

HIGH COURT OF MEGHALAYA
AT SHILLONG

Crl.A.No.37/2022 with
Crl.M.C.No.94/2022

Date of order: 07.08.2023

Betstarling Basan Vs. State of Meghalaya & anr

Coram:

Hon'ble Mr. Justice Sanjib Banerjee, Chief Justice
Hon'ble Mr. Justice B. Bhattacharjee, Judge

Appearance:

For the Appellant : Mr. K. Ch. Gautam, Adv with
Ms. R. Kharshiing, Adv

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

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

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

The appellant was charged with the commission of an offence under Section 3(a) of the Protection of Children from Sexual Offences Act, 2012 for an incident that took place on November 20, 2012. The appellant claims that despite no evidence of penetration being produced, he has been convicted for rape. The additional ground canvassed is that the trial court completely altered the charges and added additional charges after the recording of the evidence was over.

2. Indeed, the appellant here made an application for cross-examining the prosecution witnesses upon the additional charges being framed. The appellant here contended that the last witness had been examined by the court on October 5, 2021 and it was only on December 8, 2021 that the trial court found it expedient to add charges under Section 375 read with Sections 354, 354A and 354B of the Indian Penal Code, 1860 together with charges under Sections 7 and 8 of the Act of 2012 read with Sections 319, 321 and 323 of the Penal Code. The application for further cross-examination of the prosecution witnesses was rejected by an order dated June 10, 2022, less than a fortnight before the matter was set down for final arguments.

3. In the short order of June 10, 2022, the trial court recorded the submission of the parties, noticed a few Supreme Court judgments that instruct that a trial court may add to or alter the charges at any time during the trial and, finally, declined the request on the ground that no prejudice had been occasioned to the appellant herein upon the addition of the charges.

4. It is necessary to deal with such aspect of additional charges being framed, before proceeding with the merits of the matter. There is no doubt that Section 216 of the Code of Criminal Procedure, 1973 empowers the court to alter or add to any charge at any time before

judgment is pronounced. Sub-section (3) of Section 216 of the Code gives absolute discretion to the trial court to proceed with the trial or to proceed with the matter without adducing further evidence, if in the opinion of the trial court, no prejudice is likely to occasion thereby to the accused.

5. The mere fact that a judge possesses the power to alter or add to the charges at any time before the judgment is delivered, does not imply that the judge may wait till just before the judgment to undertake such exercise. Ordinarily, it is upon hearing the deposition and discovering that some offence other than the offences with which the accused had been charged may also have been committed in course of commission of charged offences, that the trial court would add the additional charges without going into the veracity of the allegations as to the commission of the other offences at such stage. Further, the court should also endeavour to ensure that if it perceives that additional charges be brought or the original charges be altered, the same be done at the earliest. In this case, it is evident that it was the deposition of the survivor that persuaded the trial court to add the additional charges. However, the survivor in this case took to the witness box on September 10, 2014, albeit before another judge.

6. It is possible in this case that after the transfer of the judge before whom the evidence was recorded at the trial, the immediate or the next successor in office may have gone into the records and deemed it necessary to add to the charges; but, ideally, since the deposition of the survivor was recorded in 2014 and the additional charges were framed in 2021, more than two months after even the defence witness was examined, the accused ought to have been allowed to cross-examine, at least, the survivor. In matters of such kind, so as to eliminate even the slightest of doubts being harboured or any ground being canvassed, the court should be liberal in allowing further cross-examination of the key witnesses, particularly those whose statements form the foundation of the additional charge.

7. But it must also be said in the same breath that in the present case no prejudice has been caused to the appellant herein upon the appellant's application for further cross-examination of the prosecution witnesses being turned down. To start with, the appellant's application in such regard was vague and not specific. Secondly, it did not single out any particular witness or witnesses or even the survivor for further cross-examination. It was a general application made almost as if asserting a right of further cross-examination upon additional charges being framed. In view of Section 216(3) of the Code, an accused does

not have an absolute right to seek further cross-examination of any prosecution witness unless an element of prejudice is demonstrated.

8. Further, it was the consistent statement of the survivor in this case that she was molested on her breasts and elsewhere. The survivor reiterated the fact that her breasts were squeezed by the appellant herein in course of her cross-examination on behalf of the accused herein. It will be evident from the additional charges framed on December 8, 2021 that the thrust of the minor charges added pertained to outraging the modesty of a woman and of assaulting or injuring her.

9. As to the major addition made in incorporating a charge under Section 375 of the Penal Code with the consequent punishment under Section 376 thereof, the discussion that follows later in the judgment will render the incorporation of such additional charge irrelevant in the larger context.

10. The father of the survivor lodged the first information report with the Mawngap Police Outpost in the evening of November 20, 2012, alleging that his 15-year-old daughter had been raped by the appellant herein at about 6:30 pm on the same day. The survivor was immediately sent for medical examination. There was no delay in such regard.

11. The medical examination of the girl did not reveal any injury of any nature, not even any abrasion or bruise. The doctor conducting the examination found the survivor's hymen to be intact and substantiated his report at the time of trial without contradiction. The opinion of the medical examiner was that the physical condition of the survivor did not indicate any recent sexual intercourse.

12. At the outset, it must be recognised that for an offence under Section 375 of the Penal Code or for penetrative sexual assault under Section 3 of the Act of 2012, complete penetration is not essential. In such sense, even if there is the slightest penetration and sufficient evidence in such regard, even though the penetration may not have been enough to disturb or tear the hymen, the offence of rape or penetrative sexual assault would have been made out. In other words, the fact that the hymen of a survivor is not torn upon such survivor claiming to have been raped is not the be-all or end-all of the matter. If there is any evidence of the slightest degree of penetration into the vaginal orifice, the offence of rape and, consequently, of penetrative sexual assault, would have been made out.

13. There is no doubt as to the age of the survivor. The medical examination in such regard indicated that the survivor was above 14 years of age but under 16. It was the consistent version of the father and

other relatives of the survivor, and of the survivor herself, that she was about 15 at the time of the incident and, certainly, below the age of 16. The appellant has not seriously joined issue in such regard and it is safe to conclude that the appellant has accepted that the survivor was less than 16 years of age as on the date of the incident.

14. In the survivor's initial statement before the investigating officer, she claimed that the appellant followed her while she left her father's shop to go towards the toilet, that he shut her mouth with one hand, grabbed her and, with the other hand, took off her slacks and her underpants before "raping" her. On a plain reading of such first statement given by the survivor, it would appear that the survivor may have been in a standing position when she was assaulted or molested by the appellant herein.

15. In her statement recorded under Section 164 of the Code, the survivor clearly indicated that she was pinned down on the floor before the appellant "raped" her. In her testimony at the trial, even though the survivor did not expressly say that the appellant herein forced the survivor down on the ground, she indicated that she had gotten up from the ground after the appellant had finished, which would imply that the appellant had laid her on the floor before committing the act complained of.

16. Ordinarily, when rape is attempted from the front on a victim who is in a standing position, penetration becomes difficult. However, when a woman is laid on the floor as the survivor in this case claimed, the chance of penetration would be more. Though the survivor in this case has used the word “rape” in several forms in all of her statements, she did not indicate the act of penetration or any degree thereof in course of any of her statements. What the survivor made out was that she was undressed, particularly on the bottom part of her body and she was molested by the appellant herein. But the survivor did not categorically indicate how the appellant had penetrated her vagina or inserted his organ therein. It appears that, to the young survivor, the fact that the appellant may have taken his penis out of his underwear and tried to push the same into the survivor amounted to the offence of rape being committed.

17. At any rate, given the description of the incident by the survivor and the fact that it had occurred on a pathway or footpath or on the side of the same between the building and the outside toilet, if the act had continued for as long as would have permitted penetration, there would surely have been some sign of bruise or injury on the person of the survivor. The entire medical report which was prepared upon examining

the survivor on the same day revealed no anomalies or abnormalities or any sign of injury.

18. Of course, the survivor alleged that the appellant squeezed her breasts and she felt pain in the upper part of her body. Such version of the survivor also appears to be believable and in course of the survivor being cross-examined, she reiterated being so molested. To such extent, the survivor's version has to be accepted.

19. Thus, once the offence of rape is not found to have been committed on the evidence presented, even if an attempt in such regard had been made out, the appellant herein could only have been found guilty of molesting and assaulting the survivor and outraging her modesty along with threatening her. In the absence of the medical report showing any kind of injury being suffered by the survivor and in the absence of the survivor asserting or indicating how she had been violated except for using the word "rape" in its several forms, the evidence before the trial court was not sufficient for it to come to a conclusion that there was any degree of penetration for an offence of rape or an offence of penetrative sexual assault having been committed by the appellant herein.

20. Not every person can be expected to be conversant with the definition of the word "rape" as indicated in Section 375 of the Penal

Code. In this case, it was a 15-year-old rustic girl who was all of 17 years old when she deposed in court and it was hardly expected of her to understand the distinction between rape and attempt at rape.

21. In the circumstances, the impugned judgment of June 28, 2022 and the consequent sentence of July 7, 2022 stand modified to the extent that the conviction of the appellant for committing rape and the consequent punishment under Section 376 of the Penal Code are set aside. The lesser charges for which the appellant has been convicted will stand to the extent indicated hereafter, along with the sentences therefor.

22. Apart from the sentence of 15 years' imprisonment and fine of Rs.1 lakh imposed under Section 376 of the Penal Code, which has now been set aside as indicated above, the rest of the punishment as directed by the trial court appears to be somewhat convoluted and erroneous as evident from the following:

“... imprisonment for one year u/s 323 of the Indian Penal Code, 1860, imprisonment for five years and fine of Rs.10,000/- (Rupees ten thousand) only u/s 354 of the Indian Penal Code, 1860, imprisonment for five years and fine of Rs.10,000/- (Rupees ten thousand) only u/s 354B of the Indian Penal Code, 1860, imprisonment for six years and fine of Rs.10,000/- (Rupees ten thousand) only u/s 506 of the Indian Penal Code, 1860, u/s imprisonment for five years and fine of Rs.10,000/- (Rupees ten thousand) only 8 of the Protection of Children from Sexual Offences Act, 2012. In default of payment of fine, the convict shall undergo another month of imprisonment for each

default. The period of time spent in custody during investigation and trial is set off from the total period of sentence. The sentences shall run concurrently.”

23. There is clear error in the award of imprisonment in excess of two years for criminal intimidation under Section 506 of the Penal Code. Upon correcting such error, the maximum prison term awarded is of five years. Considering the gravity of the offence by a 31-year-old married man on a 15-year-old girl, five years in prison is justified as the sentences would run concurrently. The fine imposed of Rs.10,000/- in each case under Sections 354, 354B and 506 of the Penal Code together with another Rs.10,000/- under Section 8 of the Act of 2012 will remain undisturbed.

24. The conviction for sexual assault and punishment awarded under Section 8 of the Act of 2012 are also upheld.

25. The entirety of the fine in terms of the original sentence as modified hereby will be made over to the survivor, if not already done.

26. CrI.A.No.37 of 2022 succeeds substantially. The impugned judgment of June 28, 2022 and sentence of July 7, 2022 are modified as indicated above.

27. CrI.M.C.No.94 of 2022 is disposed of.

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

(B. Bhattacharjee)
Judge

(Sanjib Banerjee)
Chief Justice

Meghalaya
07.08.2023
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