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Crl.A.Nos.912 and 1142 of 2022

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on	:	23.11.2022
Pronounced on	:	06.12.2022

Coram:

THE HONOURABLE **MR. JUSTICE P.VELMURUGAN**

Criminal Appeal Nos.912 and 1142 of 2022

Criminal Appeal No.912 of 2022:

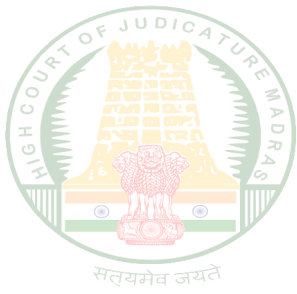
Satheeshkumar ... Appellant
Vs.

The State, represented by
The Inspector of Police,
All Women Police Station (East),
Coimbatore City.
(Crime No.5 of 2018) ... Respondent

Prayer : Criminal Appeal filed under Sections 374(2) of Criminal Procedure Code, praying to set aside the conviction and sentence imposed on the appellant by the learned Special Court for exclusive Trial of cases under POCSO Act, Coimbatore in Spl.C.C.No.27 of 2019, dated 09.11.2020 by allowing this appeal.

For Appellant : Mr.C.Munusamy

For Respondent : Mr.S.Sugendran
Additional Public Prosecutor



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Criminal Appeal No.1142 of 2022:

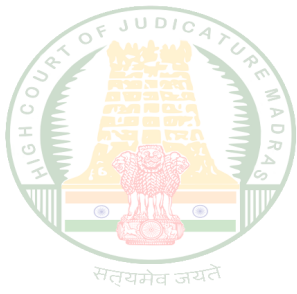
The State, represented by
The Inspector of Police,
All Women Police Station (East),
Coimbatore City.
(Crime No.5 of 2018) ... Appellant
Vs.
Satheeshkumar ... Respondent

Prayer : Criminal Appeal filed under Sections 377 of Criminal Procedure Code, praying to enhance the punishment to the minimum prescribed under the Act, on the respondent/accused passed in Spl.C.C.No.27 of 2019, dated 09.11.2020 for offence under Section 5(m) read with Section 6 of POCSO Act by the Special Court for Exclusive Trial of cases under POCSO Act, Coimbatore District.

For Appellant : Mr.S.Sugendran
Additional Public Prosecutor

COMMON JUDGMENT

These appeals in Crime No.5 of 2018 are filed challenging the same Judgment, therefore a common Judgment is passed herein. The ranking of the parties mentioned here is, as per the ranking in Criminal Appeal No.912 of 2022.



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2. This Criminal Appeal No.912 of 2022 has been filed to set aside the conviction and sentence imposed on the appellant by the learned Special Court for exclusive Trial of cases under POCSO Act, Coimbatore in Spl.C.C.No.27 of 2019, dated 09.11.2020.

3. This Criminal Appeal No.1142 of 2022 has been filed to enhance the punishment to the minimum prescribed under the Act, on the respondent/accused passed in Spl.C.C.No.27 of 2019, dated 09.11.2020 for offence under Section 5(m) read with Section 6 of POCSO Act by the Special Court for Exclusive Trial of cases under POCSO Act, Coimbatore District.

4. The respondent police registered the case in Crime No.5 of 2018 for the offences under Sections 7 and 8 of Protection of Children from Sexual Offences Act, 2012. After completing the investigation, respondent police have filed the charge sheet before Mahila Court, Coimbatore which taken the case on file in Spl.C.C.No.31 of 2018. The learned Judge after



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completing the formalities framed the charges against the appellant for the offences under Section 5(m) read with 6 of the Protection of Children from Sexual Offences Act, 2012. Subsequently transferred to the learned Principal District and Session Judge, Coimbatore, in Special Calendar Case No.27 of 2019. The learned Principal District Judge taken the case on file and renumbered assigned as Special C.C.No.6 of 2019. Subsequently, the case was transferred to the Special Court for Exclusive Trial of cases under POCSO Act, Coimbatore and the same was renumbered as in Special Calendar Case No.27 of 2019, since the offences are against child.

5. In order to substantiate the charges framed against the appellant, during the trial, on the side of the prosecution as many as 10 witnesses were examined as PW 1 to PW 10 and 12 documents were marked as Ex. P1 to P12. Besides that 1 material object was exhibited as MO1 on the side of the prosecution.

6. After completing the examination of prosecution witnesses, when the incriminating circumstances culled out from the evidence of prosecution witnesses were put to the appellant by questioning under



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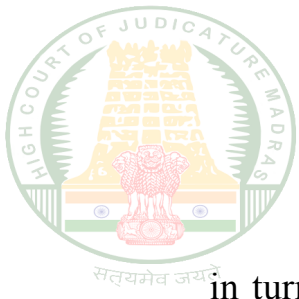
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Section 313 of CrPc, wherein he denied the same as false and pleaded not guilty. On the side of the defense, three witnesses were examined as DW1 to DW3 and no material object was exhibited.

7. Hearing the arguments advanced on either side and considering the materials, the trial court found guilt of the accused for the offence under Section 5(m) read with 6 of the Protection of Children from Sexual Offences Act, 2012 and the accused was convicted and sentenced to undergo 5 years and pay fine of Rs.2,000/- in default to undergo a further period of 1 year rigorous imprisonment for the above said offence.

8. Challenging the said judgment of conviction and sentence passed by the trial court, the accused has filed the present appeal.

9. The specific case of the prosecution is that on 23.03.2018, when the victim girl who is aged about 6 years was playing with her friends, the appellant called the victim and asked her to tell her name. He then took the child and removed her panties and inserted his fingers in her private part. When the victim shouted with pain, the accused immediately let her down. Thereafter, the victim informed her mother who is PW4 and PW4



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in turn, informed PW1 who is working in Child Line 1098, Don Bosco Illam. Then defacto complainant/PW1 made a complaint before the respondent police.

10. The learned counsel for the appellant would submit that the case of the prosecution is highly improbable and there is no independent witness examined on the side of the prosecution, except the mother of the victim. The medical certificate marked as Ex.P6 issued by Doctor/PW5 categorically states that there is no external injury on her body including the private part of the victim. The entire story of the prosecution was set up, on account of a previous enmity between the appellant's family and victim's family during fetching of drinking water in their street. While the defence side witnesses have categorically deposed that no such occurrence had taken place as alleged by the prosecution. He would further submit that the trial Court failed to appreciate the material evidence available on record in a proper perspective. The deposition of the witnesses have not shown any finger as against the accused and they have categorically deposed that no one has witnessed the occurrence. The prosecution witnesses themselves did not support the case of the

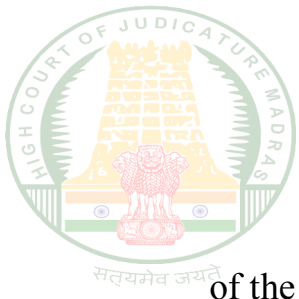


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prosecution. On the basis of uncorroborative evidence, the trial Court convicted the accused. He would further submit that there are number of contradictions among the testimony of the occurrence witnesses and they are quite unnatural and intangible and the Judgment of the trial Court is against the settled preposition of law laid down by the Hon'ble Apex Court and this Court on various decisions. The trial Court also failed to see that each and every witness are contradicting each other and it is totally unsafe to rely on the deposition given by them during the course of trial to convict the appellant. The appellant/accused has nothing to do with the alleged occurrence and he was made to suffer on account of the dispute arose during the fetching of drinking water in the pipeline situated in their street.

11. Further, he would vehemently contend that PW1 is neither the victim nor the parent of the victim and she is only a member of Child Help Line 1098 and she has locus standi to set the law into motion. When the mother of the victim is available, then genesis of complaint itself is doubtful. Further PW1 is not an eye witness, she is only a hearsay witness. The victim girl had not informed the PW1 directly. It is the case

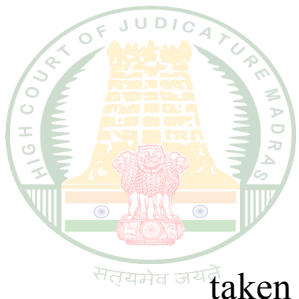


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of the prosecution that the victim girl informed her mother and in turn her mother informed PW1. Therefore, it is not known that as to whether the mother of the victim has informed the PW1, as spoken by her daughter or she has given any exaggerated version. He would submit that PW1 is neither a occurrence witness nor a immediate hearsay witness. In order to get publicity, the PW1 and to take vengeance against the appellant, the mother of the victim, had created a case, as if, the appellant had committed the alleged offence. Further, he would submit that there is a delay in filing the complaint and there is no proper explanation for the same. Further, the medical evidence does not corroborate with the evidence of the victim girl or any other prosecution witnesses which is fatal to the case of the prosecution. Further, he would submit that PW1/defacto complainant is not a sterling character and therefore, the person who is no way connected to the victim cannot set law into motion by filing complaint and based on that complaint, the respondent police could not register the case and investigate the matter.

12. Further, he would submit that the occurrence was said to have



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taken place in Annamar Kovil Street, Udaiyampalayam which is a prime locality and a residential area. It is not possible to commit such an offence in an open place in a residential area, where there are too many houses. The trial Court failed to consider the entire evidence and failed to visualise the situation. Therefore, under these circumstances, the learned counsel for the appellant prays that the appeal is liable to be allowed and the Judgment passed by the learned Special Court for exclusive Trial of cases under POCSO Act, Coimbatore is liable to be set aside.

13. The learned Additional Public Prosecutor appearing for the respondent in Criminal Appeal No.912 of 2022 and appellant in Criminal Appeal No.1142 of 2022 would submit that the case was registered against the appellant for the offence under Section 5(m) of POCSO Act, 2012. In order to substantiate the case, on the side of the prosecution, 10 witnesses were examined and on the side of the defence, 3 witnesses were examined. Though the trial Court found guilt of the appellant/accused for the offence under Section 5(m) of the POCSO Act, imposed a sentence of 5 years rigorous imprisonment and pay fine of Rs.2,000/- in default to undergo a further period of 1 year rigorous imprisonment, which is



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against the provisions of law.

14. Once the Court finds that the accused has committed an aggravated penetrative sexual assault, then he should be punished under Section 6 of the POCSO Act and minimum sentence for the offence under Section 6 of POCSO Act is 10 years. He further submitted that the trial Court has no power to reduce the sentence and impose a sentence which is below the minimum sentence. As per the Section 6 of POCSO Act the sentence to the accused shall not be less than 10 years and therefore, the trial Court ought not to have imposed a sentence less than 10 years. Therefore, the sentence of imprisonment imposed to the appellant/accused is liable to be set aside and sentence has to be enhanced from 5 years to 10 years atleast. Even though, the sentence may extend upto imprisonment for life and shall also be liable to fine, but the trial Court failed to take note of the same and imposed a sentence of 5 years which is below the minimum sentence and as per the section, minimum sentence is mandatory. The Court cannot grant below the minimum sentence, whatever the reasons maybe. In this case, the trial Court also has not even given any reason, as to why it has imposed 5



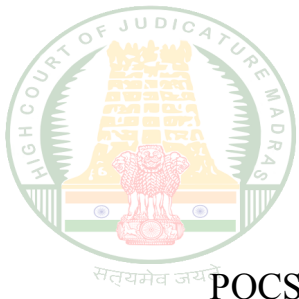
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years which is less than the minimum sentence prescribed under Section 6 of POCSO Act. Further, he would submit that imposition of less than minimum sentence is improper and incorrect which is against the purpose and object of POCSO Act.

15. The victim who was aged 6 years was examined as PW3. She has clearly narrated the occurrence. The trial Court has accepted the evidence of the victim who was examined as PW3. However, erred in awarding the sentence less than 10 years. Therefore, the sentence of the trial Court is liable to be enhanced.

16. Further, he would submit that evidence of the victim is corroborated with all the prosecution witnesses and the prosecution has proved its case beyond reasonable doubt, then the trial Court ought to have imposed a maximum sentence considering the age of the victim and nature of the offence. Even otherwise, the trial Court could have awarded a sentence which is not below the minimum sentence. Therefore, the State has filed the appeal in Criminal Appeal No.1142 of 2022 to set aside the sentence imposed by the trial Court for the offence under Section 5(m) of



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POCSO Act punishable under Section 6 of POCSO Act and appeal filed by them is liable to be allowed and the sentence has to be enhanced from 5 to 10 years or above.

17. Heard learned counsel for both sides. Perused the materials placed on record.

18. It is a specific case of the prosecution that the defacto complainant was working at Coimbatore, Ukkadam, Child Line 1098, Don Bosco Illam. The victim was aged about 6 years and she was studying LKG at Philomina School. Based on the complaint given by the PW1, the respondent police registered a case against the appellant/accused alleging that, at the time of occurrence, the victim girl, her sister and her friend were playing in front of her house situated in D.No.228, Annamaar Kovil Street, Udaiyampalayam. The accused/appellant on his way to his home, asked the victim girl to tell her name and subsequently, he took the victim girl and removed her panties. He then inserted his fingers into her vagina and committed the penetrative sexual assault on her as defined under Section 3(b) of POCSO Act. Since



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the victim girl was only 6 years old at the time of the occurrence, the act of the appellant/accused is aggravated penetrative sexual assault. Thereafter, the respondent police laid charge sheet before the Special Court for Exclusive Trial of Cases under POCSO Act, since the offence is against the child, which is exclusively triable by the Special Court.

19. In order to substantiate the said charge, on the side of the respondent/prosecution, totally 10 witnesses were examined and 12 documents were marked as exhibits. On the side of the defence, 3 witnesses were examined and no material object was marked.

20. In this case, the defacto complainant/PW1 who is a member of Child Help Line 1098 has clearly deposed that the mother of the victim informed her about the incident and thereafter she went to victim's house and ascertained the fact. After confirming that the victim girl was subjected to sexual assault, she immediately made a complaint before the respondent police. Since the mother of the victim was hesitating to go to the police station alone, as a member of Child Help Line, she filed a



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complaint against the appellant/accused, as she would be well versed about the procedure and also she would know where to approach and how to proceed with the case, therefore, nothing wrong in filing complaint by the defacto complainant herein instead of the mother of the victim. Even though a person who is a stranger to the victim girl or any person who has knowledge about the offence, can come forward and set the law into motion, by way of giving complaint before the police. The object of the POCSO Act also clearly enumerates that any person who has knowledge about the offence said to have committed in violation of the POCSO Act can set law into motion. Therefore, in the case on hand, the evidence of PW1/defacto complainant and mother of the victim/PW4 has clearly stated that her daughter informed about the penetrative sexual assault made by the appellant/accused. When she questioned the appellant/accused, there was no proper response. Therefore, she informed PW1, and PW1 in turn came to victim's house and after confirming that the victim girl was subjected to sexual assault, she made a complaint before the respondent police.

21. The evidence of victim girl corroborated with the evidence of



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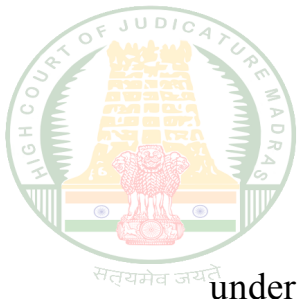
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PW1 and PW4. Though the learned counsel for the appellant stated that due to previous enmity between the appellant's family and victim's family, the victim's mother/PW4 foisted a false case against the appellant, the same is not acceptable. The appellant/accused has not produced any material evidence to substantiate the said motive. Due to a mere water dispute, no mother would go to that extent of giving false case to degrade the reputation and spoil the future of her own daughter. The evidence of the Doctor states that there is no external injuries due to the insertion of the finger of the appellant/accused and does not clearly state as to whether there was any wound in her private part. Section 3(b) of POCSO Act clearly states that

“a) ...

b) He inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of the child or makes the child to do so with him or any other person;”

22. Therefore, mere insertion is enough, the length of insertion or causing injury to the victim due to insertion are immaterial and the same are not an ingredient to attract Section 3 of POCSO Act. A mere insertion is enough to meet out Section 3 of POCSO Act, which is punishable



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under Section 4 of the Act. The learned Judicial Magistrate recorded the statement of the victim under Section 164 of CrPC which is marked as Ex.P3 which corroborates with the evidence of PW1 and PW4. PW2 who is a field worker at Coimbatore, Ukkadam, Child Line, don Bosco Illam also stated that on 24.03.2018 at 9.30 a.m. they received a call to their Child Line Office from PW4/mother of the victim stating that one Satheesh misbehaved with her daughter. So, they went to the victim's house and enquired the same. Therefore, it is clear that PW4 told her what the victim had spoken to her. Subsequently, they gave a complaint and the respondent police arrested the appellant. Therefore, the evidence of PW4 corroborated with the previous statement of the victim made before the learned Judicial Magistrate under Statement 164 of CrPC and the same was marked as Ex.P2. Ex.P2 the previous statement of the victim has clearly narrated the incident. The age of the victim was only 6 years and she was studying LKG at the time of the occurrence when she was playing in the street, the appellant called her and asked her name and then took her. Thereafter, he removed her undergarment and penetrated his finger into her private part. The appellant vehemently contended that there is a contradiction between the previous statement of the victim



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recorded by the learned Judicial Magistrate and the deposition of the victim before the trial Court and therefore, there is no aggravated penetrative sexual assault made out on the victim. However, the reading of the entire materials especially the evidence of PW1 to PW4 and Doctor/PW5 reveals that the victim was subjected to sexual assault. Though Doctor/PW5 stated that there is no external injury, it does not mean that there was no sexual assault.

23. This Court finds that the evidence of the victim is natural, cogent and consistent and there is no reason to discard the evidence of the victim. Therefore, once the evidence of the prosecutrix inspires the confidence of the Court, then the Court can record the conviction against the accused and the Court need not expect corroboration. It is not the case of the prosecution that in the presence of other witnesses, the appellant had committed the sexual assault on the victim. When a person is in same locality takes the victim who is also in the same locality, and only aged about 6 years, any other person even if at all seen while he was lifting the victim child would not suspect it. Though the area as stated by the respondent is a residential area, there is still a possibility of public not

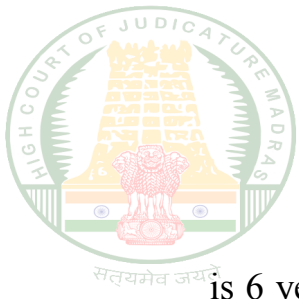


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noticing the incident, when the accused who is a neighbour took the victim girl and inserted his finger in her private part. It is not possible for everyone to notice each and every other persons activity. Since in this case, the appellant who is a neighbour said to have lifted the victim who is aged only 6 years, even the persons standing near them would not suspect. It is not the case of the prosecution that someone has seen the incident. Therefore, the Court can record the conviction with uncorroborative evidence when there is no eye witness and there is no reason to discard the evidence of victim. In the cases of this nature, the Court cannot expect eye witness. Therefore, mere non examination of any witnesses in the public may not be a sole ground to discard or disbelieve the evidence of the victim. Even though there are some contradictions here and there, the same are not material contradictions. Therefore, the trial Court rightly appreciated the evidence and convicted and sentenced the appellant.

24. The age of the victim is not disputed here. However, the medical records produced by the prosecution shows that age of the victim



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is 6 years. When she was examined by the learned Judicial Magistrate, it was deposed that the age of the victim is 6 years and she was studying LKG. In order to substantiate the age of the victim, aadhar card is produced and the same is exhibited as Ex.P4. Even in the Ex.P3, the date of birth of the victim is mentioned as 22.06.2011 and the date of occurrence is 23.03.2018. Therefore, the age of the victim is 6 years. Once the age of the victim is below 12 years and she was subjected to penetrative sexual assault the commission of offence termed into aggravated penetrative sexual assault, therefore the charge framed against the appellant is under Section 5(m) punishable under Section 6 of the POCSO Act.

25. Therefore, the trial Court had rightly appreciated the materials and convicted the appellant. However, the minimum sentence prescribed under Section 6 of POCSO Act is 10 years and above. Whereas, in this case, the trial Court awarded only 5 years, even after giving findings that the appellant committed offence under Section 5(m) punishable under Section 6 of the POCSO Act. Therefore, an appeal was filed by State against the sentence of imprisonment imposed by the trial Court under



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Section 6 of the POCSO Act.

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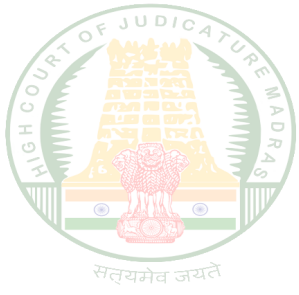
26. Section 6 of the POCSO Act, reads as follows:-

“...

6. Whoever, commits aggravated penetrative sexual assault, shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may extend to imprisonment for life and shall also be liable to fine.”

27. While re-appreciating the entire evidence, this Court finds that the appellant had committed the charged offence on the victim who is about 6 years old, and therefore, the appellant committed an offence under Section 5(m) punishable under Section 6 of the POCSO Act.

28. Therefore, the appeal filed by State in Criminal Appeal No.1142 of 2022 is allowed and the sentence of 5 years awarded by the Special Court for exclusive Trial of cases under POCSO Act, Coimbatore to the appellant is enhanced to 10 years.



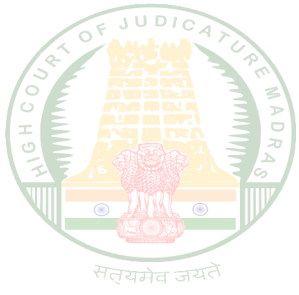
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29.The appeal filed by the accused in Criminal Appeal No.912 of 2022 is dismissed.

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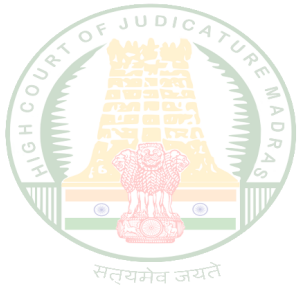
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- To
1. The Special Court for exclusive Trial of cases under POCSO Act, Coimbatore
 2. The Inspector of Police,
All Women Police Station (East),
Coimbatore City.
 3. The Superintendent,
Central Prison,
Coimbatore.
 4. The Public Prosecutor Officer, High Court, Madras
 5. The Section Officer, Criminal Section, High Court, Madras.



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P.VELMURUGAN, J

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**Pre-Deliver Order in
Criminal Appeal Nos.912 and 1142 of 2022**

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