



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

Case No. : CrI.A./4/2022

Zionmawia
S/o Vanlalhuala
R/o Vaphai, Champhai District,
Mizoram

VERSUS

State of Mizoram and Anr.
Aizawl, Mizoram

2:Lalramchuani r/b her mother Lalhlimchuang

Advocate for the Petitioner : Mr. T Lalnunsiamia

Advocate for the Respondent : Ms. Mary Lalruatkimi Kiangte (Addl.P.P., Mizoram)

BEFORE
HONOURABLE MR. JUSTICE NELSON SAILO

JUDGEMENT

Date : 15-02-2023

Heard Mr. T. Lalnunsiamia, learned counsel for the appellant and Ms. Mary L. Kiangte, learned Additional Public Prosecutor.

[2.] This is an appeal filed by the appellant against the Judgment & Order dated 20.08.2021 passed by the Fast Track Court under the POCSO Act, Champhai in FTSC (CPI), POCSO 13/2021 corresponding to Criminal Trial No. 1585/2017, whereby the appellant was convicted under Section 6 of the POCSO Act and

sentenced to 10 years Rigorous Imprisonment with a fine of Rs. 500/- and with a default clause vide the Order of Sentence dated 24.08.2021.

[3.] The case of the prosecution in brief is that an FIR was lodged by one TC Vanlalchuana, the maternal aunt of the victim to the effect that the victim was raped by the appellant sometime on 26.03.2017 repeatedly for 3 (three) times and that the victim is minor and is mentally retarded. He therefore requested that lawful action be taken against the appellant.

[4.] As a result, CPI PS Case No. 89 dated 16.08.2017 under Section 6 of the POCSO Act was registered and investigated into. After completion of the investigation, charge sheet was filed on 31.10.2017 and charge was framed against the appellant under Section 6 of the POCSO Act on 25.11.2017 and to which he pleaded not guilty and claimed for trial. Trial commenced against the appellant and in the process the prosecution examined as many as 7 (seven) prosecution witnesses, while the defence had no witness. The mother of the victim Lalhlumchuangi was examined as the sole Court witness. After the appellant was examined under Section 313 of the Cr.P.C and the parties heard, the learned Trial Court vide the impugned judgment and order and the order of sentence convicted and sentenced the appellant, in the manner as already stated hereinabove.

[5.] Mr. T. Lalnunsiam, learned counsel has drawn the attention of this Court to

the psychological assessment report of the victim at page No. 68 of the paper book which indicates that at the time of the test on 17.08.2017, the victim was found to have obtained the mental age of 7 years and 7 months with IQ=51. Accordingly, the impression recorded of the victim is that she is in the category of mild retardation in intellectual functioning with IQ=51. The learned counsel has also taken me to the medical examination report which is at page Nos. 53 & 54 of the paper book to show that the findings of the Medical Officer is that the victim is physically fit and is known to have seizure disorder and with low IQ. The learned counsel has also drawn the attention of this Court to the deposition of CW-1, i.e. mother of the victim before the Trial Court. The learned counsel submits that it is evident from the cross examination of the CW-1 that, prior to the commission of the alleged rape upon the victim by the appellant, the victim had been sexually assaulted. By further referring to the cross examination of the complainant, who was cited as PW-1 during trial, the learned counsel submits that a certain degree of consent from the side of the victim possibly happened. The appellant was not entirely at fault when he sexually assaulted the victim, as the victim being a past victim of sexually assault became an easy and susceptible prey. The learned counsel has also drawn the attention of this Court to Annexure 3 and Annexure 4 of the memorandum of appeal, which shows that the appellant is 65% locomotor disabled and the mother of the victim had also forgiven the

appellant in writing and that the victim had expired on 21.02.2021 due to stomach pain. The learned counsel therefore submits that under the facts and circumstances, the sentence imposed upon the appellant is too harsh and therefore should be reduced. In support of his submission, the learned counsel relies upon the following decisions:-

(i) *Sy. Azhar Sy. Kalandar Vs. State of Maharashtra & Anr.*, reported in 2021 SCC OnLine SC 701

(ii) *Lochan Shrivastava Vs. State of Chhattisgarh*, reported in 2021 SCC OnLine SC 1249.

[6.] Ms. Mary L. Khiangte, learned Additional Public Prosecutor, on the other hand submits that from a perusal of the examination of the appellant under Section 313 of the Cr.P.C, the appellant has clearly admitted that he had sexual intercourse with the victim twice. She submits that the victim was born on 05.05.2003 and therefore, on the date of commission of the alleged crime, i.e. 26.03.2017 she was about 15 years of age and a minor. Therefore, the learned Trial Court has rightly convicted the appellant under Section 6 of the POCSO Act and has given a lenient sentence of 10 years imprisonment, which is the minimum sentence prescribed. The learned Additional Public Prosecutor also submits that the evidence of the prosecutrix alone is sufficient to convict the accused when the same is reliable, cogent and trustworthy. In the instant case, there is no

dispute regarding the commission of the alleged crime by the appellant and under the circumstance, the conviction and sentence imposed upon the appellant may not be interfered with by this Court. In support of her submission, the learned Additional Public Prosecutor has relied upon the case of *State of Himachal Pradesh Vs. Manga Singh*, reported in (2019) 16 SCC 759.

[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.] From the submission made by the learned counsel for the appellant, what can be summed up is that the appellant has not seriously disputed his conviction and has only prayed for imposition of a lesser sentence other than 10 years Rigorous Imprisonment imposed upon him. Despite the limited prayer and submission, the evidence led by the prosecution is being examined. The victim was examined as PW-4 and in her examination-in-chief, she stated that she studied up to Class-V and knew the accused person. It was Sunday forenoon and the church service was going on and she was inside her residence at Vaphai Village. The appellant invited her to visit him at his residence and offered to pay her money, if she shared his bed with him. He then took her to his bed room and made her lie down in his bed. He took of all her clothes and also took of his pants and then raped her. After that, he gave her Rs. 20/- and warned her not to tell anybody. After a week on Sunday, the appellant again invited her to visit his house

and repeated what he did to her the earlier Sunday.

[9.] The mother of the victim was examined as CW-1. In her examination-in-chief, she stated that one Sunday forenoon, she attended church service and she was accompanied by the victim. However, the victim went home before the church service was over. After the service, she searched for her daughter and went to the residence of the appellant in search of her but did not find her. When asked, the appellant told her that her daughter had left his residence. Suspecting that her daughter was still inside the appellant's house, she waited outside and after a while her daughter came out from the residence of the appellant. She then asked the appellant why he had lied to her about her daughter's whereabouts. Her daughter then narrated the incident of rape committed on her by the appellant inside the residence. She said that the appellant offered her money and raped her. CW-1 also stated that the appellant had committed rape upon her daughter on earlier occasion as well and for which she had slapped him out of anger. In her cross examination, she stated that she did not report about the first incident of rape to the police.

[10.] The complainant was examined as PW-1, the Doctor who examined the victim as PW-5, the Doctor who made psychological assessment report on the victim as PW-6 and the case I.O as PW-7 besides other witnesses. The version of these witnesses corroborates the statement of the victim and also to the fact that

the victim is mentally retarded. PW-5 in her examination in chief stated that on examining the genital area of the victim, she found her hymen not intact and it appeared that there has been sexual intercourse in the past. The appellant also in his examination under Section 313 Cr.P.C admitted that he had sexual intercourse with the victim. Therefore, from the materials available on record and the evidence led by the prosecution, commission of sexual intercourse/rape upon the victim has been clearly established.

[11.]The question therefore to be considered is as to whether the sentence imposed upon the appellant is on the higher side. Section 6 of the POCSO Act before the amendment in the year 2019 provided that whoever committed aggravated penetrating sexual assault shall be punished with rigorous imprisonment for a term of not less than 10 years, but which may extend to imprisonment for life. By the amendment in the year 2019, the minimum sentence has been enhanced to 20 years. There is no dispute regarding the age of the victim at the time of commission of the offence that she was a minor. It is a settled law that if the victim is a child or minor as defined under the POCSO Act or the IPC giving consent for sexual intercourse is irrelevant. In other words, even if consent is given by the child, the accused person would still be punishable for having committed rape. In the instant case, the victim was not only under aged but she suffered from mental retardation and taking advantage of the same, the

appellant had committed sexual intercourse upon her on more than one occasion. The fact that the victim's mother has forgiven the accused person, cannot be the ground for reducing the sentence, since the appellant has already been imposed with the minimum sentence. Moreover, the offence committed is not a compoundable offence. The facts involved and the relevant provisions of law under which the accused was charged in *Sy. Azhar Sy. Kalandar (Supra)* are different and cannot be applied to the facts of the present case.

[12.]The decision relied upon by the counsel for the appellant, i.e. *Lochan Shrivastava (Supra)* is also distinguishable. The basis of conviction in that case was on circumstantial evidence. However, in the instant case, the evidence of the prosecutrix/victim and the other prosecution witnesses clearly establishes that the appellant had committed sexual intercourse upon the victim, who was mentally retarded and under aged. Thus, under the facts and circumstances of the case, I do not find any ground to interfere with the impugned judgment and order of conviction and also the order of sentence passed by the learned Trial Court. The appeal accordingly stands dismissed.

JUDGE

Comparing Assistant