

HIGH COURT OF MEGHALAYA
AT SHILLONG

Crl.A.No.18/2023

Reserved on: 27.02.2024
Pronounced on: 26.04.2024

Kanu Das Appellant

Vs.

State of Meghalaya represented by the
Commissioner & Secretary to the Department
Of Home (Police) Government of Meghalaya,
Shillong-793001 Respondent

Coram:

Hon'ble Mr. Justice S. Vaidyanathan, Chief Justice
Hon'ble Mr. Justice W. Diengdoh, Judge

Appearance:

For the Appellant : Mr.M.Sharma, Legal Aid Counsel
For the Respondent : Mr.R.Gurung, GA with
Ms.S.Shyam, GA

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- i) Whether approved for reporting in Law journals etc.: Yes
- ii) Whether approved for publication in press: Yes
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JUDGMENT

(Made by the Hon'ble Chief Justice)

This Criminal Appeal is directed against the judgment and order dated 08.04.2021, passed by the Special Judge (POCSO), East Jaintia Hills District, Khliehriat, Meghalaya Special (POCSO) Case No.12 of 2020 and the accused / Appellant herein was convicted by the Trial Court for the offence under Section 5(m) of the Protection of Children

from Sexual Offences Act, 2012 (in short 'POCSO Act, 2012')punishable under Section 6 of the POCSO Act, 2012 and sentenced to undergo Rigorous Imprisonment for a period of 10 years and to pay a fine of Rs.10,000/-, in default to undergo Simple Imprisonment for one year. The fine amount was directed to be given to the victim girl.

Brief Prosecution Case:

2. A complaint was given by the mother of the victim girl on 03.03.2016before Ladrymbai Police Outpost, East JaintiaHills District, Khliehriat, Meghalaya, stating that the accused, namely, Kanu Das had committed aggravated penetrative sexual assault on her daughter aged about 8 years and also raped her. Based on the complaint, FIR (Ex.P1) in KhliehriatP.S.Case No.61 (3) 2016 came to be registered against the accused under Section 354 IPC r/w Section 6 of the POCSO Act, 2012.

2.1. After investigation, a charge sheetdated 04.03.2016 was laid under Section 5 of POCSO Act, 2012 and punishable under Section 6 of POCSO Act, 2012 and upon transfer, the Special Judge (POCSO), East Jaintia Hills District had taken cognizance of the case. The prosecution, in order to substantiate the commission of the offence against the accused, has examined as many as 5 witnesses and marked 4 documents. On the side of

the defence, neither witnesses were examined nor documents marked. Statement under Section 164 Cr.P.C. (Ex.P3) was obtained from the victim girl (P.W.3). The accused was questioned under Section 313 Cr.P.C. and he denied the charges levelled against him. The Trial Court, after analyzing the evidence let in by the prosecution, found the accused guilty of the offence under Section 6 of the POCSO Act, 2012 and convicted him as stated supra.

3. The main ground that was raised by the learned Legal Aid Counsel for the appellant was that a false case has been foisted against the appellant and though the victim had informed the incident at first to her grandmother, she had not been made as a witness and enquired and it was P.W.1. viz., the mother of the victim girl, who had filed the FIR against the appellant. It was further urged that P.W.1, who had not witnessed the incident, merely narrated what the victim told her and therefore, she may be termed as a hearsay witness.

4. The learned Legal Aid Counsel for the appellant submitted that even if the statement recorded from the victim child under Section 164 Cr.P.C. is taken as it is and it is read along with the report given by P.W.2, at the best, it will only constitute an offence of sexual assault under Section 7 of the POCSO Act, 2012. This submission was made on the ground that

there is absolutely no proof to establish that there was a penetrative sexual assault against the victim child.

5. The learned Legal Aid Counsel for the appellant further submitted that as per the deposition of P.W.2 in his cross examination, who had examined the victim child, there was no sign of penetrative sexual assault and though the appellant was convicted solely on the basis of the medical report, it does not support the case of the prosecution. Thus, there was no corroboration of evidences of P.W.1 and victim child with the medical documents. Thus, he pleaded that there were several contradictions in the case of the prosecution and sought for interference by this Court in the conviction and sentence awarded by the Trial Court.

6. Per contra, learned Government Advocate appearing for the State contended that the victim girl (P.W.3) in her examination-in-chief had clearly deposed that it was the accused, who pulled her long pant and also opened his pant and inserted his private part into her vagina. The same version had been reiterated in her 164 Cr.P.C. statement(Ex.P3). The Doctor (P.W.2) in his examination categorically deposed that after clinical examination, the findings are consistent with recent sexual assault. Thus, the evidences of P.W3 had duly been fortified by the medical examination. The Apex Court in the case of **State of U.P. Vs. Babul Nath**, reported in

(1994) 6 SCC 29 observed that even an attempt to penetration will constitute the offence. The relevant Paragraph No.8 is extracted below:

“8.....From the explanation reproduced above it is distinctly clear that ingredients which are essential for proving a charge of rape are the accomplishment of the act with force and resistance. To constitute the offence of rape neither Section 375 of I.P.C. nor the explanation attached thereto require that there should necessarily be complete penetration of the penis into the private part of the victim/prosecutrix. ***In other words to constitute the offence of rape it is not at all necessary that there should be complete penetration of the male organ with emission of semen and rupture of hymen. Even partial or slightest penetration of the male organ within the labia majora or the vulva or pudenda with or without any emission of semen of even an attempt at penetration into the private part of the victim would be quite enough for the purpose of Sections 375 and 376 of I.P.C. that being so it is quite possible to commit legally the offence of rape even without causing any injury to the genitals or leaving any seminal stains....***”

7. Learned Government Advocate appearing for the State went on to add that if the statement made under 164 Cr.P.C. is found to be consistent, there is no other corroboration required to prove the guilt of the accused. The prosecution was able to prove the presumption clause provided under Section 29 of the POCSO Act beyond reasonable doubt through various depositions and evidences. As per Section 29 of the POCSO Act, 2012, burden shifts on the accused to prove his innocence and there was no explanation offered by him to the questions posed to him under Section 313Cr.P.C., as his answers to the questions were mostly in

one word, namely, “Yes or No”. He drew the attention of this Court to the judgment of the Apex Court in the case of **BharwadaBhoginbhaiHirjibhai Vs. State of Gujarat**, reported in **1983 (3) SCC 217**, wherein it was categorically held that the evidence of victim to the offence is of paramount importance and the Court cannot shrug off the case of the prosecution merely for want of strict corroboration.

“11. In view of these factors the victims and their relatives are not too keen to bring the culprit to books. And when in the face of these factors the crime is brought to light there is a built-in assurance that the charge is genuine rather than fabricated. On principle the evidence of a victim of sexual assault stands on par with evidence of an injured witness. ***Just as a witness who has sustained an injury (which is not shown or believed to be self inflicted) is the best witness in the sense that he is least likely to exculpate the real offender, the evidence of a victim of a sexoffence is entitled to great weight, absence of corroboration notwithstanding. And while corroboration in the form of eye witness account of an independent witness may often be forthcoming in physical assault cases, such evidence cannot be expected in sex offences, having regard to the very nature of the offence. It would therefore be adding insult to injury to insist on corroboration drawing inspiration from the rules devised by the courts in the western world***(obeisance to which has perhaps become a habit presumably on account of the colonial hangover). We are therefore of the opinion that if the evidence of the victim does not suffer from any basic infirmity, and the ‘probabilitiesfactor’ does not render it unworthy of credence, as a general rule, there is no reason to insist on corroboration except from the medical evidence, where, having regard to the circumstances of the case, medical evidence can be expected to be forthcoming, subject to the following qualification: ***Corroboration may be insisted upon when a woman having attained majority is found in a compromising position and there is a likelihood of her having levelled such an***

accusation on account of the instinct of self-preservation. Or when the 'probabilitiesfactor' is found to be out of tune.

In a criminal case, the Court has to see whether the deposition of the prosecutrix is found to be trustworthy, unblemished, credible and of sterling quality in the light of the judgment of the Apex Court in the case of **Ganesan vs. State**, reported in **(2020)10 SCC 573**. Thus, it was prayed that the present Criminal Appeal is liable to be dismissed.

8. We have carefully considered the submissions made on either side and perused the material documents available on record.

9. The victim child in this case was aged about eight years, at the time of the incident as per the deposition of the mother of the victim girl (P.W.1). The incident took place on 03.03.2016 in the morning and on that day, the accused had kidnapped the victim child to a jungle and raped her by sealing her mouth with his hand. The victim child was examined as P.W.3, who stated in her evidence that while she was on her way to her grandmother's shop at Ladrymbai and standing in front of the shop, as her grandmother was not present there, suddenly, the accused grabbed her hand and pulled her to the jungle. The victim child further stated that when she tried to scream, the accused shut her mouth and kept his penis in her vagina. The complaint was given by P.W.1 on the very same day, based on which, a case was registered in P.S. Case No.61 (3) 2016.

10. When the victim child's statement was recorded under Section 164 Cr.P.C., she has reiterated the same version in the same manner, in which, she deposed before the Court. Therefore, this Court is able to come to a conclusion that there was no attempt made by the victim child to improve her version, while deposing before the Court. When a child was 8 years old, her maturity level cannot be so high to infer that she has improved her case. The victim child had perfectly identified the appellant and had also stated about the incident in a very natural way, while recording the statement under Section 164 Cr.P.C. as well as when she was examined before the Court. The evidence of the victim child was not discredited, during the cross-examination.

11. It will be apposite to take note of the judgment of the Apex Court in **State of Punjab v. Gurmit Singh (1996) 2 SCC 384** in this regard. The Apex Court has cautioned that in cases involving sexual assault/molestation, a duty is cast upon the Court to deal it with utmost carefulness and sensitivity and minor contradictions or insignificant discrepancies in the statement of the prosecutrix should not be a ground for throwing out the case of the prosecution. The relevant paragraph of the judgment is extracted as under:

"8. ... The testimony of the victim in such cases is vital and unless there are compelling reasons which necessitate looking for corroboration of her statement, the courts should find no difficulty to act on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable. Seeking corroboration of her statement before relying upon the same, as a rule, in such cases amounts to adding insult to injury. Why should the evidence of a girl or a woman who complains of rape or sexual molestation, be viewed with doubt, disbelief or suspicion? The court while appreciating the evidence of a prosecutrix may look for some assurance of her statement to satisfy its judicial conscience, since she is a witness who is interested in the outcome of the charge levelled by her, but there is no requirement of law to insist upon corroboration of her statement to base conviction of an accused. The evidence of a victim of sexual assault stands almost on a par with the evidence of an injured witness and to an extent is even more reliable. Just as a witness who has sustained some injury in the occurrence, which is not found to be self-inflicted, is considered to be a good witness in the sense that he is least likely to shield the real culprit, the evidence of a victim of a sexual offence is entitled to great weight, absence of corroboration notwithstanding. Corroborative evidence is not an imperative component of judicial credence in every case of rape. Corroboration as a condition for judicial reliance on the testimony of the prosecutrix is not a requirement of law but a guidance of prudence under given circumstances. It must not be overlooked that a woman or a girl subjected to sexual assault is not an accomplice to the crime but is a victim of another person's lust and it is improper and undesirable to test her evidence with a certain amount of suspicion, treating her as if she were an accomplice. Inferences have to be drawn from a given set of facts and circumstances with realistic diversity and not dead uniformity lest that type of rigidity in the shape of rule of law is introduced through a new form of testimonial tyranny making justice a casualty. Courts cannot cling to a fossil formula and insist upon corroboration even if, taken as a whole, the case spoken of by the victim of sex crime strikes the judicial mind as probable."

12. When the testimony of the victim child inspires the confidence of this Court and is found to be reliable, there is no necessity for this Court to look for other corroborations.

13. The evidence of the victim child has been corroborated by her mother, who was examined as P.W.1. The evidence of the victim child is further corroborated by the evidence of P.W.2, the Doctor, who examined the victim child on 03.03.2016 at 06.10 p.m. Ex.P2 is the report that was prepared by the Doctor. On examination, P.W.5 had rendered the following clinical opinion in the Medical Report (Ex.P2):

"15. Clinical Opinion:

After performing the above mentioned clinical examination the findings are a) Consistent with recent sexual intercourse / assault."

While examining him (P.W.2) in-chief, the Doctor had stated as under:

"The victim has not washed or took bath since the incident.

On examination of Injuries: Contusion with abrasion over her face and tip of the nose which are simple injuries.

On Local Examination of the Genital Part: There were bruise and swelling over the labia minora, Bleeding with abrasion seen over fourchette Hymen: intact. Anus: Normal."

14. Learned Legal Aid Counsel for the appellant submitted that there are absolutely no signs of penetrative sexual assault and at the best, the report only shows that there could have been a sexual assault. The said submission of the learned Legal Aid Counsel cannot be countenanced for the reason that the victim child has described the incident, when she deposed before the Court and she has specifically stated that the appellant had inserted his penis into her private part. Section 3 of the POCSO Act explains penetrative sexual assault and Section 3(a) of the POCSO Act makes it clear that there is no requirement that the penis should have completely penetrated the vagina. Hence, sexual assault as described by the victim child clearly satisfies the requirement under Section 3(a) of the POCSO Act.

15. By referring to Section 7 of the POCSO Act, 2012, an attempt has been made on the side of the appellant that there was no penetration into her vagina and the accused had only touched her private part with his penis and therefore, the accused can at the most be punished only under Section 7 of the POCSO Act, 2012. If this interpretation is accepted, it will give a wrong signal to others that the private part of a female can be touched with penis and only insertion in the vagina is impermissible that will alone amount to commission of offence, which is not the intent of the provisions of the

POCSO Act, 2012. The interpretation that is attempted to be given by the learned Legal Aid Counsel for the appellant goes beyond the scope of Section 7 of the POCSO Act. In a tender age, there is no possibility for a child to have an idea about a sexual assault and according to the child, a physical assault like hitting or pinching is a matter of concern. In the instant case, going by the description given by the victim child about the incident and carefully considering the evidence of P.W.2 and the medical report marked as Ex.P2, we are convinced that the victim child was subjected to penetrative sexual assault.

16. The victim child was eight years old at the time of incident and hence, the offence of aggressive penetrative sexual assault is clearly established under Section 5(m) of the POCSO Act, which is punishable under Section 6 of the POCSO Act, 2012.

17. Learned Legal Aid Counsel for the appellant submitted that the victim child had initially narrated the alleged incident to her grandmother and the grandmother was not shown as a witness to the occurrence. The Medical Report clearly shows that there was a sexual assault and the evidence of victim child under Section 164 Cr.P.C. amply proves the fact that incident had occurred. Therefore, we are of the view that minor discrepancies will not prejudice the case of the victim child and a small

lacuna in the case of the prosecution will not throw away its case in entirety. As rightly argued by the learned Government Advocate with reference to the judgments of the Apex Court in the case of **MadanGopalKakkad vs. Naval Dubey and another**, reported in **(1992) 3 SCC 204** and **State of U.P. Vs. Babul Nath** (supra) observed that an attempt to penetrate itself is sufficient to constitute the offence of rape. The answer given by the appellant, when he was questioned under Section 313 Cr.P.C., is only the *ipse dixit* of the appellant and he had not answered anything to rebut the presumption / accusation levelled against him, in the absence of which, the Court has no other option, but to presume that the offence has been committed. In the present case, the appellant has not discharged the burden that was cast on him under Section 29 of the POCSO Act and hence, the legal presumption is that the prosecution has proved the offence under Section 5(m) of the POCSO Act.

18. The Court below has properly applied its mind and imposed the minimum punishment of Rigorous Imprisonment for a period of 10 years with a fine of Rs.10,000/-, in default to undergo Simple Imprisonment for one year, in view of the fact that the incident had happened prior to the amendment dated 16.08.2019, which, in our considered opinion, does not

warrant any interference by this Court, as the punishment should act as a deterrent so as to effectively handle offences against a child.

19. Finding that the prosecution has established the charges against the appellant, we do not find any ground to interfere with the judgment and order passed by the Court below.

20. In the result, this **Crl.A.No.18 of 2023** stands dismissed. As ordered by the Trial Court, the fine amount shall be paid to the victim child, if already not paid, in addition to the payment of compensation of Rs.3,00,000/- (Rupees Three Lakhs only) by the State to the victim child.

(W.Diengdoh)
Judge

(S.Vaidyanathan)
Chief Justice

Meghalaya
26.04.2024
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PRE-DELIVERY JUDGMENT IN
Crl.A.No.18 of 2023