

GAHC030000892023



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

Case No. : CRL.A(J)/6/2023

Sh. Lalhruitluanga
Zuanguai, Muanna Veng, Aizawl, Mizoram

VERSUS

State of Mizoram and Anr.
Aizawl2:Sh. Vanlalchhuanga (Informant

Advocate for the Petitioner : Mr Samuel Vanlalhriata Chhangte (Amicus Curiae)

Advocate for the Respondent : P.P./Addl.PP, Mizoram

BEFORE
HON'BLE MR. JUSTICE MICHAEL ZOTHANKHUMA
HON'BLE MRS. JUSTICE MARLI VANKUNG

Date of hearing **:06.11.2023.**

Date of judgment **:06.11.2023.**

JUDGMENT & ORDER (ORAL)

(Michael Zothankhuma, J)

Heard Mr. Samuel Vanlalhriata Chhangte, learned Amicus Curiae and Mrs. Linda L. Fambawl, learned Addl. Public Prosecutor for the State.

2. The appeal has been made against the impugned Judgment and Order dated 13.10.2022 passed by the Judge, Fast Track Special Court (POCSO Act), Aizawl in SC No. 59/2018 in Criminal RI. No. 721/2018, by which the appellant has been convicted under Section 6 of the POCSO Act and sentenced to undergo Rigorous Imprisonment for a term of 20 years with a fine of Rs. 10,000/-, in default, to undergo RI for three months.

3. The learned counsel for the appellant submits that the appellant has been convicted for committing penetrative sexual assault upon two victim girls and their elder brother, all below the age of 12 years.

4. The learned Amicus Curiae submits that the appellant, in his appeal petition, had taken a stand that the victim's parents had written a letter dated NIL, in the presence of various Non-Governmental Organizations, to the effect that the appellant did not commit any sexual assault on the victims and as such,

the appellant should be acquitted of the charge under Section 6 of the POCSO Act. He submits that the letter duly signed by the parents of the victims and which is a part of the appeal petition had not been provided to him. However, he has perused the letter which is part of the Court record and the same clearly showed that the appellant had been falsely implicated in a fabricated case. He accordingly submits that additional evidence should be taken, to find out whether the parents and the victims had lodged a false case against the appellant and whether they had tutored victims, into giving false evidence before the learned Trial Court.

5. Mrs. Linda L. Fambawl, learned Addl. Public Prosecutor submits that as the parents had allegedly written a letter stating that the appellant did not commit any sexual assault on the victims, it was the duty of the Court to find out the truth of the matter.

6. We have heard the learned counsels for the parties.

7. The prosecution case in brief is that an FIR dated 21.11.2017 was submitted by the father of the two victim girls i.e. Prosecution Witness No. 1 (PW-1), who stated that while he was out working in the afternoon on 20.11.2017, his daughters aged 6 and 4 was sexually molested by the appellant, by inserting his private parts into the mouth of his two daughters and putting his fingers inside the private parts of his elder brother.

8. Pursuant to the FIR lodged by PW-1, Bawngkawn Police Station Case No. 342/2017 under Section 6 of the POCSO Act was registered on 21.11.2017. The investigation of the case was taken up and during investigation, the I.O

came to learn that the appellant had also sexually assaulted the elder brother of the victim girls, who was 8 years in the same afternoon, alongwith the two girls. On finding a prima facie case against the appellant under Section 6 of the POCSO Act, the I.O submitted the charge sheet against the appellant.

9. Charge under Section 6 of the POCSO Act was framed against the appellant, to which he pleaded 'not guilty' and claimed to be tried. Thereafter, the learned Trial Court examined 13 prosecution witnesses. The appellant was examined under Section 313 CrPC, wherein he denied the evidence that had been recorded against him. The learned Trial Court thereafter came to a finding that the appellant had committed the offence of penetrative sexual assault against the three victims, who were below the age of 12 and convicted him under Section 6 of the POCSO Act.

10. The evidence of PW-1, who is the informant, is to the effect that he had heard from his mother (PW-3) and their neighbour Cindy (PW-12) that the appellant had sexually assaulted his three children. The neighbour Cindy, who is PW-12, in her deposition stated that she had met the three victims and saw that their eye brows had been shaved. When she asked the elder victim girl as to who had shaved their eye brows, she told PW-12 that the appellant had shaved their eye brows while he was drunk. The elder victim girl also told PW-12 that the appellant tried to have sex with one of her siblings, but when PW-12 asked the elder victim again, the elder victim was not willing to say anything.

11. PW-2, who is the elder brother (minor) of two victim girls stated that on 20.11.2017, after his father had left for work, he went down stairs with his sisters to the floor occupied by the appellant. The appellant took them to his

bedroom where he took off the pants of his sister who was now 7 years and touched her private parts. He also touched the private parts of the PW-2. The appellant also made PW-2 to remove his pants and forced him to insert his private part into the private parts of his sister and then the appellant inserted his private parts into PW-2's mouth.

12. The evidence of PW-3, who is the grandmother of the three victims, is to the effect that the appellant resided in the floor below her house and the victims were the children of her daughter. On 20.11.2017, when she got home from office, she heard PW-12 speaking to her grand children. The victims were telling PW-12 that the appellant had cut their eye brows. PW-3 then called the children inside their house and asked them what had happened. PW-3 stated that the children did not tell her everything that the appellant had done to them. Thereafter, PW-3 requested the Mizoram Hmeichhe Insuihkhawm Pawl (MHIP) which is an NGO, to speak to the children and find out what had happened. The MHIP then reported the matter to the Child Welfare Committee. In her cross examination, PW-3 stated that the children did not tell her about the sexual assault and she did not know whether the children told the MHIP about it.

13. PW-4 is the older victim girl and her evidence is to the effect that the appellant removed her pants and touched her private parts. The appellant further made her brother insert his penis into her private parts. The appellant also inserted his penis into her mouth.

14. The evidence of PW-5, who is the younger victim girl, is to the effect that the appellant made her suck his penis and he also made his older sister suck his penis. The appellant further removed her underwear and tried to insert his penis

into her private parts.

15. PW-6, who was the Doctor posted at Civil Hospital, Aizawl stated that she examined the victim girl aged about 6 years and found that her hymen was ruptured. PW-6 further stated that the rupture of the hymen was not fresh and apart from the ruptured hymen, PW-6 could not discern any injuries on the body of the victim.

16. The evidence of PW-7, who is another Doctor posted at Civil Hospital, Aizawl stated that on 21.11.2017, he examined the appellant and found that the appellant was not under the influence of drug or alcohol and he did not notice any abnormality which would indicate that he was incapable of engaging in sexual intercourse.

17. PW-8, who is another Doctor working as a Gynecologist in Civil Hospital, Aizawl stated that he examined a 5 year old girl on 22.11.2017 in a case of alleged sexual assault. PW-8 stated that the victim girl was physically and mentally normal. Further, there was no bruising or laceration on the external genitalia and there was no sign of infection. Also her hymen was intact.

18. The evidence of PW-9, who is another Doctor in the Civil Hospital, Aizawl is to the effect that he received requisition on 16.01.2018 from the Bawngkawn Police Station, to conduct medical examination of a boy around 8 years old. PW-9 stated that there was no sign of injury on the genitalia of the boy and it appeared that the victim would not have been capable of engaging in penetrative sexual assault.

19. The evidence of PW-10, who was the Judicial Magistrate First Class at the relevant point of time and who is now posted as CJM, Siaha, stated that he recorded the statement of the three minor victim children under Section 164

CrPC and the same were exhibited as Exbt. P-8 (1), P-8 (2) and P-8 (3). PW-10 stated that he recorded the statement of the victim girls on 22.11.2017 and the statement of the victim boy on 17.01.2018.

20. The evidence of PW-11 is to the effect that he was the seizure witness to the seizure of birth certificates of the victim girls and the victim boy.

21. The evidence of PW-12 is to the effect that she could not recall the date of the incident when she saw the three victims, whose eye brows had been shaved. On asking one of the victim girls as to why they had shaved their eye brows, PW-12 was told that on going to the house of the appellant, the appellant who was drunk had shaved their eye brows. Further, the elder victim girl stated that the appellant tried to have sex with one of her siblings. PW-12 stated that on asking the elder victim girl again as to what had happened, she was not willing to tell her anything. Later, the grandmother of the victim children came and took them home.

22. The evidence of PW-13, who is the I.O, is to the effect that on examining the informant, witnesses and the victims, he learns that the appellant had sexually assaulted the victim children. The victims were produced before the Judicial Magistrate to record their statement. The birth certificates of the three children were seized and the appellant was arrested. The victims were also sent for medical examination.

23. The above being said, we find that the victims were all below 12 years of age, at the time of the incident. While the two victim girls were between the age of 4 and 6, the victim boy's age was 8 years at the time of the incident. The learned Trial Judge, while recording the evidence of the victims, did not put any preliminary questions to them, to satisfy himself with regard to whether the

victims were capable of understanding the questions put to them and were capable of giving rational answers to the questions put to them.

24. The statement of the victim children under Section 164 CrPC are similar to their testimony given before the learned Trial Court. However, as a child witness of tender age is easily susceptible to tutoring, careful scrutiny of the evidence of the child witness is required to be done. Under Section 118 of the Evidence Act, 1872, a child witness is competent to depose, unless the Court is of the opinion that the child is prevented from understanding the questions put to him, or from giving rational answers by reason of his tender age. The proviso to Section 4(1) of the Oath Act, 1969 provides that where the witness is a child under 12 years of age, the Court or person having authority to examine such witness is of the opinion that though the witness understands the duty of speaking the truth, he does not understand the nature of an oath or affirmation, the provisions of Section 4 and the provisions of Section 5 shall not apply to such witness; but in any such case the absence of an oath or affirmation shall not render inadmissible any evidence given by such witness, nor affect the obligation of the witness to state the truth.

25. In the case of *Pradeep Vs. State of Haryana*, AIR 2023 SC 3245, the Apex Court held that under the proviso to Sub-Section-(1) of Section 4, it is laid down that in case of a child witness under 12 years of age, unless satisfaction as required by the said proviso is recorded, an oath cannot be administered to the child witness. However, in view of the requirement of Section 118 of the Evidence Act, the learned Trial Judge was under a duty to record his opinion that the child was able to understand the questions put to him and that he is able to give rational answers to the questions put to him. The Trial Judge must record its opinion that the child witness understands the duty of speaking the

truth and state why he is of the opinion that the child understands the duty of speaking the truth.

26. The Apex Court in *Pradeep Vs. State of Haryana* (Supra) has further held that before recording evidence of a minor, it is the duty of the Judicial Officer to ask preliminary questions to him, with a view to ascertain whether the minor can understand the questions put to him and is in a position to give rational answers. The Judge must be satisfied that the minor is able to understand the questions and respond to them and understands the importance of speaking the truth. Therefore, the role of the Judge who records the evidence is very crucial. It also held that it is advisable to record the preliminary questions and answers so that the Appellate Court can go into the correctness of the opinion of the Trial Court.

27. In the present case, we find that the learned Trial Court has not recorded his opinion in the deposition form or in the Trial Court record, to the effect that the three victims were able to understand the questions put to them and were able to give rational answers to the questions put to them. The learned Trial Judge also did not record his opinion that the child witnesses understood the duty of speaking the truth and state why he was of the opinion that the children understood the duty of speaking the truth.

28. Though corroboration of the testimony of the child witness is not a rule, but a measure of caution and prudence, as a child witness of tender age is easily susceptible to tutoring, we are of the view that unless the learned Trial Court records its opinion/satisfaction with regard to whether the victims were able to give rational answers and had understood the questions put to them, it would not be safe to convict the appellant solely on the basis of their evidence. Accordingly, the learned Trial Judge should give his opinion, to satisfy himself

with regard to the capability of the victims to understand the questions and give rational answers. The same has to be recorded in the deposition form and/or in the judgment/order to be made by the learned Trial Judge.

29. With regard to the letter submitted by the parents of the victims, we are of the view that the parents not being eye witnesses to the incident, their evidence is only hearsay evidence and the said letter cannot have any relevance to the issue at hand. The above letter in the vernacular and translated version is reproduced below as follows:-

“To,
The Magistrate
Aizawl District
Sub: Request for assistance
Sir/Madam,
We Lalrinmawii and Vanlalchhuanga have filed a case in the year 2017 against Mr.Lalhruaitluanga however we came to learn that we have been misinformed and this is what actually happened instead.

Mr.Lalhruaitluanga shaved the eyebrows of the children merely for fun and as we scold the children when they returned home, they did not narrate the incident accurately. Upon questioning them further at a later date, we realize that Mr.Lalhruaitluanga did not sexually harass them.

With this being the case, we would like to withdraw the complaints that we have lodged against him. In order to immediately stop the suffering of an innocent victim based on the confession of mentally worried children, I request you to kindly take all the possible steps from your end.

Yours faithfully

(VANLALCHHUANGA) (LALRINMAWII)
Muanna Veng Muanna Veng

WITNESSES

(V. LALRINCHHANA) (JH LALDINGNGHETI) (BIAKSIAMA)
Secretary President Secretary
YMA MHIP Local Council
Muanna Veng Muanna Veng Muanna Veng”

“To,

The Magistrate
Aizawl District.

Subject: HMALAKPUI TURA NGENNA

Sir/Madam,

Keini Lalrinmawii leh Vanlalchhuanga te hian kum 2017 a Pu Lalhrualtuanga case ka file kha thu kan lo hriat sual vang a ni tih kan hre chhuak ta a, thil awmdan chu hetiang zawk hi a lo ni e.

Pu Lalhrualtuanga hian naupang infiampuina'n tiin an mit hmul a lo ziah sak a, naupang lo haw chu thinrimin kan lo hau baw si a, an hlauthawng chuan an chanchin an sawi thiam taw lo a, a hnuah thil awmzia kan han zawt chiang leh a, Pu Lalbrualtuanga hian engtin mah zahmawh rawngkaia a fiam loh thu kan hre leh ta a.

Heatiang a lo nih takah chuan a tira kan thubuai lo thehluh tawh chu hnuh kir leh kan duh a, thil tisual lo leh thiam lobna nei lo, naupangin an rilru manganna atanga an sawi beh chhana kan lo tawrh tirna hi tihtawp a nih thuai theihna turin I theihna zawnah hina min lo lakpui hram turin I khawngaihna kan han ngen a ni e.

I rintlak,

(VANLALCHHUANGA)
Muanna veng

(LALRINMAWII)
Muanna Veng

HRIATPUITUTE

(V. LALRINCHHANA) (H. LALDINGNGHETI) (BIAKSIAMA)"

30. A perusal of the letter submitted by the parents of the victims which has been relied upon by the learned Amicus Curiae, in support of his submission that the case against the appellant is a fabricated case shows that the contents of the said letter is at variance with the testimony given by the victims before the learned Trial Court. As it was the children who were the victims of the alleged sexual assault by the appellant, we do not understand how the parents of the victims could now state that their children did not narrate the incident accurately. As the letter issued by the parents of the victim children is inadmissible as evidence, the same cannot be considered while deciding this case.

31. In the case of *State of Uttar Pradesh Vs. Krishna Master & Others*,

(2010) 12 SCC 324, the Supreme Court has held at para 36 and 37 as follows:-

“36. The abovestated reasons are the only grounds on which testimony of witness Madan Lal is disbelieved by the High Court. This Court fails to understand as to on what principle and on which experience in real life, the High Court made a sweeping observation that it is inconceivable that a child of Madan Lal's understanding would be able to recapitulate facts in his memory witnessed by him long ago. There is no principle of law known to this Court that it is inconceivable that a child of tender age would not be able to recapitulate facts in his memory witnessed by him long ago. This witness has claimed on oath before the Court that he had seen five members of his family being ruthlessly killed by the respondents by firing gunshots. When a child of tender age witnesses gruesome murder of his father, mother, brothers, etc. he is not likely to forget the incident for his whole life and would certainly recapitulate facts in his memory when asked about the same at any point of time, notwithstanding the gap of about ten years between the incident and recording of his evidence.

37. This Court is of the firm opinion that it would be doing injustice to a child witness possessing a sharp memory to say that it is inconceivable for him to recapitulate facts in his memory witnessed by him long ago. A child of tender age is always receptive to abnormal events which take place in his life and would never forget those events for the rest of his life. The child would be able to recapitulate correctly and exactly when asked about the same in future. Therefore, the specious ground on which the reliable testimony of PW 2 Madan Lal came to be disbelieved can hardly be affirmed by this Court.”

32. In the case of *State of Madhya Pradesh Vs. Ramesh & Another, (2011) 4 SCC 786*, the Supreme Court has held that the deposition of a child witness may require corroboration, but in case his deposition inspires the confidence of the Court and there is no embellishment or improvement therein, the Court may rely upon his evidence. The evidence of a child witness must be evaluated more carefully with greater circumspection because he is susceptible to tutoring. Only in case there is evidence on record to show that a child has been tutored, the Court can reject his statement partly or fully. However, an inference as to

whether child has been tutored or not, can be drawn from the contents of his deposition.

33. As it is settled law that conviction can be based on the basis of the evidence given by a child witness/prosecutrix, so long as their evidence inspires the confidence of the Court, after the learned Trial Judge is satisfied that the child witness is able to understand the questions put to him and able to give rational answers to them. However, as stated earlier, the learned Trial Judge has not recorded his satisfaction with regard to whether the minor victims/children understood the questions put to them and were able to give rational answers to them.

34. The above being said, we find that the learned Trial Court has come to a finding that the appellant committed the offence of penetrative sexual assault, while convicting him under Section 6 of the POCSO Act, 2012. The learned Trial Court may have made an inadvertent error. However, to put things in its right perspective, we would like to state that the victims being below 12 years, whenever there is penetrative sexual assault on a child below 12 years of age, the same would amount to aggravated penetrative sexual assault, in terms of Section 5 (m) of the POCSO Act, 2012.

35. Accordingly, in view of the reasons stated above, the case is remanded back to the learned Trial Court so that the learned Trial Judge, by putting preliminary questions to the victim satisfies himself as to whether they were capable of understanding the questions put to them and whether they could give rational answers to them. Thereafter, depending upon the opinion of the learned Trial Judge with regard to whether he is satisfied that the

victims/children have/had the capability to understand the questions and give rational answers to them, the learned Trial Court shall dispose of the case.

36. Consequent to the above reasons, the impugned Judgment and Order dated 13.10.2023 passed by the Presiding Officer, Fast Track Special Court (read as POCSO, Aizawl) in SC No. 59/2018 in Criminal RL No. 721/2018 is hereby set aside.

37. The appeal is accordingly disposed of. Send back the LCR.

38. In appreciation of the assistance rendered by the learned Amicus Curiae, Mr. Samuel Vanlalhriata Chhangte, the fee of Rs. 8500/- shall be provided to him by the Mizoram State Legal Services Authority.

JUDGE

JUDGE

Comparing Assistant