

<u>Serial No.01</u> <u>Regular List</u>
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HIGH COURT OF MEGHALAYA
AT SHILLONG

Crl. A. No. 19 of 2023

Date of Decision: 26.02.2024

Shri. Sai Suchen

Vs.

State of Meghalaya & 3 Ors.

Coram:

Hon'ble Mr. Justice B. Bhattacharjee, Judge

Appearance:

For the Petitioner(s) : Mr. M. B. Marboh, Adv.
Mr. O. Shylla, Adv.

For the Respondent(s) : Mr. R. Gurung, 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 under Section 374(2) Cr.P.C. has been preferred against the impugned judgment dated 19-07-2023 and the order of sentence of even date passed by the Special Judge (POCSO), West Jaintia Hills District, Jowai in Special Sessions (POCSO) Case No. 3 of 2022 under Section 7/8 POCSO Act, whereby the accused/appellant was

convicted and awarded a sentence of 3 (three) years rigorous imprisonment and fine of Rs.5,000/- and in default to undergo a simple imprisonment of 1 (one) month.

1. The fact of the case is that an FIR dated 15-12-2021 was lodged by the complainant-cum-survivor before the Officer-in-Charge, Mukatapur Police Patrolling Party (Mukatapur PPP) alleging that on 15-12-2021 at around 11AM the appellant Shri. Sai Suchen had attempted to rape her at her resident in Lumpyngngad village. The said FIR was received by the Mukatapur PPP on 16-12-2021 vide GDE No.3. Thereafter the FIR was forwarded to the Dawki Police Station wherein it was received vide another GDE No.11 dated 16-12-2021 and a cognizable case being Dawki PS Case No. 31(12)2021 under Section 7/8 POCSO Act was registered against the appellant. Upon completion of the investigation, a charge-sheet vide Charge Sheet No.02/2022 dated 26-02-2022 under Section 7/8 POCSO Act was filed against the appellant. The charge against the appellant under Section 7/8 POCSO Act was framed by the Trial Court on 06-07-2022. In support of the charge, the prosecution examined 4 (four) witnesses and exhibited 5(five) documents and also a copy of the birth certificate as Paper Mark—

1. After the completion of the prosecution witness, the statement of the appellant under Section 313 Cr.P.C. was recoded on 16-02-2023. No

defence evidence was adduced by the appellant. Thereafter the parties were finally heard and the impugned judgement and order of sentence was passed by the Trial Court.

2. Assailing the impugned judgement, the learned counsel for the petitioner submits that the survivor has made contradictory statements in her evidence before the Trial Court in as much in her statement under section 164 Cr.P.C., she stated that the occurrence took place at the entrance of her grandmother's house, whereas in her evidence before the Trial Court, she stated that place of occurrence was at the entrance of her house. She also stated before the Trial Court that she did not tell about the incident to anyone and only informed to her mother after she returned back, whereas in her statement under section 164 Cr.P.C., she stated that she had informed her grandmother. The learned counsel further submits that the conduct of the survivor post incident is very unnatural as can be derived from the evidence of PW1 and PW2 that she screamed for help and ran after the appellant with a dao but did not care to inform about the incident to her grandmother, cousins and aunt who were present near the place of occurrence. The learned counsel further submits that as per the evidence of the survivor, her younger sister was present at the time of the incident with her, but the prosecution has not cited the sister of the survivor as a witness in the case. He contends that

the sister of the survivor was a material witness whose evidence was necessary for unfolding the truth of the prosecution case. The grandmother of the survivor was also an essential witness, but the prosecution failed to examine her in the case. The learned counsel strongly argues that the appellant is considerably prejudiced in his defence by reason of the aforesaid omissions on the part of the prosecution. The learned Counsel refers to the decisions of the Apex Court reported in *(1953) 2 SCC 231, Habib Mohd. Vs. State of Hyderabad (Para – 13), (1973) 1 SCC 490, Sahaj Ram and Others Vs. The State of U. P. (Para – 12), (1973) 1 SCC 512, State of U. P. Vs. Iftikhar Khan and Others. (Para – 22)* to contend that the prosecution is duty bound to examine all material witnesses to the unfolding of the narratives on which the prosecution is based and failure on the part of the prosecution should result in drawing adverse inference against the prosecution. The learned Counsel submits that there is no corroboration of the statement of the survivor and the prosecution having failed miserably to discharge its duties in the present case, the conviction recorded against the appellant cannot be sustained in law and liable to be interfered by this Court.

3. The learned GA appearing for the State-respondents, on the other hand, submits that there is no major contradiction insofar as the evidence

of the survivor and the prosecution witnesses are concerned. He submits that there may be some inconsistency which does not go to the root of the matter. He also submits that there remains no confusion with regard to the identity of the place of occurrence and the same stands clarified and established by Exhibit-3 and the deposition of PW3 and PW4. The learned GA contends that non-examination of the sister and grandmother of the survivor has not much bearing in the prosecution case as the occurrence of the incident stood established by the evidence of the survivor. He also submits that if according to the appellant, the non-examination of the sister and grandmother of the survivor has caused prejudice to the appellant, the defence could have filed an application for summoning them under Section 311 Cr.P.C. The learned GA further submits that conviction can be founded on the sole testimony of the victim of sexual offence and in the present case there is a statutory presumption with respect to the guilt of the appellant under the POCSO Act which the defence has failed to rebut. He submits that there is nothing on record to remotely suggest that the survivor had any grudge against the appellant and hence, her evidence cannot be termed as not trustworthy. The learned GA places reliance on the decisions of the Apex Court in *(1983) 3 SCC 217, Bharwada Bhoginbhai Hirjibhai Vs. State of Gujarat (para 11)* and *(1996) 2 SCC 384, State of Punjab Vs.*

Gurmit Singh and Others (para 8) to impress upon the court that sole testimony of the prosecutrix is sufficient to convict a charged person accused of committing sexual offence.

4. The submissions made by the rival parties are duly noted by this court and dealt with by referring to the relevant parts of the evidence recorded during the course of the trial.

5. The evidence on record reveals that the PW3 had visited the place of occurrence on 16-12-2021 and prepared a rough sketch map marked as Exhibit-3 and the place of occurrence was marked as 'A' therein. Two photographs of the place of occurrence were also taken by PW3 and were exhibited before the Trial Court as Exhibit-4(1) and Exhibit-4(2). A careful perusal of the Exhibit-3 shows that the place of occurrence marked as 'A' was a gate connecting the house of the survivor and the house next door. PW1, the survivor, in her cross examination stated that there was no other house present near her house and her grandmother's house. PW4 in her cross examination stated that place of occurrence is at the gate of survivor's own house and the survivor's grandmother's house is located next door. The analysis of the above evidences leads to only one possible conclusion that the gate in question is the gate connecting the house of the victim and the house of her grandmother and it is one and the same. Hence, the survivor's statement under Section 164

Cr.P.C. and her evidence before the Trial Court with regard to the place of occurrence refer to the same place which is the gate connecting the house of the survivor with the house of her grandmother.

6. A careful scrutiny of the deposition and the statement under Section 164 Cr.P.C. of the survivor discloses that the grandmother, two cousins and aunt of the survivor were present near the place of occurrence, but there is nothing on record to show that they have seen the incident. There is also no evidence to show that they played any role in the investigation of the matter. Hence, their absence before the trial court cannot weaken the prosecution case unless it is specifically pointed out that certain vital materials linked to the incident having bearing in the outcome of the trial remained unrevealed. The appellant has failed to point out any such missing link. The post incident conduct of the survivor, if contention of the appellant in that regard is accepted, also do not project any unnatural behavior of the survivor considering the fact that she is a minor village girl. It is very natural for a traumatized village girl, having feelings of being insulted and humiliated, to pick up a dao (machete) to protect herself against the offender without informing anyone present around the place of occurrence.

7. In so far as the argument of the appellant with regard to the non-examination of the sister of the survivor is concerned, it is noticed that

the survivor in her statement under Section 164 Cr.P.C. has stated that her little sister cannot speak. In her deposition before the trial court, the survivor stated that her sister was only 7 years old. The appellant has not disputed the aforesaid facts and in such a situation, if the sister of the survivor is left out as a prosecution witness, no adverse inference can be drawn against the prosecution, especially when the offence charged with is a sexual offence. Nothing was projected before this court by the appellant as to how the unfolding of the narrative of the prosecution case was hampered by the non-production of the sister of the survivor as a witness.

8. The case laws relied upon by the learned counsel appearing for the appellant are not rendered in the context of any sexual offence. The decisions of *Sahaj Ram and Others (supra)* and *State of U. P. (supra)* followed the proposition of law laid down in *Habeeb Mohd. (supra)* case with regard to duty of the prosecution to examine material witnesses essential to the unfolding of the narrative on which the prosecution is based. None of the aforesaid decisions mandates examination of all material witnesses by the prosecution, rather it is provided therein that the prosecution is not bound to call all available witnesses irrespective of considerations of number or reliability. Witnesses essential to the unfolding of the narrative on which the prosecution is built must be

called by the prosecution whether in the result the effect of their testimony is for or against the case of the prosecution. The non-examination of a witness whose evidence would not carry the matters further would not affect the evidence of other witnesses. Where the evidence of a witness is not essential to the unfolding of the prosecution case, he cannot be considered to be a material witness.

9. The decision of *Habeeb Mohd. (supra)* was rendered in a situation where a top-ranking police officer present at the scene was not examined as a witness. The learned Trial Judge also refused to summon the said police officer without seriously applying his mind to the effects of omitting to examine such an important witness. The scenario in the present matter is not similar to the aforesaid situation. Moreover, materials on record do not show that the appellant has ever made any attempt to summon the grandmother and the sister of the survivor by availing the opportunities provided in law. The aforementioned decisions of the Apex Court, as such, are of no help to the appellant in the present matter.

10. On the other hand, the case laws cited by the learned Government Advocate are in relation to adjudication of crime relating to sexual offence. The decision rendered in *Bharwada Bhoginbhai Hirjibhai (supra)* and *State of Punjab (supra)* lay down that the testimony of the

victim of sexual assault is vital and unless there are compelling reasons which necessitate looking for corroboration of her statement, the Courts should find no difficulty in acting 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. The relevant part of paragraph 8 of *State of Punjab (supra)* is reproduced below: -

“8..... In the normal course of human conduct, this unmarried minor girl, would not like to give publicity to the traumatic experience she had undergone and would feel terribly embarrassed in relation to the incident to narrate it to her teachers and others overpowered by a feeling of shame and her natural inclination would be to avoid talking about it to anyone, lest the family name and honour is brought into controversy. Therefore her informing her mother only on return to the parental house and no one else at the examination centre prior thereto is in accord with the natural human conduct of a female. The courts must, while evaluating evidence, remain alive to the fact that in a case of rape, no self-respecting woman would come forward in a court just to make a humiliating statement against her honour such as is involved in the commission of rape on her. In cases involving sexual molestation, supposed considerations which have no material effect on the veracity of the prosecution case or even discrepancies in the statement of the prosecutrix should not, unless the discrepancies are such which are of fatal nature, be allowed to throw out an otherwise reliable prosecution case. The inherent bashfulness of the females and the tendency to conceal outrage of sexual aggression are factors which the courts should not overlook. 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.....”.

11. The discrepancies which the appellant has pointed out in the present matter are all relatable to the post incident conduct of the survivor and do not go to the root of the accusation. The statement of the survivor under Section 164 Cr. P.C. was recorded on 01-02-2022 and her evidence before the Trial Court was taken on 08-08-2022. There is a gap of more than six months in between the recording of the aforesaid statement and the evidence. It is humanly impossible to reproduce the statement which was recorded at the stage of investigation in the same words while adducing evidence in a Court at the stage of trial, particularly when there exists a gap of considerable period of time in between. A human being cannot be expected to reproduce earlier statement like a recording device while deposing as witness in a judicial proceeding and there is bound to be some discrepancies. So long such discrepancies do not go to the root of the allegation and unfold a different picture altogether, it cannot be said that there exists contradiction to land discredit to the prosecution case. Inconsistency in the statement of the survivor as to whom she informed first about the incident does not materially affect the accusation made against the appellant and the same cannot be a basis to dislodge the prosecution version of the case.

12. The PW1 in her examination-in-chief before the trial Court categorically stated that on the day of the incident when she and her younger sister were present at home and her mother went out to attend a funeral, the appellant came to her house and stood at the entrance of her house. The appellant then asked the survivor as to where her mother was and she told him that her mother went to attend a funeral. She told the appellant to move from the entrance but he kept on standing there and then he suddenly put his hand on her private part 'thawjung'. The said statement of the PW1 was not disputed in her cross-examination by the appellant. The defence did not even try to dislodge the statement of the PW1 with regard to the presence of the appellant in the place of occurrence by putting any question to that effect to the PW1 in her cross-examination. Though the appellant in his statement under Section 313 Cr.P.C has stated that he was in the office on the day of the incident, but he did not adduce any evidence to support his statement. The testimony of the PW1, as such, stood unshaken.

13. The appellant has not made any allegation of hostility or vindictiveness on the part of the survivor in making the accusation against him in order to render the statement of the survivor doubtful. The totality of the circumstances appearing in the case does not disclose that the survivor had a strong motive to falsely involve the appellant and,

therefore, there should not be any hesitation on the part of the Court in accepting her evidence adduced during the course of trial. The appellant also has not raised any challenge to the age of the survivor in this appeal and the findings recorded by the learned Trial Court to that effect has not been disputed in this appeal.

14. In view of what has been discussed above, there is no merit in this appeal and the same stands dismissed.

15. Let a copy of this Judgement and Order be furnished to the appellant forthwith.

16. Return the Lower Court Record immediately.

JUDGE

Meghalaya
26.02.2024
"Biswarup-PS"