

Serial No. 01
Supplementary List

HIGH COURT OF MEGHALAYA
AT SHILLONG

Crl.A. No. 16 of 2019

Date of Decision: 24.11.2023

The Investigation Officer, Vs. Shri. Iaraplang Umdor
Women Police Station

Coram:

Hon'ble Mr. Justice W. Diengdoh, Judge

Appearance:

For the Petitioner/Appellant(s) : Mr. R. Gurung, GA with
Ms. S. Shyam, GA
Mr. J. Thabah, GA

For the Respondent(s) : Mr. N.M. Mansuri, Adv.

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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

1. The case of the appellant is that in a case under the POCSO Act, 2012, wherein the respondent was facing trial being charged for committing an offence under Section 3(a)/4 of the said Act, the matter had proceeded to the stage of recording of evidence of the prosecution's witnesses before the Special (POCSO) Court at Shillong.

2. The learned Special Judge at the stage of recording of evidence of the prosecution's witnesses, on the appearance of the complainant and the survivor, has recorded their evidence as PW1 and PW2 respectively. This was done on a date fixed for the same, that is, 18.07.2019 where the Special P.P. and the Defence Counsel were present to conduct such examination.

3. In course of examination of the two witnesses mentioned above, the deposition of the said witnesses was not supportive of the prosecution's story and on the prayer of the learned Special P.P., they were declared as hostile witnesses and were accordingly cross-examined.

4. After the evidence of the said two witnesses were recorded, the learned Special Judge on the basis of the contents thereof has come to the conclusion that PW2 (mother) of PW1(survivor), has filed a false and fabricated FIR implicating the accused/respondent herein in a case of sexual assault which is a very serious charge. However, from the evidence recorded, it is found that whatever allegations made against the accused/respondent was not for an offence of commission of sexual assault on a minor girl, but only because the complainant was angry with the accused/respondent since he has uttered slang and curse words against her and her minor daughter. Accordingly, the learned Special Judge has discharged the accused/respondent from all liabilities in the case and he was set free from custody.

5. The appellant being aggrieved and dissatisfied with the said impugned order dated 18.07.2019 has accordingly approached this Court with an appeal under Section 378 Cr.P.C. with a prayer for setting aside and to quash the said impugned order.

6. Mr. R. Gurung learned GA appearing for the State appellant has submitted that the appellant has approached this Court for necessary orders or directions to prevent abuse of the process of the court and the irregularity apparent in the conduct of the case wherein proper procedure has not been adhered to.

7. The learned GA has also submitted that on the charge sheet being filed by the Investigating Officer coming to a finding that a prima facie case under Section 3(2)/4 of the POCSO Act, 2012 exists against the accused/respondent herein, charges under Section 4 of the POCSO Act read with Section 376(2)(i) IPC have been framed by the learned Special Court and on the accused/respondent pleading not guilty, the matter proceeded for trial.

8. The learned Special Court has taken up the recording of evidence of the prosecution witnesses and after recording the evidence of PW1 the survivor and PW2 the complainant the proceeding was suddenly stopped and the learned court without recording any further evidence as far as the remaining prosecution witnesses are concerned and also without considering the medical evidence, on the basis of the evidence of PW1 and PW2 respectively has acquitted the respondent vide the impugned order dated 18.07.2019.

9. This has caused prejudice to the prosecution's case and it is a fit case for this Court to consider the overall impact of the impugned order on procedural law and the fact that grave injustice has been occasioned by the passing of the impugned order. Therefore, the matter may be remanded to the trial court for re-trial. In support of this contention, the learned GA has referred to a suo moto writ proceeding before the

Hon'ble Supreme Court being 'Suo Moto Writ (Crl.) No.(S) 1/2017, In Re: To Issue Certain Guidelines Regarding Inadequacies and Deficiencies in Criminal Trials v. The State of Andhra Pradesh & Ors.,' paras 12, 13 and 15.

10. Per contra, Mr. N.M. Mansuri, learned counsel for the respondent has submitted that when this appeal was filed, at the outset, the respondent has challenged the maintainability of the same on the ground that the respondent was discharged from the liability of the case vide the impugned order and as such, a revision petition should have been filed instead of an appeal. However, this Court after hearing the parties on this issue has vide order dated 17.05.2023 held that as far as the tone and tenor of the impugned order dated 18.07.2019 is concerned, the accused/respondent herein has been acquitted and not simply discharged and this Court has accordingly held that an appeal is maintainable.

11. The learned counsel has also submitted that since the respondent has been found to have been acquitted in the case, therefore, this Court as the first appellate court is to appreciate the evidence recorded and on perusal of such evidence, it would be apparent that the witnesses that is, PW1 and PW2 respectively have clearly stated that the accused/respondent has not committed any act of sexual assault and the allegation against him are false and fabricated. In such circumstances, the trial court has no option but to acquit the accused/respondent finding that prolonging of the trial would serve no purpose as far as the innocence of the accused/respondent is concerned.

12. The learned counsel has also cited the following authorities in

support of his case.

- i. Shri. Edwin Nongkynrih v. State of Meghalaya, (2021) 217 AIC 898, para 14
- ii. State of Nagaland & Ors. v. Krishnanandan Paswan, (2019) 5 GauLT 425, para 25
- iii. R. Palanisamy v. State, (2013) 2MLJ (Criminal) 812, para 80
- iv. Baburao Haripawar v. State of Maharashtra, (1987) CriLJ 584, para 15

13. This Court has considered the argument advanced in favour of the respective parties and is now called upon to decide as to whether the cause of justice can be met by maintaining the impugned order or that the same requires to be upset.

14. The Code of Criminal Procedure, 1973 in Chapter XVIII has detailed the trial of a case before a Court of Session beginning from Section 225 and ending at Section 237 with the opening of the case by the Public Prosecutor, consideration of charge, whereupon the accused at that stage may be discharged from all liabilities in the case, if the Trial Court finds that there are no credible evidence or reliable materials against such accused. However, if prima facie evidence is available on record, then the court will frame charges under relevant sections of law. If the accused pleads not guilty to the charges framed, then evidence will have to be led on either side. After the prosecution's evidence is concluded, the accused will be allowed to refute particular evidence

which is found incriminating against him and also to state his side of the story. The court would then come to the conclusion that the accused may be acquitted and, if not acquitted, to allow the accused to enter his defence and finally, if the accused has brought in any evidence in his favour through his witnesses, the arguments of the parties will be heard and the conclusion of the case would be the passing of the judgment which would either be of acquittal or conviction.

15. A perusal of the proceedings in the trial court as far as the case of the parties herein are concerned, would show that on the court having framed the relevant charges against the accused/respondent, evidence was led on behalf of the prosecution. It was only after two of the prosecution's witnesses have been examined as PW1 and PW2 respectively, who are the survivor and her mother who is the complainant, the learned trial court on the basis of the evidence adduced so far had come to the conclusion that the prosecution's case has fallen flat and there is no option but to discharge the accused from the liabilities of the case which was done so vide the impugned order dated 18.07.2019. Though the trial court had used the word 'discharged', this Court in a miscellaneous proceedings connected hereto, has held that actually what was done by the trial court is to 'acquit' the accused/respondent. It may be mentioned that the stage of discharge of an accused in a criminal case is only done under the provision of Section 227 Cr.P.C while acquittal could be at the stage of Section 232 or under Section 235 when the final judgment is passed.

16. The picture is therefore clear, that after framing of the charges the trial ought to have proceeded for trial in right earnest and the

prosecution must be allowed to present all its evidence before a final finding and observation is made. As could be seen from the records, out of 12 witnesses cited, only two were examined. As submitted by the learned GA, there was one eyewitness to the incident that is, Smti Ibadakmen Kharkongor who has red-handedly caught the accused/respondent in the act. Her testimony has not been taken on board. The medical evidence and the Doctor who had examined the survivor was also not exhibited and examined which may have a telling effect on the outcome of the prosecution's case. All these factors have not been considered by the learned trial court while passing the impugned order.

17. Another aspect of the matter is the stark contradiction found in the statements on record, more particularly that of the survivor, who in her statement under Section 161 and 164 Cr.P.C. has given a vivid account of how the accused/respondent has sexually assaulted her, but in her testimony in court as PW1, she has made a total turnaround to say that the accused/respondent has literally done nothing to her. This, placed in juxtaposition with the medical and eye witness account should have prompted the learned Trial Court to consider the veracity of the statement of the witnesses made in court, which was not done so, nor was this apparent contradiction ever discussed or referred to in the impugned order.

18. As to the fact that the witnesses, that is, PW1 and PW2 respectively have turned hostile at the trial, what the response and duty of the court should have been can be seen in the case of 'State Through PS Lodhi Colony, New Delhi v. Sanjeev Nanda, (2012) 8 SCC 450'

when at para 101 it was observed as under:

“101...If a witness becomes hostile to subvert the judicial process, the court shall not stand as a mute spectator and every effort should be made to bring home the truth. Criminal justice system cannot be overturned by those gullible witnesses who act under pressure, inducement or intimidation. Further, Section 193 IPC imposes punishment for giving false evidence but is seldom invoked.”

19. In the case of State of J&K v. Shabir Ahmad Khan, 2023 SCC Online J&K 788 at paras 16 and 17, the Hon’ble High Court of Jammu and Kashmir and Ladakh has observed as follows:

“16. The learned trial court has disbelieved the statement of the prosecutrix by observing that she has made inconsistent statements, inasmuch as she has stated before the police that she was sexually assaulted by the accused/respondent but before the Court she has resiled from her said statement. It is true that the prosecutrix has turned hostile and has not fully supported the version of occurrence given by her before the police but the question arises as to whether because of this reason only, whole of her statement is liable to be discarded.

17. The Supreme Court in the case of Himanshu v. State (NCT of Delhi), (2011) 2 SCC 36, has held that the evidence of a hostile witness in all eventualities ought not stand effaced altogether and that the same can be accepted to the extent found dependable on a careful scrutiny. Similar views have been expressed by the Supreme Court in the case of Khujji v. State of M.P. (1991) 3 SCC 627. Again, in the case of Koli Lakhmanbhai Chanabhai v. State of Gujarat, (1999) 8 SCC 624, the Supreme Court held that the evidence of a hostile witness remains admissible and it is open for a court to rely on the dependable part thereof as found acceptable and duly corroborated by other reliable evidence available on record.”

20. The Hon’ble Supreme Court in the case of Hemudan Nanbha Gadhvi v. State of Gujarat, (2019) 17 SCC 523 at paras 10 and 11 has

observed as follows:

“10. A criminal trial is but a quest for truth. The nature of inquiry and evidence required will depend on the facts of each case. The presumption of innocence will have to be balanced with the rights of the victim, and above all the societal interest for preservation of the rule of law. Neither the accused nor can the victim be permitted to subvert a criminal trial by stating falsehood and resort to contrivances, so as to make it the theatre of the absurd. Dispensation of justice in a criminal trial is a serious matter and cannot be allowed to become a mockery by simply allowing prime prosecution witnesses to turn hostile as a ground for acquittal, as observed in Zahira Habibullah Sheikh v. State of Gujarat and Mahila Vinod Kumari v. State of M.P. If the medical evidence had not confirmed sexual assault on the prosecutrix, the TIP and identification therein were doubtful, corroborative evidence was not available, entirely different considerations may have arisen.

11. It would indeed be a travesty of justice in the peculiar facts of the present case if the appellant were to be acquitted merely because the prosecutrix turned hostile and failed to identify the appellant in the dock, in view of the other overwhelming evidence available. In Iqbal v. State of U.P., it was observed as follows: (SCC p. 630, para 15)

“15. Evidence of identification of the miscreants in the test identification parade is not a substantive evidence. Conviction cannot be based solely on the identity of the dacoits by the witnesses in the test identification parade. The prosecution has to adduce substantive evidence by establishing incriminating evidence connecting the accused with the crime, like recovery of articles which are the subject-matter of dacoity and the alleged weapons used in the commission of the offence.”

21. It is further observed that the learned trial court has discharged/acquitted the accused/respondent only after consideration of the evidence adduced by PW1 and PW2 respectively. A reading of the impugned order would reveal that firstly, the prosecution’s evidence has

not been concluded. There is nothing on record to show that after such evidence being recorded, the accused was examined under Section 313 Cr.P.C. What is required thereafter is for the court to hear the arguments of the parties. This too, was not found evident from records. The learned trial court could not have come to such conclusion without affording an opportunity to the parties, particularly the prosecution's side to present its case. There has, therefore, occurred a diversion from required procedures to be followed which has indeed prejudiced the prosecution's case.

22. It is further observed that the learned trial court has, in the impugned order also made some observations against the character and alleged conduct of the witnesses, that is, the PW1 and PW2 when on the basis of their deposition an adverse proceeding was directed against them. This was done without affording any opportunity to them to response to the same and therefore, due procedure was not followed.

23. The respondent has referred to the case of Shri Edwin Nongkynrih(supra) to say that this Court at para 14 of the same has decided the case in favour of the accused therein on the observation that on the action of the alleged victim no amount of prosecution can result in conviction of the accused. This observation was done so in a case of compromise between the parties and before trial has commenced. Therefore, there cannot be found any similarity to the facts and circumstances of the instant case. This reference will not help the respondent's case herein.

24. In the case of Krishnanandan Paswan(supra), at para 25, the Court has made observation on what is required to be done when an

appellate court is faced with the prospect of overturning a finding of acquittal in a case based on evidence adduced. A re-appreciation of evidence should only be carried out keeping in mind the view which is found favourable to the accused to be adopted. However, in the said paragraph, the court has also observed that it is only in respect of a case where an acquittal is based on misconception of law or based on irrelevant grounds, the appellate court can review the evidence for the purpose of ascertaining as to whether only one conclusion, that is of conviction, can be arrived at on the basis of evidence on record. In this case, as observed above, complete evidence have not been brought on record and as such, appreciation of an incomplete set of evidence will not bring out the correct conclusion either of acquittal or conviction. Which is why this Court is required to examine as to whether corrective steps are required to be taken in this regard.

25. Again, the case of R. Palanisamy(supra) at para 80 speaks of a situation where the value of the witnesses' evidence has to be taken at face value and appreciation of the same, even though such evidence goes against the prosecution's case has to be accepted as substantial evidence to allow the court to decide the case in favour of the prosecution or the defence's case. Again, in this instant case, the issue is not on appreciation of evidence, but on whether complete evidence has been recorded and appreciated.

26. On an overall appreciation of the materials on record, including the evidence already adduced, this Court is of the considered opinion that the learned trial court had misdirected itself and has reached to a hasty conclusion as far as the innocence or the guilt of the

accused/respondent is concerned. All the relevant materials and evidence have not been considered while passing the impugned order.

27. In cases involving women and children, especially a minor girl in this instant case, it would be prudent to approach the case taking into consideration all the attending factors till there is no iota of doubt as to the innocence of the accused.

28. Finally, in conclusion this Court finds that the impugned order of discharge or acquittal cannot be sustained and the same is hereby set aside and quashed.

29. The learned trial court is directed to take up the case for re-trial de novo.

30. The lower court record is hereby directed to be returned to the court concerned for due compliance as far as issuance of notices or summons are concerned.

31. The accused/respondent however, is allowed to be enlarged on previous bail, violation of conditions set therein would allow the prosecution to pray for cancellation of such bail granted.

32. With the above, this appeal is hereby disposed of. No costs.

Judge

Meghalaya
24.11.2023
"Tiprilynti-PS"