

GAHC030001812020



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

Case No. : CRL.A(J)/5/2020

K Beiluatha
s/o K Hneisa, Siaha, Mizoram

VERSUS

State of Mizoram and Anr.
Aizawl, Mizoram

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

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

JUDGMENT

Date : 02-05-2023

BEFORE
HONOURABLE MR. JUSTICE NELSON SAILO

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

[2.] This appeal from Jail filed by the appellant is directed against the Judgment & Order dated 08.05.2018 and the Order dated 09.05.2018 passed by the Court of Special Judge, POCSO Act, 2012, Siaha, Mizoram in SR No. 3/2018 by which, the appellant was convicted under Section 4 of the POCSO Act and then sentenced to undergo 8 years rigorous imprisonment with fine of Rs. 3,000/- with a default clause

respectively.

[3.] The case of the prosecution in brief is that the appellant was alleged to have been committed penetrative sexual assault upon the victim, who was a minor girl aged 14 years on the night of 17.10.2017 inside the motor workshop at Meisatla along with NH-54, Siaha. An FIR was lodged by the informant on the same day before the Officer-in-Charge of Siaha Police Station. As a result of the FIR, the appellant was apprehended from his residence and was forwarded to the Medical Officer, Siaha for medical examination. In his deposition before the Police, the appellant stated that he and the victim were lovers and that he did not know the age of the victim and he never asked her age as well. He also stated that he and the victim had sex twice out of love. As for the victim, she stated before the Investigating Authority that she and the appellant had sex on free-will and there was no compulsion or use of force. They had sexual intercourse on 14.10.2017 and thereafter, on 17.10.2017. The investigation revealed that the victim was born on 04.08.2003 as per the birth certificate, while the appellant was found to be aged 19 years. Upon finding a prima facie case under Section 4 of the POCSO Act to be well established against the appellant, charge-sheet No. 124/2017 dated 27.11.2017 was submitted by the Police before the Court.

[4.] Charge against the appellant was framed under Section 4 of the POCSO Act and to which, he pleaded not guilty and claimed for trial. As a result, Trial commenced against the appellant. During the trial, the prosecution examined as many as 8 (eight) prosecution witnesses including the victim while the defence examined as many as 4 defence witnesses. After the appellant was examined under Section 313 of the Cr.P.C, and upon hearing the parties, the learned Trial Court passed the impugned Judgment & Order of conviction and the order of sentence as already stated herein above against the appellant.

[5.] Mr. Samuel Vanlalhriata Chhangte, learned Amicus Curiae submits that from the statement of the victim, it can be seen that she had fallen in love with the

appellant since October 2017 and that they had consensual sex on 14.10.2017 and on 17.10.2017. The victim hesitantly revealed about this fact to the complainant, who is her grandfather after he threatened to beat her. The learned Amicus Curiae further submits that in the re-cross examination, the victim also stated that she replied back to the love letter written to her by the appellant from Jail. He, therefore, submits that the sexual intercourse between the victim and the appellant being consensual, the conviction and sentence impugned upon the appellant should be set aside. The learned Amicus Curiae submits that the appellant at the relevant time was studying in class-12 and was 19 years of age. He has no previous conviction or criminal record and therefore, the conviction should be interfered with or the sentence modified as his future prospects is adversely being affected. In support of his submission, he relies upon the following authorities:-

(i) Judgment & Order dated 27.10.2022 rendered by the High Court of Meghalaya in Criminal Petn. No. 45 of 2022 (Shri Silvestar Khonglah & Anr). vs. State of Meghalaya & Anr.

(ii) Judgment dated 12.05.2020 passed by a Division Bench of this Court in Criminal Appeal No. 8/2019 (J.S Robert Nohro vs. State of Mizoram).

[6.] Mrs. Linda L Fambawl, learned Addl. Public Prosecutor, on the other hand, submits that from the evidence led by the prosecution and also from the admission of the victim and the appellant, the fact that there was penetrative sexual intercourse between the appellant and the victim has been established. The medical examination of victim on her genitals revealed *mild laceration external coctus and the hymen ruptured*. Under the facts and circumstances, she submits that the appellant was rightly convicted by the learned Trial Court. Since there is no dispute about the victim being 14 years of age and therefore a minor, the consent for having sex said to have been given by her is irrelevant. The learned Addl. Public Prosecutor in support of her

submission has relied upon the case of *Satish Kumar Jayanti Lal Dabgar vs. State of Gujarat (2015) 7 SCC 359*.

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

[8.] Let us examine the evidence led by the prosecution witnesses. PW-1 who is the informant and the grandfather of the victim stated that on 17.10.2017 since the victim was late in returning home from school, he sent his son to look for her. His son then found the victim and the appellant below Don Bosco School and he brought her home. The victim confessed that she had sexually intercourse with the appellant on that day. Since the victim is a minor, he immediately proceeded to the Police station for lodging the FIR. In his cross-examination, he admitted that the victim confessed only after he threatened to beat her. He also stated that he is not a eye witness and came to learn about the incident from the disclosure made by the victim.

[9.] The victim was examined as PW-2 on 13.03.2018 wherein, she stated that on 17.10.2017, she went to school and was studying in Class-IX at Siaha H/S. She met the appellant in front of Mizoram Rural Bank Office and they visited Foxal School as a friend of the appellant had a girlfriend. Thereafter, they proceeded towards home via New Colony and after passing the area of Don Bosco School, there was one motor workshop where they found a cabin inside it and had sexual intercourse. She stated that she had fallen in love with the appellant since October 2017. The victim was also examined again on 01.05.2018 wherein she again reiterated what she had stated in her deposition made on 13.13.2018. In her re-cross examination, she also stated that she replied to the love letter written to her by the appellant from Jail.

[10.] PW-3, PW-4 are seizure witnesses who witnessed the seizing of the birth certificate of the victim.

[11.] PW-5 is the medical doctor, who examined the victim. In her examination-

in-chief, she stated that she examined the victim on 17.10.2017 at around 10:10 PM and found old rupture of hymen and some bruise mark on her private parts. In her re-examination, she stated that although recent sexual intercourse could not be determined, mild laceration external coctus hymen rupture was found revealing that there was a recent sexual intercourse.

[12.] PW-6 is the medical doctor who examined the appellant. He deposed that upon examining the appellant, he found seminal sperm in his underpants. In his cross-examination, he stated that the laboratory test of the accused was negative.

[13.] PW-7 is the case I.O who conducted investigation and who submitted the charge-sheet. In his examination-in-chief he stated that upon finding a prima facie case under Section 4 of the POCSO Act against the appellant, he submitted the charge-sheet. He exhibited the charge-sheet and the other contents and documents attached to the charge-sheet as Exbt. P-1 and Exbt. P-21.

[14.] PW-8 is the son of PW-1, who had gone in search of the victim and who had brought her home on the day of the incident. He stated that when the victim was asked by his father, she stated that she had sexual intercourse with the appellant on 17.10.2017.

[15.] Although 4 (four) defence witnesses were examined but their statements are general in nature and does not benefit to the appellant in any manner.

[16.] From a perusal of the materials available on record, there is no dispute to the fact that the appellant and the victim had sexual intercourse on the evening of 17.10.2017. There is also no dispute to the fact that the victim was a minor on the date of the incident as she was born on 04.08.2003. The evidence further reveals that the sexual intercourse between the parties was not a forced sexual intercourse but however the fact remains that as per the POCSO Act as well as the Indian Penal Code (IPC), a consent given by a minor is no consent. The Apex Court in the case of *Satish*

Kumar Jayanti Lal Dabgar (supra) in the given facts of that case in considering the 6th clause of Section 375 of the IPC held as follows:-

“14) First thing which is to be borne in mind is that the prosecutrix was less than 16 years of age. On this fact, clause sixthly of Section_375 of the IPC would get attracted making her consent for sexual intercourse as immaterial and inconsequential. It reads as follows: "375. Rape-A man is said to commit "rape" who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions:-

xx xx xx Sixthly - With or without her consent, when she is under sixteen years of age. Explanation.-Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape."

15) The Legislature has introduced the aforesaid provision with sound rationale and there is an important objective behind such a provision. It is considered that a minor is incapable of thinking rationally and giving any consent. For this reason, whether it is civil law or criminal law, the consent of a minor is not treated as valid consent. Here the provision is concerning a girl child who is not only minor but less than 16 years of age. A minor girl can be easily lured into giving consent for such an act without understanding the implications thereof. Such a consent, therefore, is treated as not an informed consent given after understanding the pros and cons as well as consequences of the intended action. Therefore, as a necessary corollary, duty is cast on the other person in not taking advantage of the so-called consent given by a girl who is less than 16 years of age. Even when there is a consent of a girl below 16 years, the other partner in the sexual act is treated as criminal who has committed the offence of rape. The law leaves no choice to him and he cannot plead that the act was consensual. A fortiori, the so-called consent of the prosecutrix below 16 years of age cannot be treated as mitigating circumstance.

16) Once we put the things in right perspective in the manner stated above, we

have to treat it a case where the appellant has committed rape of a minor girl which is regarded as heinous crime. Such an act of sexual assault has to be abhorred. If the consent of minor is treated as mitigating circumstance, it may lead to disastrous consequences. This view of ours gets strengthened when we keep in mind the letter and spirit behind Protection of Children from Sexual Offences Act, 2012”

[17.] From the above abstract, it may be seen that according to the Apex Court, even when there is a consent of a girl below 16 years, the other partner in the sexual act is treated as a criminal who has committed the offence of rape. The law leaves no choice to him and he cannot plead that the act was consensual. A fortiori, the so-called consent of the prosecutrix below 16 years of age cannot be treated as mitigating circumstance, as it may lead to disastrous consequences. This view gets strengthened keeping in mind the letter and spirit behind the POCSO Act and the justification behind sentencing is not only retribution, incapacitation, rehabilitation but deterrence as well.

[18.] The case of *Silvestar Khonglah & Anr (supra)* relied upon by the learned Amicus Curiae is regarding the quashing of the criminal proceedings by the High Court of Meghalaya by invoking Section 482 Cr.P.C whereas, the present case is an appeal from Jail after the appellant has been convicted and sentence by the Criminal Court. Therefore, I do not find the referred case to be relevant to the present case. As for the case of *J.S Robert Nohro (supra)* relied upon by the learned Amicus Curiae, the same is regarding the reduction of sentence from 15 years to 10 years for a conviction made under Section 6 of the POCSO Act. The minimum sentence prescribed under Section 6 of the POCSO Act is 10 years. The Division Bench of this Court in the given facts of that case found to be fit and proper to reduce the sentence from 15 years prescribed under Section 6 of the POCSO Act.

[19.] Coming back to the present case, the learned Trial Court upon convicting

the appellant under Section 4 of the POCSO Act sentenced him to 8 years rigorous imprisonment with a fine of Rs. 3,000/- and with a default clause. The minimum punishment prescribed under Section 4 prior to the amendment in the year 2019 is imprisonment for a term of not less than 7 years and which may extend to imprisonment for life along with fine. The appellant in the present case was 19 years of age at the relevant time and was studying in Class-XI. The appellant admittedly also does not have any criminal background and therefore, upon due consideration, I am of the considered view that ends of justice would be met if the sentence imposed upon the appellant is reduced to 7 years of rigorous imprisonment from 8 years. It is, therefore, ordered accordingly. Apart from this modification, the remaining part of the sentence shall remain the same.

[20.] With the above observation and direction, the appeals stands disposed of. A copy of this order should be sent to the Special Superintendent of the Central Jail, Aizawl for onward communication to the appellant.

[21.] In appreciation of the valuable assistance rendered by Mr. Samuel Vanlalhriata Chhangte, learned Amicus Curiae, he shall be paid a sum of Rs.7,500/- (Rupees Seven Thousand Five Hundred) only by the Mizoram State Legal Services Authority.

JUDGE

Comparing Assistant