

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on	: 22.02.2021
Pronounced on	: 12.03.2021

Coram:

THE HONOURABLE MR. JUSTICE P.VELMURUGAN

Criminal Appeal No.41 of 2021

State represented by :
The Inspector of Police,
All Women Police Station,
Udhagamandalam,
The Nilgiris District
(Crime No.1 of 2018)

... Appellant

Vs.

Dinesh

... Respondent

Prayer : Criminal Appeal filed under Sections 378 (i) of Criminal Procedure Code, to allow the appeal and set aside the judgment of acquittal of the respondent/respondent in Spl.C.C.No.6 of 2018 dated 18.12.2019 by the learned Sessions Judge of Magalir Neethimandram (FTMD), Udhagamandalam at Nilgiris and convict the respondent/respondent for the charges framed against him.

For Petitioner : Mr.K.Madhan,
Government Advocate (Crl.Side)

For Respondent : M/s.A.Veeramarthini
Legal Aid Counsel

J U D G M E N T

This Criminal Appeal has been filed against the Judgment dated 18.12.2019 in Spl.C.C.No.6 of 2018 on the file of the Sessions Judge of Magalir Neethimandram (FTMD), Udhagamandalam at Nilgiris.

2. The Appellant/police registered the case against the respondent in Crime No.1 of 2018 for the offence under Section 9(m) read with 10 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter called as POCSO Act) and Section 506(i) of IPC. After the investigation, they laid the charge sheet against the respondent before the Sessions Judge, Mahila Court, Udhagamandalam since the offence against the Women especially minor child falls under the POCSO Act. The learned Special Judge had taken the charge sheet on file in Spl.C.C.No.6 of 2018 and framed the charge against the respondent/accused.

3. On the side of the prosecution, in order to prove the charges as many as 18 witnesses were examined as P.W.1 to P.W.18 and 15 documents were marked as Exs.P1 to P15. No material object was

exhibited. On the side of defence, no witness was examined. No document was marked. After completing the examination of prosecution witnesses, incriminating circumstances were culled out from the evidence of the prosecution witnesses. However, the appellant denied all the allegations as false. After trial and hearing the arguments, the Trial Judge acquitted the respondent by holding that the prosecution has failed to prove the charges beyond reasonable doubt. Now, challenging the said judgment of acquittal, the State has filed the present appeal before this Court.

4. The learned Government Advocate (Criminal Side) would submit that the victim child was 7 years old and the parents of the victim child are coolie workers and they were residing in the work spot. The victim child, along with her brother, was staying in their grandmother's house. The victim child was studying in Shri Shanthi Vijay Girls Higher Secondary School, Ooty and only during the vacation holidays they go to their parents house. The grandmother of the victim child was not feeling well. She was admitted in the hospital and the mother of the victim child

and the sister of the mother of the victim child were taking care of their mother in the hospital in turn basis. At that time, the victim child and her brother were alone in the grandmother's house and nobody was there. At that time, the respondent/accused lifted the victim child and bite her cheek and also lips which made the victim child to cry. The brother of the victim child also pulled the hands of the respondent/accused and asked him to leave his sister, at that time, mother of the victim child came from the hospital to the house. She saw the victim child with the respondent and asked him why the victim child is crying. He stated that he came there simply to play with the victim child and left the place. Since, the victim child was still crying, her mother asked her why she is crying even though the respondent had left her. The victim child informed that the respondent had bitten her on cheek and lips. The mother also enquired her son and thereafter they went to the house of the respondent and at that time the respondent was not there. Thereafter, the wife of the respondent told that if he comes she will retain him. Next day, when the P.W.1 went to his house, he could not be found; again and

again though she went to his house 2 or 3 times, he was not in his house. Thereafter, they have approached police and lodged a complaint.

5. There was no eye witness except P.Ws. 2 and 3, who are the victim child and her brother. Specific case of the prosecution is that, in the absence of adult members in the house, since the grandmother was in the hospital and mother and her sister were in the hospital in turn basis, the respondent had lifted the victim child and bitten her cheeks and lips. P.W.3, brother of the victim child, was an eye witness and he also deposed the same. Though, they produced the victim child before a Doctor, the Doctor has stated that she was not subjected to any penetrated sexual intercourse. Based on the Doctor's evidence, the respondent was acquitted. According to the learned Government Advocate, the learned Trial Judge gave importance to the immaterial contradictions and failed to note that the victim child is 7 years old. Her brother who is only 9 years old and they had clearly and categorically made a statement when they were produced before the learned Judicial Magistrate for recording statement under Section 164 Cr.P.C and the same was also marked as

Ex.P2. Ex.P2 clearly shows that the victim child has narrated the occurrence. Though, she has clearly stated that her parents are living separately and they used to visit their parents house during vacation and holidays and the parents used to come once in a year to her grandmother's house, P.W.1, mother of the victim child, had stated that her mother was not feeling well and admitted in the hospital and therefore no one was there to look after her, she and her sister came in turn basis and went to the hospital. The Trial Court gave importance to immaterial contractions viz., at the time of occurrence, the victim child and her brother alone were there in their grandmother's house, there are no independent witness and acquitted the respondent which warrants interference.

6. The learned counsel for the respondent/accused would submit that there is no eye witness in this case and the respondent is also a married man, has children and like his children he simply played with the victim child and there was no sexual intent. The Doctor's evidence also corroborated the same. Even though there are neighbours, no

independent witness was examined and thus, prosecution failed to prove the case. The Trial Court, rightly appreciated the fact that there is no independent witness ; there is no corroboration and the Doctor's evidence clearly shows that there is no bite mark and there is no injuries and therefore the Trial Court rightly disbelieved the case of the prosecution and acquitted the respondent and that there is no merit in this appeal.

7. Heard the learned Government Advocate (Criminal Side) appearing for the State and learned counsel appearing for the respondent and perused the materials available on record.

8. The case of the prosecution is that the parents of the victim child are coolie workers and they were residing in the work spot which is faraway from the place where the victim child staying with her grandmother. The victim child, along with her brother, was staying in their grandmother's house. The victim child was studying in Shri Shanthi Vijay Girls Higher Secondary School, Ooty and only during the vacation holidays they go to their parents house. The grandmother of the victim

child was not feeling well. She was admitted in the hospital and the mother of the victim child and the sister of the mother of the victim child were taking care of their mother in the hospital in turn basis. During that time, the victim child and her brother were alone in the grandmother's house and nobody was there. At that time, the respondent/accused lifted the victim child and bite her cheek and also lips which made the victim child to cry. The brother of the victim child also pulled the hands of the respondent/accused and asked him to leave his sister, at that time, mother of the victim child came from the hospital to the house. She saw the victim child with the respondent and asked him why the victim child is crying. He stated that he came there simply to play with the victim child and left the place. Since, the victim child was still crying, her mother asked her why she is crying even though the respondent had left her. The victim child informed that the respondent had bitten her on cheek and lips. The mother also enquired her son and thereafter they went to the house of the respondent and at that time, the respondent was not there. Therefore, they registered the case against the respondent.

9. (a) In this case, a specific charge was framed against the respondent under Section 9(m) read with 10 of POCSO Act as the victim child is below 12 years old and the offence is one punishable under Section 10. The specific allegation is that the respondent, who is also neighbour and residing in the same locality, in the absence of any adult member in the house, approached the victim child and her brother where they were playing in the house, lifted the victim child and bite her cheek and also kissed her. The case was registered.

(b) In order to substantiate the case of the prosecution, the mother of the victim, who is the complainant was examined as P.W.1 and she has clearly narrated that on the date of occurrence i.e., on 17.04.2018, she went to hospital since her mother was admitted in the hospital; at that time, the victim child and her elder brother alone were there. The victim child was examined as P.W.2. She has clearly narrated that when she was playing in the house, her grandmother was in the hospital and the mother went to help the grandmother. When she was inside her grandmother's

house, the respondent came inside the house of the grandmother and lifted her. Since she cried, he left her. After sometime, she hid and leaped out and saw whether the respondent had left the house and at that time, the respondent who was hiding, came and lifted the victim child and bite on her cheek and lips. The victim child cried and on seeing that her elder brother P.W.3 asked the respondent to leave his sister. Subsequently, the mother of the victim child came from the hospital and questioned him, immediately, the respondent left the place. Thereafter, the mother enquired about it. The victim child informed her about the occurrence. The elder brother of the victim child was also examined as P.W.3. He has clearly narrated the same which corroborated the evidence of P.W.2 the victim child.

(c) One of the eye witnesses was examined as P.W.8 who has clearly narrated that on 17.04.2018 at about 5.30 p.m. the victim child was standing in her grandmother's house. The respondent was also standing near the victim child and she shouted as "leave me leave me". At the time the respondent bite the mouth of the victim child. When

P.W.8 tried to go near the place, the mother of the victim child reached that place and P.W.8 also shouted at the respondent and her evidence was not shattered.

(d) The victim child was produced before the Doctor and the doctor who has given the evidence has stated that he found no bite mark. However, the settled preposition of law is that the ocular evidence would prevail over the medical evidence. Further the bite mark would be appeared depending upon the force used by the person who bite. However, since because there was no bite mark, it cannot be stated that the evidence of the victim child cannot be believed. It depends upon the force used by the respondent.

(e) The question to be decided herein is, as to whether the respondent, with sexual intent, touched the victim child? As to whether any bite mark was found or not is not the matter. Even though, there is no bite mark, mere touching of the child with bad intention itself is an offence under Section 9(m) read with 10 of POCSO Act and even though

the victim child stated that she had hidden and searched the respondent who did not go and subsequently he pulled her hand and lifted her and bite her mouth. P.W.3, the brother of the victim child has clearly stated that he saw that he bite her sister on cheek and lip and when he asked him to leave her, he did not leave, and at that time, mother came. P.W.8 has stated that he saw the respondent while lifting and biting the victim child.

10. In order to prove the age of the victim child, the birth certificate of the victim child was marked as Ex.P10. As per Ex.P10, the date of birth of the victim child is only 04.09.2010. The date of the occurrence is on 15.04.2018. Therefore, at the time of occurrence, the age of the victim child is only 9 years old. The victim child was also produced before the Judicial Magistrate for recording the statement under Section 164 Cr.P.C and in which also the victim child has clearly narrated the incident before the learned Magistrate that the respondent lifted and bite her and at that time her brother also asked the respondent to leave his sister and subsequently her mother came. Even though, the statement

recorded under Section 164 Cr.PC is not substantive evidence but can be used for corroboration or contradiction. The evidence of the victim child was corroborated by the evidence of P.W.3 brother, P.W.8 one of the neighbours. Immediately when the child was produced within a reasonable time before the Judicial Magistrate, she has also clearly narrated the occurrence. In this case, there is no reason to disbelieve the evidence of the victim child or other eye witnesses viz., P.Ws.3 and 8. There is no necessity to make a false complaint. If at all the respondent has not committed any offence and casually lifted the victim child, without any sexual intention she might not have informed her mother and also the mother would not have taken the same that much serious. The victim child would felt that the respondent touched the victim child with bad intention therefore she was crying and when her mother asked her she revealed the same.

11. Therefore, considering the facts and circumstances of the case, this Court finds that the prosecution has proved the charge framed against the respondent for the offence under section 9(m) r/w.10 of the

POCSO Act. The Trial Court failed to consider the materials, oral and documentary evidence and eye witnesses. The reason to discard the evidence of the victim child and the complainant, is against law and the Trial Court instead of appreciating the evidence of victim child and the other eye witnesses has simply relied on the evidence of the Doctor. Therefore, this Court finds that the finding of the Trial Court is perverse.

12. Normally, the Appellate Court will not interfere with the decision of the Trial Court and will not interfere with the judgment of acquittal, unless the appreciation of evidence is perverse. If there are two views are possible, the Appellate Court cannot take one of the other views and convict the respondent/accused. But, however in this case, no other view is possible since the victim child has clearly stated more than once, before the mother, also before the Magistrate and subsequently deposed before the Court during the trial. The brother of the victim child was also present at the time of occurrence. He also corroborated her evidence. Moreover, one neighbour P.W.8 has also clearly corroborated the evidence of P.W.2 victim child. Further, he has stated that soon after

the occurrence when the respondent was with the victim, the mother of the victim also reached the place of occurrence. P.W. 8 also stated that when she tried to approach the respondent, at that time, the mother of the victim child also almost reached the place and therefore, the respondent stopped and the mother has also stated that when she approached her daughter she was crying and when questioned, he has stated that simply she is crying and stated that he has not done anything. The mother of the victim child tried to pacify her daughter. Since the victim child was still crying, after the respondent left the place she enquired why still she is crying. She stated that the respondent lifted the victim child, bite her cheek and mouth. Her son also narrated the same as stated by the victim child P.W.1

13. From the combined reading of evidence of P.Ws.1, 2, 3 and 8, this Court finds that the prosecution has clearly substantiated the charge framed against the respondent for the offence under section 9(m) r/w.10 of the POCSO Act and the Trial Court failed to appreciate the evidence and ignored the object of the Act for which it was enacted and simply

acquitted the respondent/accused on the ground of immaterial contradictions and discrepancies. The eye witnesses have clearly stated that the respondent lifted the victim child and bite her cheek and lips. Though the medical evidence does not shown anything about bite mark, it is settled proposition of law that the ocular evidence has to prevail over the medical evidence. Therefore the finding recorded by the Trial Court is perverse and liable to be set aside, and is accordingly set aside. However, there is no evidence to convict the respondent for the offence under section 506(i) of IPC.

14. The Criminal Appeal is partly allowed and this Court comes to the conclusion that the respondent has committed an offence under Section 9(m) read with Section 10 of the POCSO Act and he is liable to be punished under Section 10 of the POCSO Act. He is directed to appear before this Court on 17.03.2021 for question of sentence.

12.03.2021

Index:Yes/No

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Note:Issue order copy on 17.03.2021

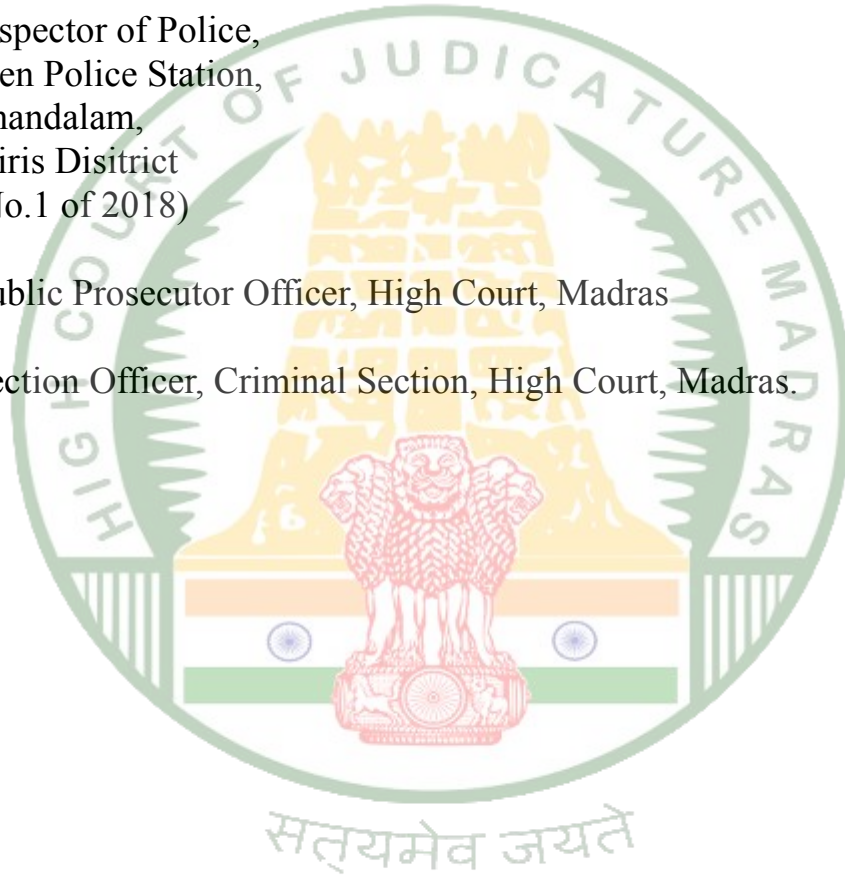
To

1. The Sessions Judge,
Magalir Neethimandram (FTMD),
Udhagamandalam at Nilgiris

2. The Inspector of Police,
All Women Police Station,
Udhagamandalam,
The Nilgiris District
(Crime No.1 of 2018)

3. The Public Prosecutor Officer, High Court, Madras

4. The Section Officer, Criminal Section, High Court, Madras.



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