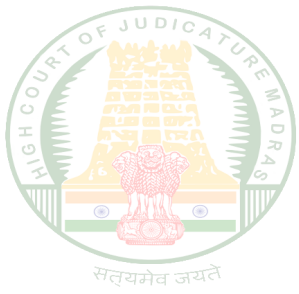
20. This Court, being an Appellate Court, as a final Court of fact finding while re-appreciating the entire evidence as discussed above, finds that the prosecution has proved its case beyond all reasonable doubt on the IPC offences. As far as the offence under POCSO Act is concerned, the prosecution has proved the foundational fact that at the time of occurrence the victim was a child and she was subjected to penetrative sexual assault by the appellant. Then there is a presumption under Sections 29 and 30 of the POCSO Act and it is for the appellant to rebut the presumption in the manner known to law. In the present the case the appellant has not rebutted the presumption. Even though the



Crl.A.No.736 of 2022

learned Legal Aid Counsel appearing for the appellant vehemently contended that there is no sufficient materials to prove the age of the victim and also pointed out some discrepancies and contradictions, as already stated that as far as the determination of the age of the victim is concerned, the prosecution has proved the age of the victim by producing Exs.P5 and P6 in which the date of birth of the victim is mentioned as 22.01.2001. As per Section 94(2)(ii) of the Juvenile Justice (Care and Protection) Act, 2015, this Court presumed that the age mentioned in the School Certificate/Ex.P5 and Transfer Certificate/Ex.P6 are genuine and taken the said certificates to fix the age of the victim, but the presumption has not been rebutted by the appellant in the manner known to law. Hence, this Court finds that the appellant has committed the charged offences and he is liable to be punished for the charged offences.

21. Therefore, this Court does not find any perversity in the appreciation of the evidence and whatever the discrepancies and contradictions that are pointed out by the learned Legal Aid Counsel appearing for the appellant are minor contradictions and not considered as material contradictions, which would not go to the root of the prosecution and the same would not affect the case of the prosecution.



Crl.A.No.736 of 2022

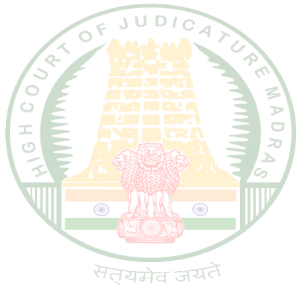
22. In fine, this Court does not find any merit in the appeal and

Criminal Appeal deserves to be dismissed and accordingly, the same is dismissed. The conviction and sentences passed by the learned Sessions Judge, Mahila Court, Perambalur in Spl.S.C.No.7 of 2018 are confirmed. Consequently, connected miscellaneous petition is closed.

23. The Legal Aid counsel appointed by this Court is entitled to legal fees as per Rules.

16.11.2022

Index: Yes/No
Speaking Order/Non-Speaking Order
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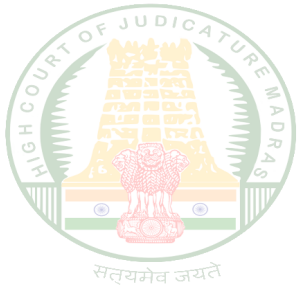


Crl.A.No.736 of 2022

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To

1. The Sessions Judge,
Mahila Court,
Perambalur.
2. The Inspector of Police,
All Women Police Station,
Perambalur District.
3. The Superintendent,
Central Prison,
Trichy.
4. The Public Prosecutor,
High Court, Madras.
5. The Deputy Registrar | with a direction to send back the
(Criminal Section), | original records, if any, to the
High Court, Madras. | trial Court



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Crl.A.No.736 of 2022

P.VELMURUGAN, J.

ms

CRL.A.No.736 of 2022
and
Crl.M.P.No.10140 of 2022

16.11.2022