

GAHC020004052019



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

Case No. : CRAPL/9/2019

FOUNDER CHUNG
CHAROIKHULLEN VILLAGE, UNDER CHURACHANDPUR DISTRICT
OF MANIPUR

VERSUS

THE STATE OF NAGALAND
KOHIMA, N/L

For Appellant : Ms. Nancy Lotha, Advocate
Mr. Azole Tep, Advocate

For respondent(s) : Ms. V. Suokhrie,
Public Prosecutor, Nagaland

Date of hearing : 19.05.2023

Date of judgment : 25.05.2023

BEFORE
HON'BLE MR JUSTICE MRIDUL KUMAR KALITA

JUDGMENT AND ORDER (CAV)

Date : 25.05.2023

(Mridul Kumar Kalita, J)

1. Heard Ms. Nancy Lotha, learned counsel for the appellant. Also

heard Ms. V. Suokhrie, learned Public Prosecutor, Nagaland.

2. This Criminal Appeal has been registered on filing of an appeal under Section 374 (2) of the Code of Criminal Procedure, 1973 by the appellant Sri Founder Chung, against the judgment dated 16.08.2019 delivered by the Court of learned Special Judge, Phek, in G.R. Case No. 103/2014 (*Pfutsero P. S. Case No. 29/2014*) whereby the present appellant was convicted under Section 354 A (1) (i) of the Indian Penal Code read with Section 511 of the Indian Penal Code and was sentenced, for the said offence, to undergo rigorous imprisonment for one year and to pay a fine of Rs. 2,000/- and in default of payment of fine, to undergo further rigorous imprisonment for three months. He was also convicted under Section 340 of the Indian Penal Code read with Section 511 of the Indian Penal Code and was sentenced, for the said offence, to undergo simple imprisonment for three months and to pay a fine of Rs. 300/- and in default of payment of fine, to undergo simple imprisonment for one month. The sentences of imprisonment, imposed on the appellant, were directed to run concurrently and Rs. 2,000/-, out of the total fine amount, if realized, was directed to be paid to the victim as compensation. The period of detention already undergone by the appellant was directed to be set off against the sentence imposed.

3. The facts, relevant for adjudication of this appeal, in brief, are as follows-

a) That the appellant was an Assistant Teacher in the Nazareth School, Pfutsero and the victim girl was a student of class X in the same school.

b) On 14.11.2021, one ASI Selu Koza lodged an FIR before the

Officer-in-Charge of Pfutsero Police Station, *inter-alia*, alleging that one Founder Chung (*present appellant*), who was serving as an Assistant Teacher in the Nazareth School, Pfutsero had called a girl student of class X to the staff room, pushed her inside the toilet of staff room and molested her, on 12.11.2014, during school hours.

c) On receipt of the said FIR, the Officer-in-Charge of Pfutsero Police Station registered Pfutsero P.S. Case No. 0029/2014 under Section 354 A (1) (i) of the Indian Penal Code read with Section 7/8 of the Protection of Children from Sexual Offences Act, 2012 (*hereinafter referred to as POCSO Act, 2012*) and initiated the investigation of the case. On completion of the investigation, the Investigating Officer laid the charge-sheet, under Section 354 A (1) (i) of the Indian Penal Code read with Section 18 of the POCSO Act, 2012, against the present appellant.

d) Though, the present appellant was arrested on 17.11.2014, in connection with the said case, however, by order dated 18.12.2014, he was released on bail and he faced the trial remaining on bail.

e) On 31.07.2018, learned Special Judge, Phek framed charges under Section 354 A (1) (i) of the Indian Penal Code and Section 340 of the Indian Penal Code read with Section 18 of the POCSO Act, 2012 against the present appellant. When the said charges were read over and explained to the present appellant, he pleaded not guilty to the said charges and claimed to be tried.

f) During trial, the prosecution side adduced the evidence of seven witnesses including the victim. The appellant was examined under Section 313 Cr.P.C., during which he pleaded his innocence.

g) After completion of the trial, learned Special Judge, Phek convicted the present appellant and sentenced him as already stated herein above in paragraph no. 2 of this judgment. The Section 18 of the POCSO Act, 2012 was not found to be applicable in the present case by the learned Special Judge, Phek as she was of the opinion that the prosecution side failed to prove the age of the victim, and the victim was not found to be minor on the date of the offence for which the appellant was convicted.

4. Before discussing the submissions made by the learned counsel for both the parties, let me go through the relevant evidence which is available on record.

5. PW-1, Selu Koza, who is the first informant of this case, has deposed that, on 12.11.2014, when he was serving as an ASI in Pfutsero Police Station, he received an information to the effect that an incident happened at the Nazareth School, Pfutsero. On receiving the said information, he went to the spot and after observing the tense situation and seriousness of the case, he lodged a *suo-moto* complaint in the Pfutsero Police Station, which he exhibited as Ext. P-1.

During cross-examination, he has stated that around 3 to 4 person came to the police station and informed that there was a molestation case at the Nazareth School and more than 70-80 persons gathered there.

6. PW-2, Manikho Chachie, has deposed that he was serving as a teacher at the Nazareth School, Pfutsero on 12.11.2014. On that day, when he went to staff room after giving class work to class V-B, he found the present appellant coming out from the toilet of the staff room and he said to him "*come, let's go out*". However, PW-2 refused to go and stated

that he came only for short needs and when he was about to go to class room, he saw someone inside the toilet, and he noticed the skirt of the person inside the toilet. When PW-2 asked the present appellant who was inside, he (PW-2) noticed that his (appellant) impression and movement and even breathing became different and he started pulling PW-2 with great force to go out, however, PW-2 refused to go out. After sometime the victim came out from the toilet with different appearance and expression on her face. When the PW-2 asked the victim as to what she was doing there, she did not say anything and went to her class. Thereafter, the appellant asked PW-2 to say that no one was there in the toilet. Thereafter, PW-2 informed about the incident to the cousin brother of the victim. He has also stated that the Principal of school also asked him to submit apology letter for not informing about the incident to the school management. During re-examination, PW-2 has also stated that once the appellant had threatened him at Kohima BOC.

During cross-examination, PW-2 has stated that he did not find any immoral activity between the appellant and victim. He also stated that there was no restriction for any student to come to the staff room.

7. PW-3, Kuku Lohe, has deposed that at the time of incident she was studying in class X at the Nazareth School, Pfutsero. She has deposed that on 12.11.2014, since children's day was approaching, they were having a free class and when she was coming out of her class along with one of her friend, the appellant asked her, if there was any teacher in their class room and when they answer the negative, the appellant asked her to call the victim and accordingly PW-3 told the victim that the appellant is calling her and thereafter, they dropped the victim to the office. PW-3 has

also deposed that when the appellant told them to call the victim, he was alone in the staff room.

During the cross-examination, PW-3 has stated that the victim came to the school even on the next day of the incident. She also stated that the teachers have the liberty to ask any question to the students regarding their family background and if the student is from poor family background teacher can help the said student.

8. PW-4, Alhine Lomi, has deposed that at the time of incident, he was a teacher at the Nazareth School, Pfutsero and he came to know about the incident from his friend Manikho and after coming to know about the incident he and his friend informed about it to the parents of the victim. He has stated that he also enquired about the incident from the victim but she did not reveal anything to him about the incident, may be because she was scared or shy.

9. PW-5, Vekedulu, has deposed that she is the Investigating Officer of the present case. She has stated that incident happened on 12.11.2014, however, as the FIR was registered only on 14.11.2014, she started the investigation from 15.11.2014. She has stated that after taking up the investigation, she visited the Nazareth School, Pfutsero and took the statement of witnesses. She also visited the residence of the victim and recorded her statement in front of her guardian. She also approached the victim for conducting her medical examination, however, the victim refused to undergo medical examination. PW-5 has deposed that, during investigation, the victim stated that on the day of incident, the teacher called her to the staff room and asked her about her family relations and she also stated that he physically molested her by touching her breast

when they were in the staff room. Thereafter, on hearing the footsteps of some other person, he (appellant) pushed her (victim) inside the toilet and locked her from the outside. She has also stated that thereafter, Mr. Manikho came there and started talking to accused and after sometime Mr. Manikho tried to go to the toilet and the accused stopped him so he left the spot. Thereafter, accused unlocked the victim and sent her back to the class, and Mr. Manikho saw the victim coming out of the toilet. PW-5 has further stated that after completion of the investigation, she laid the charge-sheet, which she has exhibited as P-2.

During the cross-examination, PW-5 has stated that the accused (*appellant*) was touching the breast of the victim in the staff room and she did not protest to the accused. She has also stated that she had not reflected in the charge-sheet that the accused (*appellant*) was touching the breast of the victim inside the staff room.

10. PW-6, Medosa, has deposed that when the present case was registered, he was serving as Officer-in-Charge of Pfutsero Police Station and he registered the FIR which was lodged by Selu Koza on 14.11.2014, wherein one Founder Chung (*appellant*), a teacher of the Nazareth School, Pfutsero was reported to have molested and attempted to rape one student of class X.

During the cross-examination, PW-6 has stated that he had no personal knowledge about the whole incident and he was not a witness to the said incident.

11. The victim, while deposing before the learned trial court as a witness, has stated that at the time of incident she was studying in class X at the Nazareth School, Pfutsero and she was 14 to 15 years of age at

that time. She has stated that the incident happened on 12.11.2014, inside the staff room. She has stated that when she was in her class room, the appellant sent two of her friends, who belong to another section, to call her and accordingly she went out of the class room to the staff room. She has stated that as soon as she reached the staff room, the appellant pull her inside the bath room/toilet, which was attached to the staff room and thereafter he locked the door and within few moments he heard the sound of a person coming to the staff room and then the appellant told her to keep quiet and thereafter he went out of the bathroom. She has stated that when she was inside the bath room, the appellant touched her shoulder with both his hands. She has further stated that after some time, the appellant entered the adjacent bathroom inside the staff room and from there he told her to go out of the bathroom and accordingly, she came out of the bathroom and went back to the class room. The victim has stated also that when she was coming out of the bathroom one of the teacher namely, Mr. Manikho was in the staff room, but she did not talk to him while going out of the bathroom to her class. She has stated that she did not inform about the incident to any person, however, in the evening, when one of her teacher, Mr. Lhouune came to their house, they discussed about the incident as he learnt about the incident from Mr. Manikho.

During the cross-examination, she has denied the suggestion put to her that she was 18 years and above at the time of incident. She has also denied the suggestion that she had falsely implicated the appellant. She has admitted that the appellant only touched her shoulder with both his hands but he did not hug her or kiss her or said anything which was

obscene or sexual in nature. She has also stated that she did not tell anything to Mr. Manikho as the appellant have not done anything wrong to her. She has also stated that the conduct of the appellant was offensive but she did not discuss it with anyone as she was scared and shy to talk about it.

12. Ms. Nancy Lotha, learned counsel for the appellant has submitted that the appellant had called the victim girl to the staff room and when they were having conversation, they heard footstep approaching to the staff room, which the appellant thought to be of the Principal, so in order to avoid misunderstanding between them, he asked the victim girl to go inside the toilet and she willingly went inside the toilet and thereafter, when the appellant found that the person entering into the staff room was not the Principal, but was one of his colleague teacher, namely, Mr. Manikho, the appellant asked the victim to come out of the toilet and victim came out of toilet and went to her class room. It is further submitted by the learned counsel for the appellant that the appellant committed nothing wrong and the entire episode was misconstrued and misinterpreted by the school authority. The learned counsel for the appellant has also submitted that the learned trial court wrongly interpreted the provision of Section 354 A (1) (i) of the Indian Penal Code. She has submitted that as the provision of said section is applicable only in situations where the accused does not the stop after committing a single isolated act of criminal force, but goes on to commit other similar act which end up converting into advance of sexual overtures, the present act alleged to have been committed by the appellant does not fall within the said category.

Ms. Nancy Lotha, learned counsel for the appellant has also submitted that the present appellant had only touched the shoulder of the victim with his both hands but he did not hug her or kiss her or said something which was obscene or sexual in nature and under such circumstances, the learned trial court was wrong in convicting the appellant under Section 354 A (1) (i) of the Indian Penal Code. Ms. Nancy Lotha, learned counsel for the appellant, has also submitted that the statement made by the victim were not corroborated by the statement of other witnesses. She has submitted that the PW-4 and the PW-5 were only hearsay witnesses. She has also stated that the testimony of the victim girl also ought not to have been relied upon by the learned trial court as she gave different versions of the story during the investigation stage and during trial stage, which makes her testimony unreliable. Ms. Nancy Lotha, learned counsel for the appellant, has also submitted that the learned trial Court failed to take into consideration the testimony of the victim girl, during her cross-examination, wherein she has stated that she did not tell anything to Mr. Manikho while coming out of the bathroom *"as the accused (present appellant) have not done wrong to her"*.

Ms. Nancy Lotha, learned counsel for the appellant, has submitted that there was no wrongful confinement of the victim by the appellant, as the victim went inside the bathroom on her own. Learned counsel for the appellant has further submitted that the learned trial court was wrong in relying wholly on the statement made by the appellant under, Section 313 Cr.P.C., for convicting him for the offence of attempt to commit of wrongful confinement.

13. Ms. Nancy Lotha, learned counsel for the appellant, has submitted

that the prosecution side has failed to prove the charges against the present appellant beyond reasonable doubt and the learned trial court convicted the present appellant merely on the basis of conjectures and surmises. Ms. Nancy Lotha, learned counsel for the appellant has cited a ruling of Hon'ble Supreme Court in "**Babu Singh Vs State of Punjab**" reported in **1964 (1) Cri. L.J 566 (SC)**, wherein it was observed by the Hon'ble Supreme Court that in criminal trial the presumption of innocence is a principle of cardinal importance and so the guilt of the accused must in every case be proved beyond a reasonable doubt. Probabilities, however strong and suspicious, however grave, can never take the place of proof.

She has also cited a ruling of Hon'ble Supreme Court in "**Sarwan Singh Ratan Singh Vs State of Punjab**," reported in **AIR 1957 S.C 637**, wherein it was observed by the Hon'ble Supreme Court that there may be an element of truth in the prosecution story against accused, considered as a whole, the prosecution story against the accused "may be true", but between "may be true" and "must be true" there is inevitably a long distance to travel and whole of the distance must be covered, by the prosecution by legal, reliable and unimpeachable evidence before an accused can be convicted.

She has also cited a ruling of Hon'ble Supreme Court in "**Mousam Singha Roy & Ors Vs State of West Bengal**," reported in **2003 (3) JCC 1385; [(2003) 12 SCC 377]**, wherein it was observed by the Hon'ble Supreme Court that the law does not permit the courts to punish the accused on the basis of moral conviction or on the suspicion alone. The burden of proof in criminal trial never shifts, and it is always the burden of the

prosecution to prove the case beyond reasonable doubt on the basis acceptable evidence. It is also a settled principle of criminal jurisprudence that the more serious the offence, the stricter degree of proof, since the higher degree of assurance is required to convict the accused.

Ms. Nancy Lotha, learned counsel for the appellant, has also cited the ruling of Hon'ble Supreme Court in "***K.P. Thimmappa Gowda Vrs State Of Karnataka***," reported in **(2011)14 SCC 475** wherein it was observed by the Hon'ble Supreme Court that if two views are reasonably possible, one that the appellant is guilty, and the other that he is innocent, then the benefit of doubt goes in favour of the accused.

She has also submitted that as the prosecution side has failed to prove the charges against the present appellant beyond reasonable doubt and hence he should be acquitted of the charges and be set at liberty.

Alternatively, she has also made a submission that in case this court is not convinced with her argument and chooses to uphold the conviction, the sentences imposed on the present appellant are too harsh under the facts and circumstances of the present case and accordingly she has prayed for taking a lenient view of the matter and converting the sentences of imprisonment into that of fine only.

14. On the other hand, Ms. V. Suokhrie, learned Public Prosecutor, Nagaland has submitted that the evidence available on record, if considered in its totality, would only lead to the conclusion that the present appellant has committed the offence alleged against him and the learned trial court has rightly convicted him. She has pointed out to the testimony of PW-3, who was the friend of the victim and was studying in the class X of the same school, on the date of the alleged incident,

wherein she has stated that when the teacher (the appellant) told them to call the victim, he was alone in the staff room. She has also pointed out to the testimony of the victim, wherein the victim has deposed that as soon as she reached the staff room, the appellant pulled her inside the bathroom and locked the door from within and while inside the bathroom, he touched her shoulder with his both hands. She has also pointed out to the testimony of the victim, during the cross-examination, wherein she has stated that the conduct of appellant was offensive but she did not discuss it with any person, as she was scared and was shy to talk about it. She also pointed out to the testimony of PW-2 which shows that the appellant was trying to ensure that PW-2 leaves the staff room at the earliest before noticing that the victim was in the toilet. However, when PW-2 saw the victim coming out of the toilet, the appellant told him to say that nobody was in the toilet, though PW-2 had seen her.

Ms. V. Suokhrie, learned Public Prosecutor, Nagaland has submitted that learned Special Judge, Phek has rightly convicted the present appellant for attempting to commit offence under Section 354 A (1) (i) of the Indian Penal Code as well as for attempting to commit offence of wrongful confinement and has imposed appropriate punishment to the appellant and therefore, no interference should be made in the finding of conviction as well as in the sentence imposed by the learned trial court.

15. I have considered the rival submissions made by learned counsel for the appellant as well as learned Public Prosecutor, Nagaland. I have also perused the materials available in the case record.

16. It appears from the impugned judgment that the present appellant was convicted for attempting to commit the offence of sexual harassment

under Section 354 A (1) (i) of the Indian Penal Code read with Section 511 of the Indian Penal Code as well as for attempting to commit the offence of wrongful confinement under Section 340/511 of the Indian Penal Code. From the materials on record, it appears that the appellant was basically found guilty of attempting to commit offences under Section 354 A (1) (i) of the Indian Penal Code as well as offence punishable under Section 342 of the Indian Penal Code. The conviction ought to have been recorded under Section 511 of the Indian Penal Code read with Section 354 A (1) (i) of the Indian Penal Code, for an attempting to commit sexual harassment, instead of what has been shown in the impugned judgment. Similarly, after finding the present appellant guilty of attempting to commit offence of wrongful confinement, his conviction should have been recorded under Section 511 of the Indian Penal Code read with Section 342 of the Indian Penal Code, instead of what has been shown in the impugned judgment.

17. For sake of convenience, section 354 A (1) (i) of the Indian Penal Code is quoted herein below:-

“354 A. Sexual harassment and punishment for sexual harassment-

(1) A man committing any of the following acts--

(i) physical contact and advances involving unwelcome and explicit sexual overtures; or

(ii) a demand or request for sexual favours; or

(iii) showing pornography against the will of a woman; or

(iv) making sexually coloured remarks,

shall be guilty of the offence of sexual harassment.

(2) Any man who commits the offence specified in clause (i) or clause (ii) or clause (iii) of sub-section (1) shall be punished with rigorous imprisonment for a term which may extend to three years, or with fine, or with both”.

18. If we go through the testimony of victim girl, made during trial, wherein she has categorically stated that she was called to the staff room by the present appellant and when she reached the staff room she was pulled inside the bathroom, wherein the present appellant touched her shoulder and her statement which was recorded under Section 161 Cr.P.C by the Investigating Officer, wherein she had stated that the present appellant called her to the staff room, where he asked her as to with whom she was living and what her parents are doing and then she pushed her inside the staff room and started touching her hands, there does not appear to be any material contradiction between both the statements given by the victim. The submission of the learned counsel for the appellant that the testimony of the victim is not reliable due to inherent contradictions, therefore, does not appear to be acceptable.

19. The statement of PW-2 and PW-3 corroborates the testimony of the victim that she was called by the appellant to the staff room while he was alone there. Learned Public Prosecutor, Nagaland also pointed out to the statement of accused (appellant) recorded under Section 313 Cr.P.C, wherein he admitted that on hearing the footsteps of someone which he thought to be of the Principal of the school, he told the victim to step aside and go inside the bathroom. It shows that the victim was alone with the appellant and he asked her to go inside the bathroom of the staff room. There appears to be no reasonable ground for a teacher to call a girl student to the staff room and asked her to go inside the attached to

the toilet, on hearing the footsteps of someone coming to the staff room had no wrong had been done. The explanation give by learned counsel for the appellant for the admitted conduct of the appellant does not inspire confidence and is not acceptable.

20. There is no reason to disbelieve the testimony of the victim to the effect that the appellant touched her shoulder with both his hands inside the bathroom. The circumstances under which the accused touched the victim inside the bathroom only shows that he attempted to make physical contact and advances involving unwelcome and explicit sexual overtures against the victim in the toilet of the staff room and, therefore, this Court is of the considered opinion that learned trial court has rightly convicted the present appellant under section 511 of the Indian Penal Code for making an attempt to commit offence under Section 354 A (1) (i) of the Indian Penal Code.

21. Moreover, the manner and circumstances in which the victim was made to go inside the toilet of the staff room, as revealed from the evidence on record, leaves no room for any doubt that the appellant attempted to wrongfully confine the victim in the toilet of the staff room of the school. However, it is pertinent to mention that instead of convicting the present appellant under Section 340 of the Indian Penal Code (*which is a definition clause*) read with Section 511 of the Indian Penal Code, he should been convicted under Section 511 of the Indian Penal Code read with Section 342 of the Indian Penal Code for attempting to wrongfully confine the victim girl. This Court finds no illegality in the finding arrived at by the learned trial court to the extent that the present appellant was found guilty of attempting to commit offences of sexual

harassment as well as of wrongful confinement against the victim girl. However, the error in recording the conviction is hereby rectified by convicting the present appellant under section 511 of the Indian Penal Code read with section 354 A (1) (i) of the Indian Penal Code. The appellant is also convicted under section 511 of the Indian Penal Code read with section 342 of the Indian Penal Code.

22. As regards the submission of learned counsel for the appellant regarding the harshness of the sentence imposed on the present appellant, this Court is also of the considered opinion that considering the fact that the offences involved in this case are only of attempt to commit the offences under Section 354 A (1) (i) of the Indian Penal Code and under Section 342 of the Indian Penal Code and also considering the fact that the said attempts were made about 9 years ago and a long period of time has elapsed since then, a lenient view on the question of sentencing of the present appellant may be taken.

Accordingly, the sentence imposed by the learned trial court for the offence of attempt to commit offence under Section 354 A (1) (i) of the Indian Penal Code is modified into rigorous imprisonment for two months and also to pay a fine of Rs. 2,000/- for the said offence and in default of fine to undergo further simple imprisonment for one month. Similarly, the sentence imposed by learned trial court for the offence of attempting to commit wrongful confinement (*under section 511 read with section 342 of the Indian Penal Code*) is modified to simple imprisonment for two month and to pay a fine of Rs.300/- only and in default of payment of fine to undergo further simple imprisonment for one month. Both the sentences shall run concurrently. The period of detention already undergone by the

appellant shall be set off against the sentence imposed. The fine amount, if realized shall be paid to the victim girl as compensation.

23. Let the case record of GR Case No. 103/2014 arising out of Pfutsero Police Station Case No. 29/2014 be sent back to the Court of learned Special Judge, Phek along with a copy of this judgment.

24. The appellant shall surrender before the learned trial court within a period of 45 days from the date of this judgment to serve out his sentence.

25. With the above observations, this appeal is disposed of.

JUDGE

Comparing Assistant