

GAHC030000482021



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : Crl.A./3/2021

Lalthangfela
Venglai, Bairabi

VERSUS

State of Mizoram and Anr
Mizoram 2:Andrew Lalpekhlua
Kolasib Hmar Ven

Advocate for the Petitioner : Mr J C Lalnunsanga

Advocate for the Respondent : Mrs. Linda L Fambawl (Addl.PP, Mizoram)

B E F O R E

THE HON'BLE MR. JUSTICE NELSON SAILO

Date of hearing : 22.02.2023
Date of Judgment : 06.03.2022

J U D G M E N T & O R D E R (CAV)

Heard Mr. J.C. Lalnunsanga, learned counsel for the appellant and Mrs.
Linda L. Fambawl, learned Addl. Public Prosecutor for the State respondent.

[2.] This is an appeal filed by the appellant against the Judgment & Order dated 16.12.2020 passed by the learned Fast Track Court, Kolasib District, Kolasib in Sessions Case No. (K) 25/2017 arising out of Criminal Trial No. 339/2017 by which the appellant was convicted under Section 6 of the POCSO Act and sentenced to undergo Rigorous Imprisonment for 10 years and to pay a fine of Rs. 5,000/- and in default, to suffer Rigorous Imprisonment for a period of 1 month.

[3.] The case of the prosecution in brief is that on 20.06.2017 at around 4:30 p.m, a written FIR was lodged by Andrew Lalpekhlua s/o Lalthansanga (L) of Kolasib to the effect that during the year 2012, his youngest sisters (victim) was sexually assaulted by her stepfather and that he continued to have sexual intercourse with her since then for almost every day and against her will. As a result, Kolasib P.S Case No. 97/2017 dated 20.06.2017 under Section 6 of the POCSO Act was registered and the case investigated into. Upon completion of the investigation, the investigating authority on finding a prima facie case under Section 6 of the POCSO Act to be well established against the appellant, submitted the charge sheet. Following the submission of the charge sheet, charge was framed against the appellant under Section 6 of the POCSO Act and to which, he pleaded not guilty and claimed for trial. Accordingly, trial commenced against the appellant and during the trial, the prosecution examined as many as 6 prosecution witnesses. Upon completion of the prosecution's evidence, the appellant was examined under Section 313 Cr.PC to enable him to explain the evidence that was led against him. However, the appellant did not

have anything to say or have witness in his defence. In other words, his reply to the questions put forth was basically that of denial. Consequently, the Trial Court upon hearing the parties passed the impugned Judgment & Order convicting and sentencing the appellant in a manner as already stated herein above.

[4.] Mr. J.C. Lalnunsanga, learned counsel submits that the arguments he would like to advance on behalf of the appellant are three fold. Firstly, POCSO Act became effective only from 14.11.2012 and since there is no specific date on which the alleged incident had happened apart from claiming that it happened in the year 2012, POCSO Act would not be attracted. Secondly, he submits that there is a huge delay in filing the FIR and that no explanation has been made for such delay and that the prosecutrix has not passed the test of sterling witness. In support of his submission, the learned counsel relies upon the case of ***Thulia Kali -Vs- The State of Tamil Nadu (1972) 3 SCC 393*** and ***Santosh Prasad ALIAS SANTOSH KUMAR -Vs- STATE OF BIHAR (2020) 3 SCC 443***. Thirdly, he submits that the learned Trial Court passed the impugned Judgment & Order as well as the impugned sentence order on the same day and therefore, the same is not in accordance with the law laid down by the Apex Court in ***Allauddin Mian & Others Sharif Mian & Another -Vs- State of Bihar (1989) 3 SCC 5*** and also as per the decision of the Division Bench of this Court in ***Sh. Thawngchungbik -Vs- State of Mizoram (2018) 1 GLR 482***.

[5.] The learned counsel submits that although according to PW-1, they came to know about the sexual assault upon the victim by their stepfather in the year 2016

but the FIR was lodged only on 20.06.2017 without any explanation for the delay. PW-1 who is the elder brother of the victim according to the learned counsel also stated that it was during the year 2012 that his stepfather had sex with his sister forcibly. There being no certainty about the exact date and on the other hand the POCSO Act having taken effect from 14.11.2012, the provisions of the POCSO Act cannot be applied to the instant case. The learned counsel further submits that even the victim herself who was examined as PW-2 stated in her examination-in-chief that the incident happened in the year 2012 without mentioning any specific date or month of that year. Therefore, according to the learned counsel, conviction of the appellant under POCSO Act cannot be sustained.

[6.] The learned counsel also submits that according to the Apex Court in ***Thulia Kali*** (supra), First information report in a criminal case is an extremely vital and valuable piece of evidence for the purpose of corroborating the oral evidence adduced during the trial. The importance of the above report can hardly be overestimated from the standpoint of the accused. The object of insisting upon prompt lodging of the report to the police in respect of commission of an offence is to obtain early information regarding the circumstances in which the crime was committed, the names of the actual culprits and the part played by them as well as names of eye witnesses present at the scene of occurrence. Delay in lodging the first information report quite often results in embellishment which is a creature of afterthought. On account of delay, the report not only gets bereft of the advantage of

spontaneity, danger creeps in of the introduction of coloured version, exaggerated account or concocted story as a result of deliberation and consultation. It is, therefore, essential that the delay in the lodging of the first information report should be satisfactorily explained. The learned counsel submits that in the instant case, the delay in lodging the FIR has not been explained and therefore, the commission of the alleged offence is highly doubtful, if not an afterthought. Therefore, the conviction of the appellant on this ground cannot be sustained.

[7.] The learned counsel also submits that from the evidence of the prosecution witnesses in their cross-examination, there appears to be some element of misunderstanding and quarrel between the relatives of the victim and the appellant. Therefore, in view of such personal enmity, a serious doubt is cast upon the case of the prosecution. Even on this ground, the conviction of the appellant cannot be sustained.

[8.] The learned counsel further submits that the impugned Judgment & Order of the learned Trial Court speaks for itself in so far as the order of conviction and the order of sentence was passed on the same day. Referring to the case of **Allauddin Mian & Others** (supra), the learned counsel submits that according to the Apex Court, as a general rule, the Trial Court should after recording the conviction, adjourn the matter to a future date and call upon both the prosecution as well as the defence to place the relevant materials bearing on the question of sentence before it and thereafter, pronounce the sentence to be imposed on the offender. The same

having not been followed, the conviction of the appellant cannot therefore be sustained on this ground as well.

[9.] Besides the above, the learned counsel for the appellant submits that the allegation made by the victim that she was repeatedly raped is farfetched inasmuch as there is no evidence led by the prosecution as to the dates on which the appellant was said to have committed rape upon the victim. All that is revealed from the prosecution's evidence is that the alleged rape happened in the year 2012 and thereafter, almost every day. Such allegation according to the learned counsel for the appellant is not supported by the medical examination of the victim as the report only says that there is a sign of old tear in the hymen and it admits one finger freely without any resistance. He also submits that the age of the victim has not been proved since the Birth Certificate was not exhibited. Further, the original case I/O was not examined and it was only the subsequent case I/O who had not done the investigation or taken the victim for medical examination, who was examined by the prosecution. The subsequent case I/O who was examined as PW-8 therefore does not support the case of the prosecution in any way. Under the circumstances, the learned counsel submits that the Judgment & Order of conviction and sentence should be set aside and the appellant be acquitted of the charge.

[10.] Mrs. Linda L. Fambawl, learned Addl. Public Prosecutor on the other hand submits that from the evidence of PW-1, it is clear that the incident of rape committed upon the victim by the appellant happened from the year 2012 onwards and

continued to happen thereafter. Therefore, the proceedings have rightly been initiated under the POCSO Act. She submits that from the evidence of PW-3, who is the elder sister of the victim, the victim stayed with their stepfather for almost 6 years. After the demise of their father on 02.10.2006, their mother married their stepfather i.e., the appellant in the year 2010 and the victim stayed with them for almost 6 years. The victim in her deposition before the Trial Court clearly stated that the appellant used to have sex with her forcefully almost every day and due to fear, she could not disclose the facts to anyone. The learned Addl. Public Prosecutor also submits that even before the trial began, the statements of the victim was recorded by a Judicial Magistrate under Section 164 Cr.PC which is similar to the evidence given by her during the trial. The version of the victim being consistent and corroborated by the evidence of the other witnesses, the learned Trial Court rightly convicted and sentenced the appellant. In so far as the date of conviction and the date of sentencing being on the same day, the learned Addl. Public Prosecutor submits that no prejudice has been caused to the appellant inasmuch as the learned Trial Court gave due opportunity of hearing to the parties. She submits that the case of **Allauddin Mian & Others** (supra) and **Sh. Thawngchungbik** (supra) are clearly distinguishable inasmuch as the facts involved in those cases and in the present case are not similar. Further, it was a case of conviction under Section 302 IPC and the sentence imposed was Rigorous Imprisonment for life whereas, the sentence imposed in the present case is Rigorous Imprisonment for 10 years with fine. Therefore, the impugned Judgment & Order of

conviction and sentence does not suffer from any infirmity and the same may be upheld by this Court.

[11.] I have heard the submissions made by the learned counsels for the rival parties and I have also perused the materials available on record.

[12.] In order to see as to whether the conviction of the appellant can be sustained, let us examine the evidence led by the prosecution. PW-1 is the elder brother of the victim and aged 32 years at the time of deposition. In his examination-in-chief he deposed that he knows the appellant who was present in the Court. On 02.10.2006, his father passed away and in the year 2010, his mother married the appellant and he was looked after by his relatives. As for his younger sister i.e., the victim, she stayed with her mother. In the year 2016 when he was staying at Lunglei, his younger sister was staying with their eldest sister and during that time, they came to learn that their stepfather used to have sex with the victim forcefully. They came to know about this from her classmate as their sister told her everything about the incident and later on, their sister herself was asked about the incident. The victim told her that during the year 2012, their stepfather i.e., the appellant had sex with her forcefully as she was lying in her bed and after that, he used to have sex with her almost every day. Being highly aggrieved, he submitted the FIR at the Kolasib Police Station. He exhibited the FIR and his signature as Exhibit P1 and P1(a) respectively. In his cross-examination, he stated that during the time of the alleged incident, the victim was studying in Middle School. She studied up to Class-VII when she was living

with the appellant. She continued her studies when he took her to his house by admitting her in Class-IX at RMSA School, Kolasib. The victim could not say the exact time of the incident but according to PW-1, it could be around the year 2013-2014. He agreed that the victim could give him wrong information. The victim informed him that the appellant threatened to kill her if she disclosed about the incident on his release if he was put in jail. The appellant was arrested and thereafter released from jail but he had not carried out his threat till date.

[13.] PW-2 is the victim herself. In her examination-in-chief, she stated that during the year 2012, she was studying in Class-VII and she was staying with her mother and her stepfather. She could not recall the exact date and time but one day at around 4 – 5 pm, her stepfather came home from his work and gave her some samosa and frooti and she ate some of it. In the night at around 12 pm, he tried to sleep with her but as she was afraid, she left her bed and sat on the bench. While she was trying to sleep again at around 3 pm, he came back to her bed and he grabbed her hand and closed her mouth with his hand and pulled down her pants and underwear and raped her. She tried to cry out but could not as he put his hands over her mouth. After this, the appellant used to have sex with her almost every day and due to fear, she could not disclose the same to others. Only after she stayed with her sister, she disclosed the incident to her sister and told her everything. In her cross-examination, she stated that her mother was a Health Worker. The son of the appellant from his previous marriage and her brother and sister born between the

appellant and her mother were all living under the same roof. The house was a small house and all of them slept in one room during the night time. Their house consist of a common bedroom and one sitting room-cum-kitchen. She and the son of the appellant from his previous marriage sleep together on the floor while the others sleep on the bed. She stated that it was a fact that the alleged incident took place in the year 2012 and that she did not have sexual intercourse with other person other than the appellant. She also stated that some of her relatives and the appellant used to quarrel regarding the service and service benefit of her mother. It was a fact that her relatives and the appellant could not come to a settlement and both side still maintained personal enmity. She also stated that the appellant indeed committed sexual assault on her and that the instant case was not instituted against the appellant due to personal enmity. At the time of the incident, the children of the appellant and her mother were 2 & 4 years only and they had not started their education and stayed at home with their mother.

[14.] PW-3 aged 30 years at the time of deposition is the elder sister of the victim. In her examination-in-chief, stated that the victim who is her younger sister used to stay with their mother and their stepfather for almost 6 years. After that, she stayed with her other sister and it was only during such time that they came to know about the fact that their stepfather used to have sex with the victim. She stated that they came to know about the incidents as the victim told her close friend and her friend had informed them. They then asked the victim how she was sexually assaulted

by their stepfather. After interrogating her, the victim told them that her stepfather had sex with her forcefully a number of times when she was staying with her mother and stepfather. In her cross-examination, she stated that she did not see the alleged incident and she disclosed the matter to her brother on the basis of the information received by her from the victim.

[15.] PW-5 is the seizure witness who witnessed the seizure of the Birth Certificate of the victim on 20.06.2017.

[16.] PW-6 is the Doctor who examined the victim. In her examination-in-chief she stated that on 20.06.2017 at 2 pm, the victim was produced before her for medical examination and she was accompanied by a Police Constable. After careful examination of her private parts and her body, she found her to be mentally and physically sound. She did not see seminal stain or bruise laceration of external genitalia. Her hymen admitted one finger freely without resistance and there was a sign of old tear in the hymen. Discharge and abrasion was seen at the interior part of labia matura. She exhibited the medical report and her signature as Exhibit P-V and V (a). In her cross examination, she stated that she believe that the victim might have had sexual intercourse more than once and the abrasion seen in the private part of the victim may be caused either by infection or sexual intercourse. The abrasion appeared to be fresh and recent.

[17.] PW-8 is the case I/O who submitted the chargesheet. In his examination-

in-chief, he stated that PW-1 submitted the FIR. He stated that during the investigation, the place of occurrence was visited and the complainant was thoroughly examined and his statements recorded. Likewise, the victim also was examined and her statements recorded. During the investigation, the Birth Certificate of the victim bearing registration No. 90/01 dated 27.02.2001 was recovered and seized at Kolasib Police Station in presence of witnesses on being produced by the complainant. As a prima facie case under Section 6 of the POCSO Act was found to be well established against the appellant, the chargesheet was submitted. He exhibited the chargesheet and his signature as Exhibit P-VI and P-VI (a) respectively. In his cross-examination, he stated that he did not investigate the case from the very beginning but came in later on after the previous Investigating Officer was transferred. However, he was the one who submitted the chargesheet.

[18.] From the depositions of the prosecution witnesses, the fact of the appellant having forceful sexual intercourse with the appellant came to light after the victim left the house of the appellant and was staying with her elder sister. According to PW-3, the victim informed her close friend about the incident and she in turn informed them. It was only then that they came to learn about the incident and they also asked the victim themselves. According to the victim, the incident had taken place in the year 2012 while she was studying Class-VII. Later, when she left the house of her stepfather and began staying with her elder sister, she was admitted to Class – IX at RMSA School, Kolasib. The complainant who was examined as PW-1 in his

examination-in-chief stated that in the year 2016 when he was staying at Lunglei and his younger sister was staying with his elder sister, it was during such time that they came to learn that their stepfather used to have forceful sex with the victim. After ascertaining about this fact from his sister, he filed the FIR. It is in evidence that the appellant had threatened the victim and for such reason, she could not disclose about the incident to others. Moreover, the victim was staying with the appellant himself under the same roof at the relevant time. Therefore, the question is whether the delay in filing the FIR would go against the case of the prosecution. The Apex Court in ***Thulia Kali*** (supra), had observed that FIR in a criminal case is an extremely vital and valuable piece of evidence to corroborate the oral evidence adduced during the trial. The same should be lodged with promptness since delay in filing the same has the danger of the introducing of coloured version or exaggerated account or even concocted story as a result of deliberation and consultation. Therefore, essentially the delay in the lodging of the FIR should be satisfactorily explained.

[19.] In the present case, according to the victim she was studying in Class-VII and was living with her stepfather and mother at the relevant time where her stepfather began having forceful sexual intercourse with her. She was threatened by him of not only hurting her but her mother and other siblings as well. It was only after she came out of the house and began staying with her elder sister that the incident came to light. It may be noticed that the statements of the victim was recorded under Section 164 Cr.PC before the trial wherein, she stated that one of her friend who lived

beyond their house saw her diary in which she had written about the incident. She then asked her about the incident and she revealed the details to her friend and her friend in turn told her elder sister Jenny about it and she in turn revealed the same to the family. Even from this, it can be seen that the version of the victim has been consistent although the details given in the 164 statements has not been repeated in her evidence during the trial, the same is not contradictory to the statements made during the trial. Moreover, her version has been corroborated by the evidence of the other prosecution witnesses.

[20.] The Apex Court in the case of ***State of Punjab -Vs- Gurmit Singh & Others***, reported in ***(1996) 2 SCC 384*** in the given facts of that case held that courts cannot over-look the fact that in sexual offences delay in the lodging of the FIR can be due to variety of reasons particularly the reluctance of the prosecutrix or her family members to go to the police and complain about the incident which concerns the reputation of the prosecutrix and the honour of her family. It is only after giving it a cool thought that a complaint of sexual offence is generally lodged. In the present case, the victim on being threatened did not have the courage to report the matter to anyone including her mother. It was only after she was staying with her elder sister that the incident came to light through the narration made by one of her friend. The explanation for the delay in my considered view only justifies the delay in filing the FIR.

[21.] The Apex Court in ***State of Himachal Pradesh -Vs- Sanjay Kumar Alias Sunny***, reported in ***(2017) 2 SCC 51*** held that it was settled by now that the testimony of a victim in cases of sexual offences is vital and unless there are compelling reasons which necessitate looking for corroboration of a statement, the courts should find no difficulty to act on the testimony of the victim of a sexual assault alone to convict the accused. No doubt, her testimony has to inspire confidence. Seeking corroboration to a statement before relying upon the same as a rule, in such cases, would literally amount to adding insult to injury. The deposition of the prosecutrix has, thus, to be taken as a whole. The victim of rape is not an accomplice and her evidence can be acted upon without corroboration. Coming to the present case, the version of the victim is found to be consistent and the medical examination of the victim although done much later to the incident alleged only goes to show that the victim had been subjected to forceful sexual intercourse at some point of time. Therefore, the version of the victim is found to inspire the confidence of this Court.

[22.] Although the learned counsel for the appellant has submitted that POCSO Act would not be applicable since the incident happened in the year 2012 while the POCSO Act became effective only from 14.11.2012, the said submission in my considered view cannot be accepted in view of the fact that the evidence on record shows that the forceful sexual intercourse started in the year 2012 and it continued

thereafter almost as a daily affair until the victim left the house of the appellant and stayed with her elder sister. She was studying in Class-VII when the incident started and later when she began to stay with her elder sister, she was admitted in Class-IX in RMSA, Kolasib. Therefore, I do not find force in the argument advanced by the learned counsel for the appellant on this point.

[23.] Another aspect of the matter which should be taken note of is that the objects and reasons for the enactment of POCSO Act is that sexual offences against children was felt to be not adequately addressed by the existing laws. A large number of such offences are neither specifically provided for nor are they adequately analyzed. Therefore, offence against children according to the framers of the Act required to be defined explicitly and countered through adequate penalties as an effective deterrence. Section 42 in Chapter IX of the POCSO Act deals with alternate punishment. It provides that where an act or omission constitutes an offence punishable under the POCSO Act and also under the relevant provisions of the Indian Penal Code or the Information Technology Act, 2000, then, notwithstanding anything contained in any law for the time being in force, the offender found guilty of such offence shall be liable to punishment under the POCSO Act or under the Indian Penal Code as provides for punishment which is greater in decree. Section 42A of the POCSO Act also provides that the provisions of the POCSO Act shall be in addition to and not in derogation of the provisions of

any other law for the time being in force and, in case of inconsistency, the provisions of the POCSO Act shall have overriding effect on the provisions of any such law to the extent of the inconsistency. Therefore, in view of these 2 (two) provisions under the POCSO Act in addition to what has already been stated in the preceding paragraph, I do not find any force in the submission that POCSO Act would not apply to the present case.

[24.] The other ground urged by the learned counsel for the appellant is that the learned Trial Court could not have convicted and sentenced the appellant on the same day in view of the Apex Court decision in ***Allauddin Mian & Others*** (supra). On this count, it may be seen that the case of ***Allauddin Mian & Others*** (supra) was taken into consideration by a 3 (three) Judges Bench of the Apex Court in ***Accused 'X' -Vs- State of Maharashtra***, reported in ***(2019) 7 SCC 1*** wherein the Apex Court held that meaningful hearing under Section 235 (2) of [Cr.PC](#), in the usual course, is not conditional upon time or number of days granted for the same. It is to be measured qualitatively and not quantitatively. As long as the spirit and purpose of Section is met, inasmuch as the accused is afforded a real and effective opportunity to plead his case with respect to sentencing, whether simply by way of oral submissions or by also bringing pertinent material on record, there is no bar on the pre-sentencing hearing taking place on the same day. Depending on the facts and circumstances, a separate date may be required for hearing on sentence, but it is equally permissible to argue on

the question of sentence on the same day if the parties wish to do so.

[25.] In the present case, from the impugned Judgment & Order, it can be seen that the learned Trial Court heard the learned Addl. Public Prosecutor as well as the learned Defense Counsel at length. While the Addl. Public Prosecutor prayed for maximum punishment, the Defense Counsel prayed for leniency. After hearing the parties and after careful consideration of the materials and evidence in its entirety, the learned Trial Court had sentenced the appellant to undergo Rigorous Imprisonment for 10 years with fine of Rs. 5,000/- and with a default clause. Therefore, the appellant having been given a fair chance of hearing on the sentence through his counsel, passing of the sentence on the same day of conviction in my considered view will not vitiate the conviction and sentence.

[26.] The learned counsel for the appellant had submitted that the Birth Certificate of the victim have not be exhibited during the trial, the conviction of the appellant on this ground under the POCSO Act cannot be sustained as there is no prove of the age of the victim. It may however be seen that the appellant did not lead any evidence in his defense to prove his innocence or to controvert the age of the victim. The defense had cross-examined the prosecution witnesses and nowhere during the cross-examination has a suggestion being made that the victim was a minor at the time of the alleged incident. The victim was medically examined on 20.06.2017 wherein she was recorded as 16 years. The medical report has been

exhibited as Exhibit PV and the signature of the Medical Officer as Exhibit PV (a). The same has not been controverted by the defense in any manner. Moreover, going by the age recorded in the medical report, the victim was still a minor even at the time of her medical examination. Therefore, I do not find any force in the objection or ground taken by the learned counsel for the appellant as regards the age of the victim being doubtful.

[27.] Thus, upon due consideration of the materials available on record, I do not find any ground to interfere with the impugned Judgment & Order rendered by the Trial Court. Accordingly, the appeal is dismissed.

JUDGE

Comparing Assistant