

Crl.A(MD) No.499 of 2024

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Dated: 03.08.2024

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THE HONOURABLE MR. JUSTICE A. D. JAGADISH CHANDIRA
and
THE HONOURABLE MS. JUSTICE R. POORNIMA

Crl.A(MD) No.499 of 2024

Jahangir

... Appellant

vs.

The Inspector of Police,
All Women Police Station,
Thilagarthidal
Madurai
(Crime No.22 of 2020)

... Respondent

Prayer:- Criminal Appeal filed under Section 374(2) of Cr.P.C., to set aside the judgment of conviction and sentence dated 08.04.2024 passed by the Principal Special Court for Exclusive trial of cases under POCSO Act, Madurai in Spl.S.C.No. 101 of 2020.

For Appellant : Mr.P.Pavel

For Respondent : Mr.G.Karuppasamy Pandian
Counsel for State of Tamil Nadu (Crl.Side)

J U D G M E N T

A.D.JAGADISH CHANDIRA,J.

The instant criminal appeal is filed by the accused (hereinafter referred to as “the appellant”) seeking to set aside the judgment of conviction and sentence dated



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08.04.2024 passed by the Principal Special Court for Exclusive trial of cases under

POCSO Act, Madurai (hereinafter referred to as “the Trial Court”) in Spl.S.C.No.

101 of 2020 (hereinafter referred to as “the impugned judgment”).

2. *Vide* the impugned judgment, the Trial Court convicted the appellant and sentenced him as tabulated below:

Penal Provision	Imprisonment	Fine amount
Section 5(l) and 5(m) r/w. 6 of Protection of Children from Sexual Offences Act, 2012	Life Imprisonment for the remainder of the natural life	Rs. 25,000/- in default of which to undergo two years simple imprisonment
Period of detention already undergone by the appellant was ordered to be set off		

In so far as the award of victim compensation to the victim child (P.W.1) is concerned, the Trial Court had taken into consideration the age of the victim child (P.W.1) and the mental trauma suffered by her due to the commission of the offence by the appellant and had thereby awarded a compensation of Rs. 6,00,000/- (Rupees Six Lakhs Only) to the victim child (P.W.1) as per Section 33(8) of the POCSO Act, 2012 and G.O. (Ms.) No.33, dated 03.10.2020 issued by the Social Welfare and Nutritious Meal Programme SW(5)(2) Department, and further directed the awarded compensation amount to be disbursed from the "Tamil Nadu Child Victim Compensation Fund under the Protection of Children from Sexual Offences Act, 2012". Considering the age of the victim child, the awarded compensation was



directed by the Trial Court to be kept in a fixed deposit in any one of the nationalised bank as preferred by the defacto complainant till the victim child attains majority. Till then, the defacto complainant on behalf of the victim child was permitted by the Trial Court to withdraw the interest accrued thereon every once in three months and utilise the same for the welfare of the victim child.

3. The case of the prosecution, in a nutshell, is as follows;

3.1. The case of the prosecution is that the victim child (P.W.1) was aged about 10 years and was studying 5th Standard. The appellant was living upstairs with his wife, while his daughter and her family have been living in the ground floor of the same house. The grand daughter of the appellant used to play with the victim child (P.W.1) and hence the appellant was a known person to the victim child (P.W.1). Further, the appellant used to be alone at home after his wife would leave for her work.

3.2. In the above backdrop, on 08.06.2020 at about 10.00 a.m., while the mother of the victim child (hereinafter referred to “the defacto complainant (P.W.2)”) sent the victim child (P.W.1) to go to the Ganapathy Provisional Store to buy ‘uru dal’, the appellant had noticed the victim child (P.W.1) en route to the said store and thereby enticed the victim child (P.W.1) under the premise that his grand daughter had invited her to come play with her and took her upstairs to his portion of



the house. Where, the appellant with a sexual intent hugged, kissed, caught a hold of the victim child's (P.W.1) breasts and laid down the victim child (P.W.1) whilst removing her clothes and thereafter committed penetrative sexual assault on her. Unable to bear the pain the victim child (P.W.1) screamed and to avoid being heard the appellant her let her go.

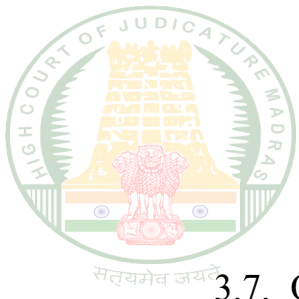
3.3. Again on 13.06.2020 at about 11.00 a.m., when his wife and daughter were not in the house and when the victim child (P.W.1) was playing with the other children who lived nearby, the appellant enticed her to his house, locked the door and thereby once again committed penetrative sexual assault on her. Since, the victim child (P.W.1) was experiencing some stomach pain she informed the defacto complainant (P.W.2) and thereby the defacto complainant (P.W.2) preferred a complaint (Ex.P.2) with the AWPS, Thilgar Thidal.

3.4. Based on the defacto complainant's complaint (Ex.P.2) an FIR (Ex.P13) was registered in Crime No.22 of 2020 for the offences under Sections 5(l), 5(m) r/w. 6 of the POCSO Act by the Special Sub-Inspector of Police (P.W.13). Thereafter, the Special Sub-Inspector of Police (P.W.13) forwarded the complaint (Ex.P.2) and the FIR (Ex.P13) to her higher officials as well as to the Trial Court.



3.5. The Inspector of Police (P.W.15) immediately took up the case for investigation went to the place of occurrence and inspected the same in the presence of the independent witnesses Arasammal (P.W.6) and Muniyammal(PW.7) and prepared an observation mahazar (Ex.P4) and rough sketch (Ex.P16). She further examined the defacto complainant (P.W.2), the father of the victim child (P.W.3) victim child (P.W.1), the maternal uncle (P.W.4) of the victim child (P.W.1) and the maternal aunt (P.W.5) of the victim child (P.W.1) and recorded their respective statements. Based on the statements received, she arrested the appellant at his residence and recorded his voluntary confession statement in the presence of the above mentioned independent witnesses Arasammal (P.W.6) and Muniyammal (PW.7).

3.6. Following which, the Inspector of Police (P.W.15) sent the victim child (P.W.1) to the Madurai Rajaji Government Hospital for medical examination through the Women Head Constable (P.W.8) and Women Grade 1 Police (P.W.9). Where Dr. Krishnaveni (P.W.11) examined the victim child (P.W.1) and issued a Medical Certificate (Ex.P.10) opining that although, the victim child's (P.W.1) hymen was intact and no injuries were noted, the hymen may or may not rupture depending on the actions of the perpetrator.



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3.7. On 17.06.2020, the appellant was produced for medical examination before Dr. Arunbalan (P.W.12) who a Medical Certificate (Ex.P.12) opining that it could not be conclusively said that the appellant was either impotent or was incapable of having sexual intercourse.

3.8. On 29.06.2020, the Judicial Magistrate, Additional Mahila Court, Madurai recorded the Statement (Ex.P.1) of the victim child (P.W.1) under Section 164 of Cr.P.C. Thereafter, on 23.07.2021, the Inspector of Police (P.W.15) sent a letter requesting the school certificate of the victim child (P.W.1) to the Headmistress (P.W. 14) of the victim child's school and obtained a School Certificate (Ex.P15) reflecting the age of the victim child (P.W.1).

3.9. Hence, on the basis of the investigation, the Inspector of Police (P.W.15), by way of an alteration report (Ex.P19), altered the offences from Sections 5(l), 5(m) r/w. 6 of the POCSO Act to Section 363 of IPC, Sections 342, 376(A) of IPC and Sections 9(l), 9(m) r/w Section 10 of POCSO Act. Thereafter, the Inspector of Police (P.W.15), continued the investigation and examined the remaining witnesses and recorded their respective statements.



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3.10. Lastly, on 26.08.2015, the final report was filed by the Inspector of Police (PW21), against the appellant for the offences under Section 363 of IPC, Sections 342, 376(A) of IPC and Sections 9(l), 9(m) r/w Section 10 of POCSO Act.

4. On appearance of the appellant, the provisions of Section 207 Cr.P.C. were complied with and thereupon, the case was committed to the Court of Session in S.C. No. 101 of 2020 and made over to the Trial Court. The Trial Court framed charges against the appellant for having committed the offences under Sections 5(l), 5(m) r/w. 6 of the POCSO Act. When the charges were read over and explained to the appellant, he pleaded not guilty.

5. In order to prove the prosecution case, the prosecution examined 15 witnesses as P.W.1 to P.W.15 and marked Ex.P1 to Ex.P19. After examination of the prosecution witnesses, when the appellant was questioned under Section 313 of Cr.P.C. on the incriminating circumstances appearing against him, he blatantly denied the same as false without offering any explanation whatsoever and although he filed a list of witnesses he did not examine any defence witnesses or mark any documents on his side.

6. The Trial Court, after hearing the arguments on both sides, found the appellant guilty and convicted and sentenced him as tabulated at paragraph 2, *supra*,



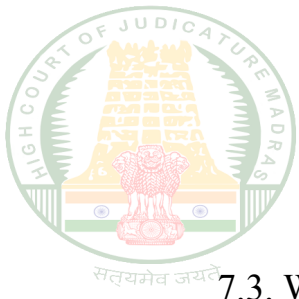
vide the impugned judgment and challenging his conviction and sentence, the instant criminal appeal has been filed by the accused i.e. appellant.

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7. The learned counsel for the appellant submitted as follows:

7.1. The appellant was denied the opportunity to a fair trial and thereby his fundamental rights under Article 21 of the Constitution of India stood infringed.

7.2. The appellant was not granted a fair opportunity of cross examining the material witnesses namely (1) the victim child (P.W.1), (2) the defacto complainant (P.W.2), (3) the father (P.W.3) of the victim child (P.W.1), (4) the maternal uncle (P.W.4) of the victim child (P.W.1), (5) Dr. Krishnaveni (P.W.11), (6) Dr. Arun Balan (P.W.12) and (7) the Special Sub-Inspector of Police (P.W.13) as the counsel appointed to represent the appellant before the Trial Court was not present on the date of examination of the aforesaid material witnesses. This would go on to show that although, a counsel was appointed to represent the appellant, the said counsel has not put in a sincere endeavor to effectively represent the appellant and thereby has overlooked the necessity to represent during the examination of the aforesaid material witnesses. Therefore, the illusory presence of the said counsel has infringed the appellant's right to legal aid under under Article 21 & 39A of the Constitution of India.



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7.3. When the appellant was not effectively represented before the Trial Court, it was the bounden duty of the public prosecutor to point out the same to the Trial Court and further it was the bounden duty of the Trial Court to take into consideration the same and to ensure that the appellant receives an effective legal representation while being tried for the charged offences. Failure of the Trial Court to ensure effective legal representation during the examination of the aforesaid material witnesses has occasioned in injustice to the appellant thereby leading to him being convicted and sentenced as as tabulated at paragraph 2, *supra*, *vide*.

7.4. Hence, the impugned judgment, which is a resultant of the lack of legal representation during the trial, is liable to be set aside as violative of the fundamental right to a fair trial under Article 21 of the Constitution of India.

8. The learned counsel appearing for the respondent fairly submitted that though the appellant was represented by a counsel, he has not cross examined the material witnesses owing to him being out of station on the days of the examination of the aforesaid material witnesses. However, in order to remedy the same, the said counsel had subsequently filed Crl.M.P. No. 503 of 2022 seeking to recall the aforesaid material witnesses, which in turn came to be dismissed by the trial Court *vide* its order dated 25.05.2022. Pursuant to the dismissal of the same, Crl. O.P.



(MD) No. 15671 of 2022 was filed before this Court challenging the said order dated

25.05.2022 and this Court had also dismissed the same *vide* its order dated

06.09.2022. Therefore, the learned counsel would fairly concede that when the

appellant was not effectively represented by his counsel during the examination of

the aforesaid material witnesses, it was the duty of the public prosecutor to have

pointed out to the Trial Court of the requirement of providing free legal aid and that

the failure to do so has occasioned in injustice to the appellant.

9. We have given our careful and anxious consideration to the rival contentions put forth by the counsel on either side and have thoroughly scanned through the entire evidence available on record and have also perused the impugned judgment of conviction and sentence.

10. On doing so, we find that although, the appellant had engaged a counsel on record, the said counsel did not represent the appellant during the examination of the aforesaid material witnesses. In this regard, we find **Ramanand v. State of U.P. [(2023) 16 SCC 510]** to be useful as the Apex Court therein while discussing what it meant to be effectively represented by a defense counsel had held that the presence of counsel on record means an effective, genuine and faithful presence and not a mere farcical, sham or virtual presence that is illusory, if not fraudulent. Hence, the mere factum of engagement of counsel by the appellant could not tantamount



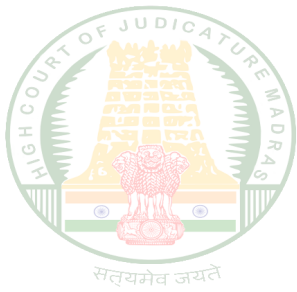
effective representation. Further, in the present case, it can be seen that during the trial the presence of the said counsel was nothing but a farce.

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11. Having found thus, we are tasked to ascertain the effect it would have on conviction and sentence of the appellant. In this regard, we find it useful to take note of **Mohd. Hussain v. State (Govt. of NCT of Delhi) [(2012) 2 SCC 584]** wherein the Apex Court had stressed upon the importance of the presence of a counsel during the examination of the prosecution witnesses to ensure a fair trial to the accused. The Apex Court had therein also highlighted that it was the duty of the court to ensure a fair trial to the accused and having highlighted thus remanded the case to the trial court therein for commencement of a fresh trial after ensuring that the accused was provided able and effective assistance of a counsel. The relevant extract of **Mohd. Hussain, supra**, is as follows;

“22. In Ram Awadh v. State of U.P. [1999 Cri LJ 4083 (All)] the Allahabad High Court held: (Cri LJ p. 4086, para 14)

“14. ... A duty is cast upon the judges before whom such indigent accused are facing trial for serious offence and who are not able to engage a counsel, to appoint competent persons for their defence. It is needless to emphasis that a Judge is not a prosecutor and his duty is to discern the truth so that he is able to arrive at a correct conclusion. A defence lawyer plays an important role in bringing out the truth before the Court by cross-examining the witnesses and placing relevant materials or evidence. The absence of proper cross-



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examination may at times result in miscarriage of justice and the Court has to guard against such an eventuality.”

23. The prompt disposition of criminal cases is to be commended and encouraged. But in reaching that result, the accused charged with a serious offence must not be stripped of his valuable right of a fair and impartial trial. To do that, would be negation of concept of due process of law, regardless of the merits of the appeal. The Criminal Procedure Code provides that in all criminal prosecutions, the accused has a right to have the assistance of a counsel and the Criminal Procedure Code also requires the court in all criminal cases, where the accused is unable to engage counsel, to appoint a counsel for him at the expenses of the State. Howsoever guilty the appellant upon the inquiry might have been, he is until convicted, presumed to be innocent. It was the duty of the court, having these cases in charge, to see that he is denied no necessary incident of a fair trial.

... 28. In view of the above discussion, I cannot sustain the judgments impugned and they must be reversed and the matter is to be remanded to the trial court with a specific direction that the trial court would assist the accused by employing a State counsel before the commencement of the trial till its conclusion, if the accused is unable to employ a counsel of his own choice. Since I am remanding the matter for fresh disposal, I clarify that I have not expressed any opinion regarding the merits of the case.”

12. A coordinate bench of this Court has also taken note of the **Mohd. Hussain**, *supra*, in **M. Kannan v. State [2017 SCC OnLine Mad 10874]** and has on consideration of the ratio therein has reiterated that effective legal assistance is an essential ingredient to fair trial and that when there is denial of a fair trial to the accused, the conviction and sentence thereof cannot be allowed to be sustained. Even



in **M. Kannan**, *supra*, the case was remanded to the trial court so as to afford an opportunity to the accused to cross examine the prosecution witnesses. The relevant

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extract of **M. Kannan**, *supra*, is as follows;

33. In *Mohd. Hussain @ Julfikar Ali v. The State (Govt. of NCT) Delhi* cited *supra*, on facts, similar to the case on hand, the Hon'ble Supreme Court found one Mr. Riyaj Ahmed, an Advocate, who was engaged by the accused appeared on behalf of the accused represented him and cross examined some of the witnesses and omitted to cross examine the others. Later on Mr. Riyaj Ahmed did not appear in the Court on some days. At that time, the Court appointed one Mrs. Sadhna Bhatia as Amicus Curiae to defend the accused at State expenses. Ultimately the accused was convicted. The Court thus found that there was no proper legal assistance to the accused. The Hon'ble Supreme Court held that for the failure of the Advocate to appear and extend legal assistance by cross examining the witness, the accused cannot be blamed. The Supreme Court held that though right to speedy trial is a fundamental right and that rigid time limit is not countenanced, but in the facts of the case, since there was denial of fair trial, violating Article 21 of the Constitution of India, the conviction and sentence should be set aside.

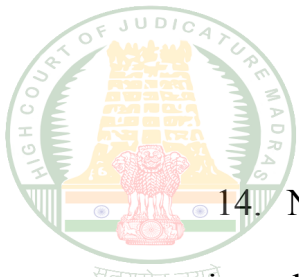
34. In the instant case, the facts are almost similar. For failure and gross dereliction of duty of the learned counsel engaged by the accused, the accused cannot be penalized. In our considered view, the trial without legal assistance cannot be regarded as reasonable, fair and just. As held by the Hon'ble Supreme Court, it is an essential ingredient of reasonable, fair and just procedure to an accused who is to seek his liberation through the Court process that he should have effective legal assistance. Therefore, we hold that in the instant case, there is denial of fair trial to the appellant and hence, the conviction and sentence cannot



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be allowed to sustain and the matter needs to be remanded back to the trial Court so as to afford sufficient opportunity to the accused to cross examine the witness and to examine witnesses in defence.

13. On perusal of **M. Kannan, supra**, we are also of the same view that the ratio in **Mohd. Hussain, supra**, would necessarily come to the aid of an accused who has been denied a fair opportunity of cross examination owing to the illusory presence of his counsel. Even in the present case, although the appellant had engaged a counsel, it is unfortunate that the appellant has not been effectively represented by the said counsel during the examination of the aforesaid material witnesses thereby ultimately resulting in the conviction and sentence of the appellant. Although, the said counsel has attempted and failed to resolve the situation by filing Crl. M.P. No. 503 of 2022 and Crl. O.P. (MD) No. 15671 of 2022 we find there being an imminent need for the cross examination of the material witnesses before convicting the appellant. As stated above the appellant has a fundamental right to a fair trial and considering the peculiar nature of the present case, wherein the conviction has stemmed from the infringement of such fundamental right, the dismissal of Crl. M.P. No. 503 of 2022 and Crl. O.P. (MD) No. 15671 of 2022 can not be the sole basis for sustaining the conviction and sentence of the appellant.



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14. Notwithstanding everything that has been discussed above, we are conscious that the trial in the present case is for the offenses under the POCSO Act, 2012 and that Section 35 to 37 of the POCSO Act, 2012 serves as a safeguard to protect the interests of the victim child (P.W.1). Therefore, as a coordinate bench in **M. Kannan, supra** has struck a balance between the interests of the victim child and the fundamental right of the accused, we are also inclined to strike a balance in the present case.

15. In light of the above discussion, we find it incumbent to resort to **Suhas Chakma v. Union of India, [(2024) 16 SCC 1]** and **Ashok v. State of Uttar Pradesh [(2025) 2 SCC 381]** wherein the Apex Court has laid emphasis on the need to appoint a legal aid counsel at all material stages of the trial to ensure a fair trial to the accused. The relevant extract of **Ashok, supra**, is as follows;

38.1. It is the duty of the Court to ensure that proper legal aid is provided to an accused;

38.2. When an accused is not represented by an advocate, it is the duty of every Public Prosecutor to point out to the Court the requirement of providing him free legal aid. The reason is that it is the duty of the Public Prosecutor to ensure that the trial is conducted fairly and lawfully;

38.3. Even if the Court is inclined to frame charges or record examination-in-chief of the prosecution witnesses in a case where the



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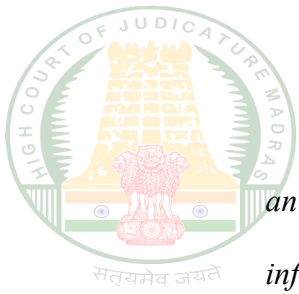
accused has not engaged any advocate, it is incumbent upon the Public Prosecutor to request the Court not to proceed without offering legal aid to the accused;

38.4. It is the duty of the Public Prosecutor to assist the Trial Court in recording the statement of the accused under Section 313 of the CrPC. If the Court omits to put any material circumstance brought on record against the accused, the Public Prosecutor must bring it to the notice of the Court while the examination of the accused is being recorded. He must assist the Court in framing the questions to be put to the accused. As it is the duty of the Public Prosecutor to ensure that those who are guilty of the commission of offence must be punished, it is also his duty to ensure that there are no infirmities in the conduct of the trial which will cause prejudice to the accused;

38.5. An accused who is not represented by an advocate is entitled to free legal aid at all material stages starting from remand. Every accused has the right to get legal aid, even to file bail petitions;

38.6. At all material stages, including the stage of framing the charge, recording the evidence, etc., it is the duty of the Court to make the accused aware of his right to get free legal aid. If the accused expresses that he needs legal aid, the Trial Court must ensure that a legal aid advocate is appointed to represent the accused;

...38.11. The right of the accused to defend himself in a criminal trial is guaranteed by Article 21 of the Constitution of India. He is entitled to a fair trial. But if effective legal aid is not made available to



an accused who is unable to engage an advocate, it will amount to infringement of his fundamental rights guaranteed by Article 21;

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16. Therefore, as stated in **Ashok**, *supra*, the Trial Court ought to have ensured that proper legal aid was provided to the appellant when the appellant's counsel failed to effectively represent the appellant during the examination of the aforesaid material witnesses. The Trial Court has erred in simply proceeding with the examination of the aforesaid material witnesses without ensuring a fair opportunity of cross examination to the appellant. Hence, we reiterate that the appellant has been denied a fair trial whereby his fundamental right under Article 21 of the Constitution of India has been infringed. The infringement of the appellant's right is sufficient prejudice to vitiate the trial thereby warranting the conviction and sentence thereof to be set aside. Therefore, in our considered view, in order to provide a fair opportunity of cross examination to the appellant, the matter ought to be remanded to the Trial Court to consider the matter afresh.

17. In the result, the Criminal appeal stands partly allowed. The impugned judgment of conviction and sentence dated 08.04.2024 passed by the Principal Special Court for Exclusive trial of cases under POCSO Act, Madurai in Spl. S.C. No. 101 of 2020 is set aside and the case in Spl. S.C. No. 101 of 2020 is remanded to the Principal Special Court for Exclusive trial of cases under POCSO Act, Madurai



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to consider and decide the case afresh, after providing an opportunity to the appellant for cross examination of prosecution witnesses. The Principal Special Court for Exclusive trial of cases under POCSO Act, Madurai shall proceed with the trial in Spl. S.C. No. 101 of 2020 by retaining the available chief examination of the prosecution witnesses and by providing an opportunity to the appellant to cross examine the prosecution witnesses who were not cross examined earlier. If the appellant is unable to appoint a counsel of his choice, the Principal Special Court for Exclusive trial of cases under POCSO Act, Madurai shall appoint the Chief Legal Aid Defence Counsel, who shall effectively represent the appellant. If any incriminating circumstances appear in the evidence as against the appellant during the cross examination, the procedure as per Section 313 of CrPC is to be followed. Since, the appellant is still in custody, he shall be produced before the Principal Special Court for Exclusive trial of cases under POCSO Act, Madurai, for further remand and the trial shall be concluded as expeditiously as possible preferably within a period of three months from the date of receipt of a copy of this Judgment. It is made clear that the trial Court shall ensure that the witnesses recalled shall be cross examined on the same day of their presence.

[A.D.J.C.,J.] [R.P.,J]
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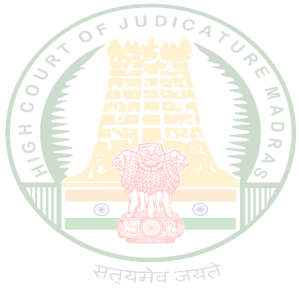
1.The Principal Special Court for
Exclusive trial of cases
under POCSO Act, Madurai

2.The Inspector of Police
All Women Police Station,
Thilagarthidal
Madurai

3.The Additional Public Prosecutor
Madurai Bench of Madras High Court, Madurai

4.The Section Officer
Criminal Section (Records)
Madurai Bench of Madras High Court
Madurai.

5.The District Legal Services Authority,
Madurai



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