

Serial No. 03
Regular List

HIGH COURT OF MEGHALAYA
AT SHILLONG

Crl.A.No.13/2022

Date of Order: 23.03.2023

Sunshine Kharpan Vs. The State of Meghalaya & 2 ors

Coram:

Hon'ble Mr. Justice Sanjib Banerjee, Chief Justice
Hon'ble Mr. Justice W. Diengdoh, Judge

Appearance:

For the Appellant : Mr. K.S. Kharshiing, Adv with
Mr. P.V. Kharmawshun, Adv

For the Respondents : Mr. K. Khan, PP with
Mr. S. Sengupta, Addl. PP

i) Whether approved for reporting in Law journals etc.: Yes/No

ii) Whether approved for publication in press: Yes/No

JUDGMENT: (per the Hon'ble, the Chief Justice) (Oral)

The appeal arises out of a judgment of March 30, 2022 and the order pronounced thereupon on March 31, 2022 by which the appellant has been sentenced under Section 6 of the Protection of Children from Sexual Offences Act, 2012 to imprisonment for 10 years and a fine of Rs.10,000/. In default of payment of the fine, the appellant is to undergo further imprisonment for six months. No separate sentence was passed for the commission of the offence under Section 4 of the Act of 2012 or under Section 376(2) of the Penal Code, 1860. The appellant was also found

guilty under Section 506, second part, of the Penal Code and sentenced to seven years' imprisonment. Such sentence is to run concurrently with the larger sentence passed under Section 6 of the Act of 2012. The period of detention already undergone was required to be set off from the total period covered by the sentence.

2. According to the appellant, there was no evidence of penetrative sexual assault and even the person who counselled the survivor shortly after the first information report was lodged, deposed that the survivor did make an allegation of penetration. The appellant relies on the deposition of such counsellor. In her testimony before court, the counsellor clearly stated that the survivor had told her that there was no penetration.

3. A medical examination was conducted on the survivor on the day that the FIR was lodged on November 13, 2013. The survivor complained of pain while walking, urinating and defecating, but her undeveloped genitals, according to the medical examiner, did not show evidence of any recent intercourse or of the survivor being accustomed to sexual intercourse. The medical examiner, however, observed that the possibility of recent sexual intercourse could not be ruled out, due to the presence of congestion around the survivor's vagina.

4. Elsewhere in the report, while describing the genitals of the survivor, the medical examiner discovered the hymen to be intact. Even though the two-finger test has now gone out of practice that it is frowned

upon, the medical examination report of November 13, 2013 reveals that the undeveloped vagina admitted only one fingertip when the medical examiner attempted to gauge the same.

5. The appellant contends that in the context of the counsellor's assertion that the survivor informed the counsellor that there was no penetration suffered by her and the medical report revealing that there may not have been any penetration, the case of penetrative assault was not made out and Sections 4 and 6 of Act of 2012 could not have been brought into play. The appellant maintains that for an act to amount to penetrative sexual assault, the obvious requirement is of penetration in the mouth or vagina or urethra or anus, but the medical report in this case does not speak of penetration at all.

6. However, there is no doubt that the survivor asserted penetration, but not in clear terms in her initial statement. In her statement recorded under Section 164 of the Code of Criminal Procedure, 1973, the survivor merely claimed as follows regarding the incident that was alleged to have taken place on October 26, 2013:

“On the 26th day of the tenth month of this year, u Tynshain took out my pant and he closed my mouth with a cloth, then he said if you tell your father or mother I will kill, I will hit I will beat. After he took off my pants he slept on top of me...”

7. Thus, the clear assertion in the initial statement of the survivor was that she was molested, but there was no positive assertion of

penetration. In her deposition at the trial, the survivor said the following in respect of the incident that she claimed to have taken place on October 26, 2013:

“On 26.10.2013, at night time when “Khadeng” was not present at home and her children were already sleeping, the accused came to my room and directed me to open my clothes, but I did not obey him and he opened my clothes by himself and made me naked and he opened his own pant, then he was on top of me and inserted his male organ inside my vagina. After he raped me, he threatened me not to inform “Khadeng” and my parents or else, he will kill me.”

8. The survivor went on to recall that the incident took place on a Saturday, whereupon on the next day she left her “Khadeng’s” house and returned home. Upon her return, the parents required the survivor to go back to her “Khadeng’s” house but she refused to do so. She then recalled:

“On the next day i.e. Monday my parents forced me to go back to “Khadeng’s” house and it was only then I informed them about the incident.”

9. The counsellor, who was called as PW-7, clearly indicated that she inquired of the survivor if there was any penetration or whether she was pregnant or she was only molested, whereupon the survivor “told me that there is no penetration, then I started my counselling.”

10. The medical examiner was called as PW-10 and she confirmed having prepared the medical report, obtained samples and carried out a general examination of the survivor and even of the then accused. She reiterated that on examination of the private parts of the survivor, she found

that there was presence of congestion around the vagina of the survivor and the survivor also complained of pain while walking, urinating and defecating. It does not appear that she was cross-examined at all. Thus, both her observation as to the possibility of recent penetration into the vagina and the discomfort suffered by the survivor as a result of possible penetration remain uncontroverted.

11. On the basis of the credible statement of the survivor, it is apparent that a case of molestation was made out. Though the appellant herein merely denied the statements made against him by the survivor in course of the appellant's examination under Section 313 of the Code, he did not attempt to set up any alibi or raise any doubt as to his possible presence at the place of occurrence at the relevant time.

12. It must be appreciated at this stage that it is immensely difficult and traumatic for a victim, particularly when she is a minor girl, to recount the abuse that she may have suffered. Euphemisms are regularly used as "he got on top of me" or "he slept over me". For a girl child aged 13 it was traumatic to have suffered what she did and each time that she had to remember the incident she underwent the same trauma. In such circumstances, the fact that the survivor in this case did not clearly state in course of her original statement under Section 164 of the Code that she suffered penetrative sexual assault but she later claimed as such in course of the trial, would not amount to the survivor seeking to embellish or

improve on her original version. The fact that the survivor failed to indicate penetration or insertion even to the smallest extent in course of her original statement under Section 164 of the Code will have to be attributed to the trauma that she must have been undergoing some 15 days or so after the incident. By the time she deposed in court, she was a more mature 17 years old and she understood the importance of indicating the extent of her suffering and clearly asserted that she had been violated by insertion of the appellant's penis into her vagina.

13. The requirements of both the definition of rape in the Penal Code and of penetrative sexual assault under the Act of 2012 do not call for complete penetration or the insertion of the penis to the full into the vagina of the victim. Indeed, when it comes to minors, the complete insertion may be impossible without the area around the vagina being totally ruptured and torn. It may be recalled that the test conducted on the survivor by the medical examiner indicated that insertion into the undeveloped vagina was possible till the tip of her finger. Thus, the insertion that the survivor complained of must be understood in such context of insertion to the extent that it was possible and it is also understandable that deeper insertion was not possible to rupture the hymen of the survivor.

14. In the elaborate judgment of the trial court of March 30, 2022, the survivor's description of the incident and the appellant's denial of the statements in course of his examination under Section 313 of the Code have

been referred to at length. The trial court also invoked the statutory presumption under Section 29 of the Act of 2012, particularly in the absence of the appellant attempting to ascribe any motive to the survivor for making a false accusation or seeking to set up any alibi and merely attempting to deny the allegations.

15. There is no escaping the fact that the lady who counselled the survivor immediately after the FIR was lodged was a disinterested witness and there is no reason to believe that she would indicate something that did not actually transpire. However, in the absence of it being evident as to whether the survivor volunteered to inform the counsellor that she did not suffer any penetration or whether upon the counsellor putting questions to the survivor, the answers that the survivor gave led the counsellor to believe that there was no penetration, nothing conclusive can be drawn from the relevant assertion of the counsellor, even if it is not disbelieved.

16. On the other hand, there is the direct statement of the survivor and such direct statement, despite it not having been made in course of the original recording under Section 164 of the Code, rings true, particularly as the nature of the description of how her clothes were taken off by the appellant and the appellant forcibly “slept on top of me” was repeated. In the light of the material that was before the trial court and since the trial court had the advantage of noticing the demeanor of the survivor and also that of the appellant in course of his examination under Section 313 of the

Code, it would be foolhardy to interfere with the inference and conclusion drawn. To repeat, since the appellant did not make out any case of why the stepfather of the survivor, who was the person who lodged the FIR, would bring a false charge against him or any motive on the part of the minor survivor to go through the trauma of the entire process in seeking to sustain a false accusation, the bare denial of the accusations against the appellant sound hollow.

17. The trial court has dealt with the matter appropriately and has arrived, in the circumstances, at the right conclusion of finding the appellant guilty and awarding the sentence as provided in accordance with law.

18. Neither the judgment of March 30, 2022 nor the consequent sentence of March 31, 2022 calls for any interference.

19. Accordingly, Crl.A.No.13 of 2022 is dismissed.

20. Let an authenticated copy of this judgment and order be immediately made available to the appellant free of cost.

(W. Diengdoh)
Judge

(Sanjib Banerjee)
Chief Justice

Meghalaya
23.03.2023
"Santosh, P.S."