

<u>Serial No.01</u> <u>Supple List</u>

HIGH COURT OF MEGHALAYA
AT SHILLONG

Crl. A. No. 16 of 2023

Date of Decision: 16.02.2024

Shri. Wanlang Phawa

Vs.

State of Meghalaya.

Coram:

Hon'ble Mr. Justice B. Bhattacharjee, Judge

Appearance:

For the Petitioner(s) : Mr. R. H. Alice, Legal Aid Counsel.

For the Respondent(s) : Mr. K. P. Bhattacharjee, GA.

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

JUDGMENT AND ORDER

This Criminal appeal is directed against the Judgment and order of conviction dated 24-03-2022 and sentence dated 24-03-2022 passed by the learned Special Judge (POCSO)/ Addl D.C(J), East Jaintia Hills District, Khliehriat in POCSO Case No. 2/2020 by which the accused/appellant was convicted under Section 7/8 of POCSO Act, 2012 and awarded a sentence of 5 (five) years of rigorous

imprisonment and a fine of Rs.5,000/- (five thousand rupees) only and in default to undergo one month's simple imprisonment.

1. The fact of the case as can be gathered from the materials on record is that a written FIR dated 23-09-2019 was lodged by the complainant (PW-1) before the Officer-in-Charge, Lumshnong P.S, East Jaintia Hills District, alleging that the appellant Shri. Wanlang Phawa has sexually assaulted his son (PW-2), aged about seven years, on 23-09-2019 at 11.00 A.M. The said FIR was received vide GDE No. 8 dated 23-09-2019 and a case was registered as Lumshnong P.S C/No. 46(9)2019 u/S 3(a) POCSO Act and the matter was investigated into. Upon completion of the investigation, a charge-sheet bearing No. 32/19 dated 16-11-2019 u/S 377 IPC R/W Section 3(a)/5(m)/6 of POCSO Act was filed against the appellant with a prayer for allowing submission of FSL report on a subsequent date. Thereafter the FSL report was submitted to the Trial Court vide a supplementary charge-sheet dated 11-11-2020.

2. On production of the appellant before the Trial Court, a Legal Aid Counsel was provided to him and after hearing both the sides, the charge under Section 5(m)/6 of POCSO Act read with Section 377 IPC was framed against the appellant on 15-01-2020. The appellant pleaded not guilty and claimed to be tried. In support of the charges,

the prosecution examined 11 (eleven) PWs and exhibited 9 documents and also produced 29 material exhibits. After the closure of the prosecution evidence, the statement of the appellant u/S 313 Cr. P.C was recorded on 18-02-2022. On the refusal of the appellant to adduce defence witness, the matter was finally heard on 10-03-2022 and thereafter vide impugned judgment and order dated 24-03-2022, the Trial Court convicted the appellant u/S 7/8 of POCSO Act and also passed the order of sentence on the same day awarding five years rigorous imprisonment and a fine of Rs. 5,000/- only and on default to undergo one month's simple imprisonment to the appellant.

3. Mr. R. H. Alice, the learned Legal Aid Counsel, appearing for the appellant submits that the charges against the appellant was framed under Section 5(m)/ 6 of POCSO Act read with Section 377 IPC but the learned Trial Court has convicted the appellant under Section 7/8 of POCSO Act by altering the charges while delivering the impugned judgment and order of conviction. He contends that as per the mandate of Section 216 (1) Cr. P.C, a Court may alter or add to any charge at any time before judgment is pronounced and not at the time of pronouncing of judgment. He further contends that the alteration of a charge was also not read and explained to the appellant by the Trial Court which also violated the stipulation made in Section

216(2) Cr. P.C. The other point raised by the learned counsel for the appellant is that the statement of the survivor is not corroborated by any other piece of evidence and hence, the impugned judgment and order and the order of sentence cannot be sustained in law and is liable to be set aside and quashed. In support of his argument the learned counsel has placed reliance on the judgment of the Apex Court reported in the following cases: -

- i) (2004) 5 SCC 347, *Hasanbhai Valibhai Qureshi Vs. State of Gujarat & Ors.* (Paras 8 & 9).
- ii) (2014) 11 SCC 538, *Central Bureau of Investigation Vs. Karimullah Osan Khan* (Para 18).

4. Mr. K. P. Bhattacharjee, learned GA appearing for the State-respondent supports the impugned judgment and order and the order of sentence and submits that alteration of charges at the time of pronouncement of judgment and order has not caused any prejudiced to the appellant.

5. Before dealing with the submissions advanced by the rival parties, it would be appropriate to briefly discuss the substance of evidence recorded at the trial. PW-1, the complainant, who is the father of the survivor, in his deposition stated that on the day of incident he was in his workplace and on being informed by his wife about the incident, he immediately rushed home. After reaching home

he made an enquiry from his son/survivor who narrated that the appellant had called the survivor to his house and on entering the house the appellant took off the trouser of the survivor and also took off his own trouser and started committing sexual assault from his buttock but fortunately some other kids were present in an around which made the appellant release the survivor. The PW-1, thereafter, went to the house of the appellant and confronted him and the appellant admitted his guilt. Subsequently, the matter was informed to the local authority and the incident was reported to the Lumshnong Police State wherein the FIR was lodged. The PW-2, the survivor, at the time of recording of evidence by the Trial Court identified and pointed at the appellant from behind a curtain and in his deposition categorically stated that on the day of incident the appellant dragged the survivor to his house and pulled down his trouser and then sexually assaulted the survivor from behind his buttock. The survivor had seen the appellant taking out his penis and standing behind him and he could feel the appellant making physical contact in his buttock. The survivor, however, did not feel any pain and at the time when the appellant committed the crime, two of his friends came looking for him for which the appellant had to let go of the survivor. The survivor thereafter ran home and narrated the incident to his mother,

who in turn informed the matter to his father. The PW-2 also exhibited his statement recorded under Section 164 Cr.P.C as Exhibit -

2. The deposition made by the PW- 1 and PW- 2 stood unrebutted as both of them were not cross-examined on account of absence of defence counsel and both the witnesses were discharged. In spite of existence of incriminating evidence against the appellant, no application was filed by the defence during the course of the trial to recall the aforesaid witnesses for the purpose of cross-examination.

6. The PW- 3 deposed that on the day of the incident when he was returning home which is nearby the place of occurrence, he was called by a boy to come and see the survivor who was inside the house of the appellant. On reaching the verandah of the house of the appellant, he saw both the appellant and the survivor coming out of the house of the appellant. PW- 4, the mother of the survivor, in her evidence stated that on the day of the incident, at around 12 noon, the survivor came home crying and told her that he was sexually assaulted by the appellant person in his buttock. Thereafter, she informed her husband about the incident. PW-5, who is a young witness of 14 years, deposed that he did not remember about the incident and also denied to have known the appellant. However, he identified the appellant via V/C to be a resident of Lumshnong. PW-6, who is a child witness,

deposed that on the day of the incident while he was going along with the survivor towards the house of the survivor, on reaching in front of the house of the appellant, the appellant dragged the survivor inside his house and closed the door. He identified the appellant in the Court through V/C. The PW-6 was also not cross-examined by the defence. PW-7 is a doctor who conducted medical examination of both the survivor and the appellant. Though the concerned medical reports are not of much relevance, the said witness deposed about the incident which was narrated by the minor survivor matching the version of the incident deposed by the survivor in his evidence before the Trial Court. The said witness also deposed that the appellant admitted that he had committed the crime with full knowledge.

7. The PWs-8 & 9 are both seizure witness in whose presence the material exhibit containing biological samples of the survivor and the appellant were collected. The depositions of the said witnesses are considered not very vital as the impugned conviction of the appellant is not based on any material exhibit collected during the course of the investigation. PW-10 in his evidence deposed that on being informed of the incident by the PW-1, he went to the house of the appellant along with PW-1 and others and thereafter informed the headman of the village and then proceeded to the Lumshnong PS to report the

matter. PW-11, the investigating officer of the case, in his deposition before the Trial Court narrated the details of investigation made by him and stated that on the basis of the material collected and after discussions with the senior officer, he found that a case has been well-established against the appellant. No contradiction has been pointed out in his evidence.

8. A detailed analysis of the aforesaid evidences would reveal that the allegation made by the prosecution has been supported by all the witnesses. The statement of the survivor stood firm and nothing has been pointed out in the evidence which may casts a shadow of doubt over the statement of the survivor. On the contrary, it is found that the allegation made against the appellant is well-supported by the other evidence of the PWs. The contention of the appellant that the evidence of the survivor has not been corroborated is devoid of merit and cannot be accepted. In addition, the appellant has also failed to project any rebuttal to the foundational proof adduced by the prosecution witness.

9. Coming to the contention of the learned counsel for the appellant with regard to the alteration of charges at the time of delivery of the impugned judgment and order and non-adherence to the principle of law as per the mandate of Section 216 Cr.P.C. by the

Trial Court, it is noticed that the learned Trial Court while pronouncing the judgment has altered the charges framed with a view to convict the appellant for a minor offence, although the appellant was not charged with it. The learned Trial Court on a thorough scrutiny of the evidence on record, came to a conclusion that no offence has been made out under Section the 6 POCSO Act read with Section 377 IPC but held that a case under Section 7 POCSO Act punishable under Section 8 POCSO Act stands established against the appellant. There is nothing on record to show that the charges were, in fact, altered and a new set of charges was framed against the appellant. Thus, in a true sense there was no alteration of charge in terms of Section 216 Cr.P.C by the Trial Court instead it was a case where the Court had proceeded to convict the appellant for a minor offence.

10. 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.

11. Minor cognate offence means a lesser 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 5/6 and 7/8 of the POCSO Act would indicate that the offences are cognate offence inasmuch as the said Sections deal with sexual offence. Section 5/6 POCSO Act speaks about aggravated penetrative sexual offence, Section 7/8 POCSO Act deals with 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 7/8 POCSO Act is cognate offence of the major offence mentioned in Section 5/6 POCSO Act and not entirely distinct and different offence, constituted by altogether different ingredients. When an appellant 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 appellant can be convicted for minor offence though not so charged.

12. A mere mention of alteration or addition of charge in the judgment and order of a trial Court to sustain the conviction recorded for a minor cognate offence cannot be termed as an alteration or addition of charge as contemplated in section 216 Cr.P.C. In the present case, the learned Trial Court after appreciation of the entire evidence on record came to a finding that the appellant is guilty of commission of an offence under Section 7/8 POCSO Act and not under Section 5(m)/6 of POCSO Act read with Section 377 IPC for which the charge was framed against the appellant at the beginning of the trial. The alteration of charge was not at all necessary for the Trial Court to sustain the conviction recorded under Section 7/8 POCSO Act. The Trial Court was well-within its power to convict the appellant for a minor cognate offence by virtue of Section 222 Cr.P.C. without altering the charge.

13. The materials on record in the present case undoubtedly support the conviction recorded by the learned Trial Court. No plea has been raised by the appellant that the conclusion drawn by the learned Trial

Court to convict the appellant for the minor cognate offence has resulted in prejudice to the appellant. In fact, the Trial Court at para 30 of its judgment and order dated 24-03-2022 has recorded that the defence has fairly argued for attraction of the altered Section therein.

14. The citations of case law relied upon by the learned counsel for the appellant would apply in a situation where the charge is altered by a criminal Court in exercise of its power under Section 216 of Cr.P.C. In the present case, the learned Trial Court has not altered the charge against the petitioner strictly in terms of the provisions of Section 216 Cr.P.C, instead proceeded to hold the appellant guilty of a minor cognate offence in exercise of authority vested under Section 222 Cr.P.C and hence, the same cannot be faulted with. Moreover, it is an admitted position that no prejudiced has been caused to the appellant.

15. In view of the aforesaid discussions, there is no merit in this present Criminal Appeal and the same is dismissed.

16. A copy of this judgment and order be supplied to the appellant, free of cost, forthwith.

17. Return the L.C Record immediately.

JUDGE

Meghalaya
16.02.2024
"Biswarup-PS"