

Serial No. 01
Regular List

HIGH COURT OF MEGHALAYA
AT SHILLONG

Crl. A. No. 22 of 2022

Date of Decision: 22.05.2023

Shri. Dobi M. Marak

Vs.

State of Meghalaya & Anr.

Coram:

Hon'ble Mr. Justice W. Diengdoh, Judge

Appearance:

For the Petitioner/Appellant(s) : Mr. K.Ch. Gautam, Adv.

For the Respondent(s) : Mr. B. Bhattacharjee, AAG, with
Mr. A.H. Kharwanlang, Addl. Sr. GA.

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| i) | Whether approved for reporting in
Law journals etc.: | Yes/No |
| ii) | Whether approved for publication
in press: | Yes/No |

JUDGMENT AND ORDER

1. Being aggrieved by the Judgment dated 22.03.2022 and corresponding sentence dated 29.03.2022 passed by the learned Special Judge (POCSO) in Special (POCSO) Case No. 04 of 2016 which resulted in the appellant being convicted and sentenced for a period of seven years in a case

under Section 376(2) IPC read with Section 3(a)/4 of the POCSO Act, 2012, but which conviction was finally made under Section 376(1) and Section 506(1) IPC, this appeal was filed with a prayer to set aside and quash the said conviction and sentence.

2. The wheels of these proceedings was set in motion with the filing of an FIR on 28.02.2015 by the father and uncle of allegedly a minor girl of about 14 years who in their complaint before the Officer Incharge, Tikrikilla, Police Station, West Garo Hills District of Meghalaya, had informed the police that the said minor girl was raped and thereafter threatened not to inform of the said incident to anyone by the appellant herein. The said incident took place on 01.01.2015 at Laskerpara area.

3. The said FIR was duly registered as Women Police Station (T) Case No. 5(2) of 2015 under Section 376(2) (i)/506 IPC read with Section 3(a)/4 of the POCSO Act and investigation was accordingly launched. The appellant/accused was arrested on 10.03.2015 and was sent to judicial custody. From the records it is seen that the appellant was released on bail on 10.06.2015, but was re-arrested on 18.08.2016 on the strength of a non-bailable warrant of arrest. He was however, again enlarged on bail vide order dated 07.10.2016 passed by the Special (POCSO) Court.

4. The Investigating Officer, after taking up the investigation, had apparently examined the alleged victim girl and relevant witnesses and has also facilitated the medical examination of the victim. After the investigation was concluded, the Charge Sheet was filed before the Court on 28.01.2016. In the final report under Section 173 Cr.P.C., the I/O has finally opined that under the facts and circumstances, a prima facie case under Section 376(2)(i)/506 IPC read with Section 3(a)/4 of the POCSO Act was found well established against the accused/appellant and he was accordingly directed to appear before the competent court for the commencement of his regular trial. The I/O has also cited as many as 11 witnesses and a number of documentary and material exhibits to prove the prosecution's case.

5. Mr. K.Ch. Gautam, learned counsel for the appellant at the outset has submitted that the Protection of Children from Sexual Offences Act is a special legislation to curb the crime of sexual abuse and sexual exploitation of children and as prescribed by the Act, those who are below 18 years of age fit in the definition of 'Child' under Section 2(d).

6. In a case under the POCSO Act, it is therefore the bounden duty of the prosecution that for age determination, Rule 12 of the Juvenile Justice (Care and Protection) Rules 2007 is to be employed. This process has to be

resorted for the prosecution to establish the foundational facts for the court to take the aid of Section 29 of the POCSO Act.

7. It is the submission of the learned counsel that in the instant case, the prosecution having failed to establish this foundational fact, which was also admitted by the learned Trial Judge in the impugned judgment, where it has been noted that the age of the victim could not be proved to be below 18 years, as such, for the trial court to rely on Section 29 of the Act to presume that the appellant has committed the offence as alleged, the same is not tenable under the circumstances. Therefore, the conviction of the appellant under Section 376(1) IPC could not have been maintained.

8. Another limb of argument advanced by the learned counsel for the appellant is that the learned Trial Judge while coming to the conclusion that a case of rape as punishable under Section 376(1) IPC has been made out, has however come to such conclusion on the reading and application of the provision of Section 42-A of the POCSO Act as well as under Section 42 of the same.

9. According to the learned counsel, Section 42-A speaks of a situation where there is a provision of law apart from those under the POCSO Act which may be in derogation or inconsistent with the provisions of the POCSO

Act, in which case, the provisions of the POCSO Act would hold primacy position and would override such other legislation in case of any inconsistency.

10. As to the application of the provision of Section 42 of the Act to the proceedings before the learned Trial Court, the learned counsel has submitted that the import of Section 42 is that wherever an offence punishable under the POCSO Act is made out and simultaneously the offence also attracts, amongst other, an offence under the Indian Penal Code, then only to the extent of the degree of punishment, the offence which carries the higher degree of punishment will be executed by the trial court, irrespective of whether the proceedings are carried out under the POCSO Act. However, in this case, admittedly, in the first place, no case has been made out for any offence under any of the provisions of the POCSO Act, but the learned Trial Judge has determined that a case is made out under Section 376(1) as also under Section 506(Pt-I) IPC. This provision is therefore not applicable to the facts of the case. The learned Trial Judge could not have acted in the capacity of a Judge of the Special (POCSO) Court to convict the appellant under provisions of the Indian Penal Code. The proper course of action was for the case to be referred to the Sessions Judge for trial of the same.

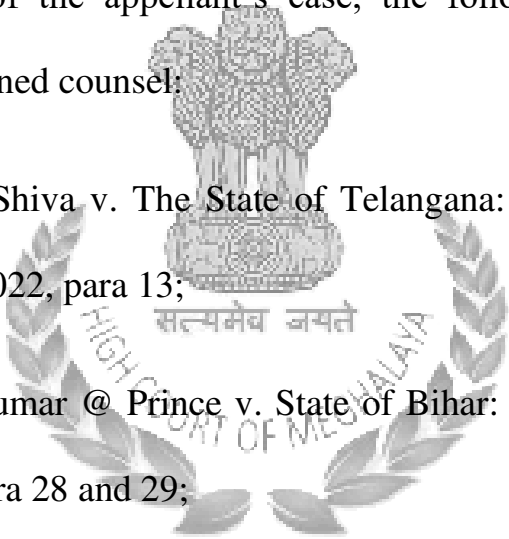
11. Another angle sought to be covered by the appellant to debunk the evidence of the survivor is to put emphasis on the apparent contradiction in the statement of the survivor, when in her statement under Section 161 Cr.P.C. she has stated that the appellant had raped her, while before the Magistrate when her statement under Section 164 Cr.P.C., she had only said that the appellant had dragged her to the jungle by the wrist and had forcefully restrained her. In her evidence before the Court as PW-2, she has elaborately related how the appellant had allegedly dragged her to the jungle, removed her clothes and had laid on top of her with his private (sic private part) touching her private part. Here too, nothing is said about actual penetration. These contradictions, according to the learned counsel for the appellant is a clear indication of the alleged survivor trying to improve her case at every stage, as such, the evidence of the alleged victim is not of sterling character.

12. As to the medical evidence, the learned counsel has submitted that firstly, the PW-6, who is the Doctor who has examined the alleged survivor on 28.02.2014, the findings of the said examination was not drawn up in the proper format, secondly, this witness has deposed that at the time of examination of the survivor, no signs of recent sexual assault was evident, though it was stated that her hymen was not intact, which does not prove that the survivor was sexually assaulted. As to the evidence of the other witnesses,

the learned counsel has submitted that it is mostly hearsay evidence and not material to the determination of the case.

13. On the strength of the argument advanced, the learned counsel has submitted that the impugned judgment was passed without taking the above considerations into account and as such, the same is liable to be set aside and quashed and the conviction to be overturned.

14. In support of the appellant's case, the following decisions were referred to by the learned counsel:

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- i. Mekala Shiva v. The State of Telangana: Criminal Appeal No. 167 of 2022, para 13;
 - ii. Arjun Kumar @ Prince v. State of Bihar: 2021 SCC Online Pat 1353, para 28 and 29;
 - iii. Jarnail Singh v. State of Haryana: (2013) 7 SCC, para 22;
 - iv. Joubansen Tripura v. State of Tripura: 2021 SCC Online Tri 176, para 13;
 - v. Rai Sandeep @ Deepu v. State (NCT of Delhi): (2012) 8 SCC 21, para 22;

vi. Anwar Hussain Sheikh v. State of Meghalaya & Anr.: 2022 SCC Online Meg 429.

15. Per contra, Mr. B. Bhattacharjee, learned AAG, supporting the impugned judgment and sentence has submitted that the learned Trial Judge has taken into account all the relevant materials on record as well as the evidence of the Prosecution's witnesses and has rightly come to the conclusion that the appellant is found guilty of the offences charged against him and by applying the related law and principles of criminal jurisprudence, has passed the impugned judgment and sentence. Therefore, this Court even as an Appellate Forum may not set aside and quash the conviction and sentence awarded. This appeal is devoid of merits and the impugned judgment and sentence may be upheld.

16. On the contention of the appellant that the Trial Court has committed a grave error by passing the impugned judgment and sentence finding the appellant inter alia, guilty of the offence under Section 376(1) as well as under Section 506(1) IPC, the learned AAG has submitted that the learned Special Judge while passing the impugned judgment has acted in that capacity under the provisions of Section 28(1) and (2) of the POCSO Act, which provision enable the Special Court not only to try any offence under the POCSO Act but also to try a case against an accused for an offence under the

Code of Criminal Procedure with which an accused may be charged at the same trial.

17. In other words, the learned AAG has submitted that since the Special Court under the POCSO Act is equivalent to a Sessions Court, it has therefore, the power and authority to also try offences under Indian Penal Code and to pass a sentence therein. Section 71 IPC is referred to in this context.

18. Another limb of argument advanced by the learned AAG is that the Trial Court under sub-Section 3 of Section 220 Cr.P.C has rightly assumed jurisdiction to try the said offences which falls within two or more separate definitions of law, that is, the act or rather the offence of rape involved in the case of the appellant being clearly defined under the Code of Criminal Procedure, therefore, the Trial Court functioning as a court competent to try POCSO matters, since the offence involved an offence of sexual assault, there is nothing wrong with the appellant/accused being charged with such offences and for convenience sake the case under the provisions of IPC and the case under the POCSO Act as relates to the proceedings herein can be grouped together and tried by the same Special Judge.

19. Next, coming to the facts and circumstances of the case of the appellant, the learned AAG has submitted that the testimony of the survivor before the Trial Court as PW-2 is very clear and categorical inasmuch as the survivor has been able to convey the fact that she was sexually assaulted by the appellant herein and there is no contradiction in her statement under Section 161 as well as 164 of the Cr.P.C.

20. That the statement of the survivor under Section 161 Cr.P.C contradicts those recorded under Section 164 Cr.P.C as well as those recorded before the Trial Court and that in the face of such glaring contradiction and inconsistency the appellant could not have been convicted, but was convicted anyway, the learned AAG has submitted that a perusal of the statement made by the survivor under Section 161 would show that the same or almost the same has been found in her deposition made before the court as PW-2 and as such, there is no contradiction in her statement as far as the factum of rape is concerned. It is also seen that the appellant in his defence while cross examining the survivor, any contradiction or inconsistency exhibited by the survivor has not been confronted before the Trial Court. Moreover, statements under Section 164 Cr.P.C cannot be used to contradict evidence in court, submits the learned AAG.

21. Leading this Court to the evidence by the survivor the learned AAG has submitted that the survivor has clearly stated that it was the appellant who had waylaid her on that fateful day of 01.01.2015 and that he has forcefully covered her mouth so that she could not scream for help and having taken off her underwear, he laid on top of her and his private part touched her private part, this act cannot in any way be interpreted or construed except to lead one to believe that it was an act of sexual assault.

22. Refuting the contention of the appellant that the act of laying on top of the survivor with his (appellant) private part touching her private part does not constitute rape or sexual offence, the learned AAG has referred to the case of ***Cheerfulson Snaitang v. State of Meghalaya***, wherein a Division Bench of this Court vide order dated 14.03.2022 in CrI. A. No. 5 of 2020 at paragraph 8 has observed as follows:

“8. Even if the victim’s evidence in her cross-examination is taken at face value, it would not imply that there was no penetrative sex. If it be accepted that at the relevant time the victim was wearing her underpants and the appellant rubbed his organ from over her underpants, there was no difficulty in penetration. Penetration for the purpose of Section 375 of the Penal Code does not have to be complete. Any element of penetration would suffice for the purpose of the relevant provision. Further, Section 375(b) of the Penal Code recognises that insertion, to any extent, of any object into the vagina

or urethra would amount to rape. Even if it be accepted that the appellant herein forced his organ into the vagina or urethra of the victim despite the victim wearing her underpants, it would still amount to penetration for the purpose of Section 375(b) of the Penal Code.”

23. Though the FIR may have been filed about a month or so after the said incident, for reasons best known to the complainants who are her father and uncle respectively, yet the testimony of the doctor who has medically examined the survivor would reveal that the survivor was sexually assaulted which has resulted in her hymen being torn. The corroboration of the testimony of the survivor and that of the doctor has strengthened the case of the prosecution for which the learned Trial Court has no hesitation to come to the conclusion that rape had indeed taken place and the order of conviction and sentence thereof may not be upset by this Appellate Court.

24. Even otherwise, if there was no injury found on the private part of the survivor, the Hon'ble Supreme Court in the case of *Ranjit Hazarika v. State of Assam* reported in (1998) 8 SCC 635 at para 5 has observed that, “...*To constitute the offence of rape, penetration, however slight, is sufficient...*”, how much more in the instant case when the medical examination has clearly shown that the hymen of the survivor was torn. Therefore, in the light of such strong and cogent evidence, that the survivor

was subjected to sexual assault and rape, the case of the prosecution is proved beyond reasonable doubt even if the same is based on the sole testimony of the survivor/prosecutrix.

25. The conviction and sentence meted out to the appellant herein being justified on the facts and circumstances of the case, the impugned judgment and sentence passed by the learned Trial Court may not be set aside and quashed, finally submits the learned AAG.

26. This Court has given due consideration to the contention and submission of the learned counsels for the rival parties and is in agreement with the appellant that the main issues to be decided herein is whether the learned Trial Court can convict the appellant for an offence which is found under the Indian Penal Code, such court functioning as a Special Court meant exclusively to try only offences under the Protection of Children from Sexual Offences (POCSO) Act and the second issue being that in the face of an apparent contradiction and inconsistent evidence rendered by the survivor, with special emphasis on the statement of the said survivor recorded under Section 161 Cr.P.C and the one recorded under Section 164 Cr.P.C not being in consonance with the testimony recorded as PW-2 in course of the trial, whether the learned Trial Court can rely on such evidence to come to the finding that a case for conviction has been made out.

27. Going back to the stage where the charges against the appellant/accused were framed, it is noticed that the learned Trial Judge has charged the appellant under two heads of charges, one, under Section 376(2)(i) IPC read with Section 3(a)/4 of the POCSO Act and another, under Section 506 Pt-II IPC. After recording of the evidence of the prosecution's witnesses, including that of the survivor, the Court has come to the conclusion that the appellant/accused has committed the offence punishable under Section 376(1) as well as under Section 506(Pt-I) IPC.

28. The Trial Court in its order of sentencing has concluded that a case of rape perpetrated by the accused/appellant on the survivor has been made out, but since the age of the survivor at the time of the incident could not be determined, the court taking recourse to Section 222(2) Cr.P.C, which provides that if a person is charged for an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence though he is not charged with it. Hence, the conviction under Section 376(1) and 506(Pt-I) IPC.

29. There is no quarrel with the applicability of the provision aforesaid, but on closer scrutiny, what is noticed is that the fact that a court can convict an accused for a lesser offence, presupposes a situation where there is present a set of offences carrying a major and minor punishment respectively, but

such offences should be found under a particular Code or Act, such as the offences described under the Indian Penal Code. An example of this is when an accused is charged for an offence punishable under Section 302 IPC, but evidence proved that only an offence under Section 304-Pt-II is made out, then the court can convict the person for the lesser offence.

30. That the Trial Court is a designated Special Court under the provisions of the Protection of Children from Sexual Offences Act is not in doubt. However, the fact that in course of the trial, the Trial Court having framed charges, inter alia, under Section 3(a)/4 of the POCSO Act, the contention of the appellant that the final conviction is not under the said provision of the POCSO Act but under the provisions of the IPC, thereby rendering the Trial Court to assume jurisdiction as a Sessions Court and not as a Special Court, the said contention cannot be accepted by this Court, inasmuch as the language of Section 28, sub-Section 2 of the POCSO Act is clear and unambiguous.

31. Section 28, sub-Section 2 of the POCSO Act empowers a Special Court under the POCSO Act not only to try offences under the said Act, but additionally, to also try an offence with which the accused may, under the Code of Criminal Procedure be charged at the same trial. In the instant case, the appellant was charged for an offence under the POCSO Act, as well as for

an offence under the IPC, triable under the Cr.P.C therefore, there has occurred no wrongful exercise of jurisdiction by the Trial Court herein.

32. Now, a look into the evidence of the prosecution as far as the testimony of the survivor is concerned would lead one to come to the conclusion, as to whether a case for conviction or acquittal is made out or not. As is the procedure, the Investigating Officer, in course of his investigation has taken down the statement of a number of relevant witnesses, more pertinently, that of the survivor. In her statement under Section 161 Cr.P.C, the survivor has stated that on the date of the incident, while coming back home from church the accused/appellant came towards her and took her to the dark place where he eventually raped her after threatening to kill her. In her statement recorded before the Magistrate under Section 164 Cr.P.C, she has stated that on her way home from church, the appellant was waiting by the road as it was dark and he grabbed her by her wrist and dragged her to the jungle and forcefully restraint her, also threatening to shoot her. In her deposition before the court as PW-2, the survivor has also repeated the same fact, that is, that she saw the appellant ahead of her, standing on the way and thereafter, he dragged her towards the farm of one Shri. Gatman Sangma which farm, is almost like a jungle as nobody used to stay there. The appellant then opened her clothes then also removed his clothes and lay on top of her

with his private part touching her private part. In her cross-examination, she has also reiterated that it is not a fact that the appellant did not lay on top of her.

33. What emerges from the above is that the survivor has been able to consistently convey the message that in fact, when she was on her way home in the dead of night, on the way she was confronted by the appellant who overpowered her and eventually sexually assaulted her. Apparently, there appears to be no contradiction in the statement of the survivor as regard the actual act of sexual assault perpetrated upon her by the appellant. There could be minor discrepancies in her statement only with regard to the statement that the appellant threatened to shoot her when, admittedly she did not see any gun. Here too, it may be true that the appellant has threatened to shoot her but the same is only a threat. Minor discrepancies which have no impact on the final outcome or conclusion of the offence alleged would not cast any doubt on the veracity of the statement made by the survivor. In any case, the appellant has also failed to confront the survivor with such contradiction in her cross-examination. Therefore, the argument of the appellant on this ground cannot be sustained.

34. Having come to the finding that there is no contradiction in the statement and deposition of the survivor, her assertion that she has been

sexually assaulted by the appellant has to be accepted. The authorities cited by the learned AAG as far as the factum of sexual assault or rape is concerned, is found relevant. The reference to the case of Ranjit Hazarika (supra) was to point out that even if, upon medical examination, the hymen is found to be intact and there is absence of injury within such area, on the basis of the testimony of the prosecutrix, a case of rape has been affirmed. A Division Bench of this Court in the case of Cheerfulson Snaitang (supra) has rightly interpreted the provisions of Section 375(b) of the Indian Penal Code to say that force penetration into the vagina over the underpants would still amount to penetration.

35. To further strengthen the assertion of the survivor that she was sexually assaulted, the deposition of the doctor who has examined her on 28.02.2014 (sic 2015) that is, about two months after the incident is also significant inasmuch as, though the doctor has stated that there is no sign of sexual assault or injury on the survivor's private part at the time of examination, which is understandable since a considerable period of time has elapsed from the date of the incident to the date of medical examination. However, the doctor went on to say that the medical examination has revealed that the hymen of the survivor was not intact. It must be noted that the survivor is a minor of about 14 years at the time of the incident and was not

married at the relevant time, therefore, this would only strengthen the case of the survivor that she was actually sexually assaulted.

36. The authorities cited by the appellant, that is, the case of Mekala Shiva (supra), speaks of the benefit of doubt to be extended to the accused/appellant where the prosecution has failed to prove the age of the victim. This would not apply to the case in hand inasmuch as, though admittedly, the age of the survivor could not be proved, yet on an overall consideration of the main charges against the appellant the offence of sexual assault has been proved beyond reasonable doubt. The case of Arjun Kumar @ Prince (supra) is also on the same line that is, on the issue of absence of the factum of age of the victim, which as pointed out would not be relevant to the case in hand. Again, the reference to the case of Jarnail Singh (supra) is only to the fact that age determination of a minor has to be with reference to Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules, 2007. Here too, the application of this authority would not be relevant to the case of the parties.

37. As to the case of Sri Joubansen Tripura (supra), reference to para 13 of the same is only to bring to the fore the presumption that the accused/appellant has committed the offence alleged, foundational facts have to be established by the prosecution, for example, prove that the victim is a

child, the alleged incident has taken place, that the accused has committed the offence and whenever physical injury is caused, establish it with supporting evidence. To a great extent, the foundational facts indicated above have been proved by the prosecution in this case.

38. Lastly, the appellant has cited the case of Rai Sandeep (supra) wherein at para 22 of the same, the Apex Court has discussed about the quality of a sterling witness. The Court has held that “... *To test the quality of such a witness, the status of the witness would be immaterial and what would be relevant is the truthfulness of the statement made by such a witness. What would be more relevant would be the consistency of the statement right from the starting point till the end, namely, at the time when the witness makes the initial statement and ultimately before the court. It should be natural and consistent with the case of the prosecution qua the accused...*” From whatever has been noted as regard the statement of the survivor, it can be said that she is indeed a sterling witness on which rests the case of the prosecution and which case has been successfully proved by cogent evidence. Therefore, this observation would also go in favour of the case of the prosecution.

39. On an overall appreciation of the facts and circumstances of the case in hand, this Court has no hesitation to come to the conclusion that there is no

infirmity in the impugned judgment and sentence and that the appellant has not been able to make out a case to dislodge the same.

40. This appeal is accordingly dismissed as devoid of merits.

41. Crl. A. No. 22 of 2022 being disposed of let copy of this order be made over to the appellant free of costs.

42. Send back the lower court records.

Meghalaya
22.05.2023
"Tiprilynti-PS"



Judge