



Serial No. 04
Regular List

HIGH COURT OF MEGHALAYA
AT SHILLONG

BA No. 21 of 2024

Date of Decision: 11.06.2024

Smti. Wanphai Masharing
M/o Shri. Pynskhemborlang Masharing
R/o H/No. 19, Mawnohsynrum Village,
Ri-Bhoi District- 793103
Meghalaya

.....Applicant

-Versus-

1. State of Meghalaya
Through the Superintendent of Police
Ri-Bhoi District, Meghalaya
2. Smti. Bilaris Kharbuli (Complainant)
W/o Shri. Phul Maring
R/o Mawnohsynrum Village, 793103
Ri-Bhoi District,
Meghalaya.
3. Miss X (Survivor)
D/o Smti. Bilaris Kharbuli
R/o Mawnohsynrum Village, 793103
Ri-Bhoi District,
Meghalaya.

.....Respondents

Coram:

Hon'ble Mr. Justice W. Diengdoh, Judge

Appearance:

For the Petitioner/Appellant(s) : Mr. L. Syiem, Adv. with
Mr. W. Bynnud, Adv.



For the Respondent(s) : Mr. H. Kharmih, Addl. P.P with
Mr. H. Abraham, GA

i)	Whether approved for reporting in Law journals etc.:	Yes/No
ii)	Whether approved for publication in press:	Yes/No

ORDER (ORAL)

1. This is an application under Section 439 Cr.P.C made with a prayer for grant of bail to the accused person Shri. Pynskhemborlang Masharing connected with Special POCSO Case No. 20 of 2023 under Section 354, 354B, 361, 363, 376(1), 375(2)(j), IPC read with Section 3(a)/4/7/8 of the POCSO Act pending before the court of the learned Special Judge, (POCSO), Nongpoh, Ri Bhoi District.

2. Heard Mr. L. Syiem, learned counsel for the petitioner who has submitted that on the basis of an FIR dated 23.05.2023 filed by the respondent No. 2 the accused person in question was arrested in connection with Women PS Case No. 29(05) of 2023 under Section 354(A)(i)/376(1) IPC read with Section 3(a)/4 POCSO Act, 2012.

3. The learned counsel has also submitted that the background facts leading to the arrest of the accused person in question was based on the statement of the survivor who had narrated to her mother, the respondent No. 2 herein about an incident which occurred sometime in the month of December 2022, where she was allegedly sexually assaulted by one person named Raymond Nongkhlaw. The survivor has further stated that in the month of March 2023 she had a love relationship with the accused person



in question that is, Pynskhemborlang Masharing and was involved in sexual intercourse with him.

4. The fact that such incident of sexual relationship had happened was revealed only when the survivor had complained of stomach ache following which her mother took her to the hospital whereupon on being examined by the doctor, she was found to be pregnant. Thus, on revelation of the facts as stated herein above as regard her encounter with Shri. Raymond Nongkhlaw and the accused person herein in question, the said FIR was lodged and the matter after being investigated, the accused person in question was arrested on 27.05.2023 and is still in judicial custody till date.

5. The I/O has then filed his charge sheet with a finding that the accused person in question is found to be prima facie involved in the offence of sexual assault and is accordingly made to stand trial. The stage of the case before the trial court is for recording of evidence of the witnesses, the survivor had also been examined on 08.05.2024 as PW-1.

6. The learned counsel has submitted that on perusal of the statement of the survivor as well as her deposition before the trial court, what is evident is that though prima facie the act of sexual intercourse between the two can be assumed to have taken place, however the survivor has clearly stated that her relationship with the accused person in question is a love relationship, meaning that even if there had been any sexual intercourse between them, the same is consensual in nature.

7. Since the accused person in question is in custody for more than a year, the trial having commence, therefore investigation is complete, there would be no possibility of the accused person to tamper with the evidence



at this stage. The fact that the accused person in question is also very young in age, his further incarceration would jeopardize his future among other things and as such, this application is preferred with a prayer for grant of bail to the accused person in question with any conditions that this Court may deem fit and proper to impose.

8. Mr. H. Kharmih, learned Addl. P.P has submitted that on perusal of the deposition of the survivor and the materials on record, this Court may judiciously apply its discretion to decide as to whether bail ought to be granted or not.

9. This Court has taken due note of the submission made and has also perused the petition and the accompanying annexures. The copy of the deposition of the survivor which has been brought on record by way of an affidavit has also been looked into by this Court.

10. The facts and circumstances of the case are peculiar in a sense that the survivor had been allegedly subjected to sexual assault by two persons on different occasions. However, as far as the case of the accused person in question is concerned, going by the statement of the survivor the relationship between the two can be assumed to be one of consensual.

11. In such a situation, it may not be out of place to refer to the case of *Vijayalakshmi & Anr. v. State Rep. By. The Inspector of Police, All Women Police Station, Erode*: CrI. O.P. No. 232 of 2021, wherein at para 12 and 18 of the same the Hon'ble Madras High Court has observed as follows:

“12. As rightly recognized by the Learned Single Judge of this Court in Sabari’s Case (cited supra), incidences where teenagers



and young adults fall victim to offences under the POCSO Act being slapped against them without understanding the implication of the severity of the enactment is an issue that brings much concern to the conscience of this Court. A reading of the Statement of Objects and Reasons of the POCSO Act would show that the Act was brought into force to protect children from offences of sexual assault, sexual harassment and pornography, pursuant to Article 15 of the Constitution of India, 1950 and the Convention on the Rights of the Child. However, a large array of cases filed under the POCSO Act seems to be those arising on the basis of complaints registered by the families of adolescents and teenagers who are involved in romantic relationships with each other. The scheme of the Act clearly shows that it did not intend to bring within its scope or ambit, cases of the nature where adolescents or teenagers involved in romantic relationships are concerned.

18. In the present case, the 2nd Petitioner who was in a relationship with the 2nd Respondent who is also in his early twenties, has clearly stated that she was the one who insisted that the 2nd Respondent take her away from her home and marry her, due to the pressure exerted by her parents. The 2nd Respondent, who was placed in a very precarious situation decided to concede to the demand of the 2nd Petitioner. Thereafter, they eloped from their respective homes, got married and consummated the marriage. Incidents of this nature keep occurring regularly even now in villages and towns and occasionally in cities. After the parents or family lodge a complaint, the police register FIRs for offences of kidnapping and various offences under the POCSO Act. Several criminal cases booked under the POCSO Act fall under this category. As a consequence of such a FIR being registered, invariably the boy gets arrested and thereafter, his youthful life comes to a grinding halt. The provisions of the POCSO Act, as it stands today, will surely make the acts of the boy an offence due to its stringent nature. An adolescent boy caught in a situation like this will surely have no defense if the criminal case is taken to its logical end. Punishing an adolescent boy who enters into a relationship with a minor girl by treating him as an offender, was never the objective of the POCSO Act. An adolescent boy and girl who are in the grips of their hormones and biological changes and whose decision-making ability is yet to fully develop, should essentially receive the



support and guidance of their parents and the society at large. These incidents should never be perceived from an adult's point of view and such an understanding will in fact lead to lack of empathy. An adolescent boy who is sent to prison in a case of this nature will be persecuted throughout his life. It is high time that the legislature takes into consideration cases of this nature involving adolescents involved in relationships and swiftly bring in necessary amendments under the Act. The legislature has to keep pace with the changing societal needs and bring about necessary changes in law and more particularly in a stringent law such as the POCSO Act."

12. Again, in the case of *Ranjit Rajbanshi v. State of West Bengal & Ors.* C.R. A No. 458 of 2018, the observation of the Hon'ble Calcutta High Court at para 47, 48 and 49 has also been found relevant by this Court when it was observed as follows: -

"47. In the present case, the victim girl was admittedly 16 ½ years old and studied in Class XII at the relevant point of time. She was not naïve enough not to know the implication of sexual intercourse; rather, the victim admittedly had a physical relationship with the accused, who was also of a very young age, on several occasions prior to the incident. Although the consent of a minor is not a good consent in law, and cannot be taken into account as 'consent' as such, the expression 'penetration' as envisaged in the POCSO Act has to be taken to mean a positive, unilateral act on the part of the accused. Consensual participatory intercourse, in view of the passion involved, need not always make penetration, by itself, an unilateral positive act of the accused but might also be a union between two persons out of their own volition. In the latter case, the expression 'penetrates', in Section 3(a) of the POCSO Act might not always connote mere voluntary juxtaposition of the sexual organs of two persons of different genders. If the union is participatory in nature, there is no reason to indict only the male just because of the peculiar nature of anatomy of the sexual organs of different genders. The psyche of the parties and the maturity level of the victim are also relevant factors to be taken into consideration to decide whether the



penetration was a unilateral and positive act on the part of the male. Hence, seen in proper perspective, the act alleged, even if proved, could not tantamount to penetration sufficient to attract Section 3 of the POCSO Act, keeping in view the admitted several prior occasions of physical union between the accused and the victim and the maturity of the victim.

48. As such, it cannot be said that the accused was guilty of penetrative sexual assault, as such, since here the act of penetration, even if true, would have to be taken not as an unilateral act of the accused but a participatory moment of passion involving the participation of both the victim and the accused.

49. Although the question of consent does not arise in case of a minor, in order to attract Section 376(1) of the IPC, it had to be established that the alleged offence was committed against the will of the victim. Read in conjunction, the provisions of Section 376 of the IPC and Section 3 of the POCSO Act ought to be construed on a similar footing and cannot incriminate the accused for a voluntary joint act of sexual union.”

13. In the opinion of this Court the abovementioned observations by the Hon’ble High Courts (supra) are found relevant to the case of the accused person in question. It is however made clear that the opinion expressed is only for the purpose of this instant bail application since the trial court would have to exercise its mind judiciously based on the evidence presented before it for a final decision as far as the case of the accused person in question is concerned and not to be influenced by the opinion expressed herein.

14. As far as the prayer for bail is concerned the same is found acceptable by this Court. The accused person Shri. Pynskhemborlang Masharing is accordingly directed to be released on bail on the following conditions:

- i. That he shall not abscond or intimidate the witnesses,



particularly the survivor;

- ii. That he shall have no physical contact or any contact of any kind with the survivor during the pendency of the case before the trial court;
- iii. That he shall not leave the jurisdiction of the State of Meghalaya without the prior permission of the trial court;
- iv. That he shall bind himself on a bond of ₹ 30,000/- (rupees thirty thousand) only with one surety of like amount to the satisfaction of the trial court;
- v. That he shall appear before the court as and when called upon.

15. In view of the above, this petition is accordingly disposed of. No costs.

Judge

Meghalaya
11.06.2024

TIPRILYNTI
KHARKONGOR

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