

Serial No. 01
Regular List

HIGH COURT OF MEGHALAYA
AT SHILLONG

Crl. M.C. No. 54 of 2024 in
Crl. A. No. 27 of 2024

Date of Decision: 03.06.2024

Shri Rockyroy Lyngkhoi, Vs.
S.o. (L).O. Lyngdoh,
R/o. Myriaw Village,
P.S. Mairang, Eastern West Khasi Hills
District.

... Appellant

1. State of Meghalaya, Rep.
by the Chief Secretary Govt.
of Meghalaya, Shillong.

2. The Officer in Charge,
Nongstoin Police Station,
West Khasi Hills District,
Meghalaya, Shillong

3. The Investigating Officer,
Nongstoin Police Station,
West Khasi Hills District,
Meghalaya, Shillong.

... Respondents

Coram:

Hon'ble Mr. Justice B. Bhattacharjee, Judge

Appearance:

For the Petitioner/Appellant(s) : Mr. H.L. Shangreiso, Sr. Adv. with
Ms. P. Biswakarma, Adv.

For the Respondent(s) : Mr. K. Khan, PP with
Mr. S. Sengupta, Addl. Sr. GA.

O R D E R (Oral)

1. Heard Mr. H.L. Shangreiso, learned Sr. Counsel appearing for the

applicant and also heard Mr. K. Khan, learned PP appearing for the State respondent.

2. This is an application under Section 389 Cr.PC seeking suspension of the sentence passed in Special (POCSO) Case No. 6 of 2020 by the learned Special Judge (POCSO), Nongstoin, West Khasi Hills, whereby the applicant has been sentenced to undergo five years rigorous imprisonment under Section 10 of the POCSO Act and payment of fine of ₹ 20,000/- (rupees twenty thousand) only and in default, to undergo further three months simple imprisonment.

3. Mr. H.L. Shangreiso, learned Sr. Counsel submits that the trial had proceed against the applicant after a charge under Section 5(n) of the POCSO Act was framed against him, however, inspite of the fact that no charge under Section 5(n) of the said Act was established, the learned trial court convicted the applicant under Section 9(n) of the POCSO Act without altering the charge or affording any opportunity to the applicant to defend him against the conviction under Section 9(n) of the POCSO Act. Learned Sr. counsel contends that the trial court could not have exercised its jurisdiction mechanically and resorted to the provision of Section 222(1) Cr.PC by ignoring the mandate of law provided under sub-Section 4 of Section 222 Cr.PC. It is also the submission of the learned Sr. counsel that the offence for which the applicant has been convicted and sentenced is totally different from what was alleged by the prosecution at the stage of framing of charge in the case. He submits that the action of the trial court has prejudiced the applicant to a great extent in his defence at the trial. The learned Sr. counsel places reliance on the decision of the Apex Court reported in (2001) 2 SCC 577, *Shamnsaheb M. Multtani v. State of Karnataka* and *Criminal Appeal No. 503 of 2013*,

State of Karnataka by Gandhinagar P.S. v. M.N. Basavaraja & Ors. to buttress his argument and submits that the applicant has a fair chance to be successful in his appeal preferred before this Court and hence is entitled to get the sentence suspended till the final outcome of the matter.

4. Mr. K. Khan learned PP, on the other hand contends that the trial court is empowered under Section 222(1) Cr.PC to convict a person for a minor offence than what has been charged with, if the ingredients of both the offences are more or less the same. The learned PP draws attention of this Court to the relevant part of the evidence of the survivor and also the judgment of conviction to justify the conviction of sentence recorded in this case. He also contends that the offence under Section 9(n) of the POCSO Act is a minor cognate offence of Section 5(n) of the POCSO Act and hence, no illegality or infirmities can be attached to the conviction of the applicant under Section 9(n) of the POCSO Act. He further contends that there is nothing on record to show that the applicant has been prejudiced in any manner by the said conviction and as such, it cannot be said that the impugned sentence and conviction suffers from any legal infirmity. He submits that the present application seeking suspension of sentence is devoid of merit and is liable to be rejected.

5. A perusal of the materials on record reveals that the applicant was put on trial to face charge under Section 5(n) of the POCSO Act on the basis of the allegation contained in the charge sheet filed by the prosecution. It appears that after recording the evidence of all the prosecution witnesses and also the defence witnesses adduced by the applicant, the trial court found that no case has been made out for conviction of the appellant under Section 5(n) of the POCSO Act. However, on analysis of the entire evidence on record, the learned trial

court held that the applicant has committed a crime under Section 9(n) of the POCSO Act. A bare perusal of the evidence of PW-2, especially the response of the said witness to the questions put by the trial court, at this juncture, would show that the finding recorded by the learned trial court to satisfy itself to the establishment of guilt of the applicant under Section 9(n) of the POCSO Act, does not suffer from any apparent infirmity. Minor cognate offence means a lessor offence that is related to the greater offence and shares several of the elements of the greater offence and is of the same class or category. A conjoint reading of Sections 5(n) and 9(n) of the POCSO Act would indicate that the offences are cognate offence inasmuch as the said Sections deal with sexual offence. Section 5(n) POCSO Act speaks about aggravated penetrative sexual offence, Section 9(n) POCSO Act deals with aggravated sexual assault. The essential element for both the aforesaid offences are common as both deal with unlawful sexual activity against children, while the former speaks of higher degree of sexual offence, the latter deals with a lesser degree of the same offence. Therefore, it can be safely concluded that the offence disclosed in Section 9(n) POCSO Act is cognate offence of the major offence mentioned in Section 5(n) POCSO Act and not entirely distinct and different offence, constituted by altogether different ingredients. When an accused is charged with an offence consisting of several particulars, and if all the particulars are proved, then it will constitute the main offence, while if only some of those particulars are proved and their combination constitute minor offence, the accused can be convicted for minor offence though not so charged.

6. Both the case laws referred to by the learned Sr. Counsel for the applicant are with regard to the offences mentioned in Section 302 IPC and Section 304 (B)IPC. A perusal of the provisions of both the aforesaid

Sections would show that the ingredients for constitution of offences under the aforesaid Sections are distinct and different. The description of offence contained in one of the said Sections cannot be termed as a minor cognate offence of the other Section and hence the proposition of law laid down in the aforesaid judgments are not applicable in this matter.

7. Section 222 Cr.P.C empowers a criminal Court to convict a person for a minor offence although he is not charged with it. The Apex Court in the case of *Rafiq Ahmad Alias Rafi Versus State of Uttar Pradesh, (2011) 8 SCC 300* has held that when charge for a major offence is not made out, conviction for a minor cognate offence, even in absence of charge, can be sustained. If an appellant is charged with grave offence but same is not established on merits or for a default of technical nature, he can still be convicted and punished for commission of a less grave offence without altering the charge, provided the lesser offence is of cognate nature and its ingredients are proved beyond reasonable doubt, appellant does not suffer any prejudice and it does not result in failure of justice.

8. In view of the settled proposition of law and the discussions made above, this application has no merit and stands rejected.

9. Let the appeal filed by the applicant be heard expeditiously.

10. The application stands disposed of.

Judge

Meghalaya
03.06.2024
"N.Swer, Stenographer, Gr-II"