

HIGH COURT OF MEGHALAYA
AT SHILLONG

Crl.A.No.31/2022 with
Crl.M.C.No.76/2022

Reserved on: 21.02.2024

Pronounced on: 07.03.2024

Rajingstar Thabah

Vs.

1. The State of Meghalaya represented by the Secretary, Government of Meghalaya Home (Police) Department, East Khasi Hills District, Meghalaya.
2. Investigating Officer, Mawngap Police Station, East Khasi Hills District, Meghalaya.
3. Smti. Rani Thabah, W/o Shri Kebarius Marbaniang, R/o Mawdnung (Sohiong), East Khasi Hills District, Meghalaya

Coram:

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

Appearance:

For the Appellant : Mr. K. Ch. Gautam, Adv

For the Respondents : Mr. R. Gurung, GA with
Ms. S. Shyam, GA

JUDGMENT

(Made by the Hon'ble Chief Justice)

This Criminal Appeal is directed against the judgment and order dated 08.07.2022 and the order of sentence dated 11.07.2022, passed by the Special Judge (POCSO), Shillong in Special POCSO Case No.5 of 2018 and the accused / Appellant herein was convicted by the Trial Court for an offence under Section 6 of The Protection of Children from Sexual Offences Act, 2012 (in short 'POCSO Act, 2012') and sentenced

to undergo Rigorous Imprisonment for a period of 18 years and to pay a fine of Rs.20,000/-, in default to undergo Simple Imprisonment for another 3 months. 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 03.11.2017 before Sohiong Police Outpost, East Khasi Hills, stating that the accused, namely, Rajingstar Thabah had committed aggravated penetrative sexual assault on her daughter aged about 5 years and 10 months and also threaten her with dire consequences. Based on the complaint, FIR (Ex.P2) in Mawngap P.S.Case No.43 (11) 2017 came to be registered against the accused under Section 6 of the POCSO Act, 2012 read with Section 376(2)(i) and Section 511/506 IPC. Since there was no material evidence adduced by the prosecution against the accused under Section 506 IPC, there was no conviction imposed under the said section.

2.1. After investigation, a charge sheet (Ex.P8) was laid in C.S.No.05/2018 dated 25.01.2018 and the Court 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 12 witnesses and marked 8 documents. On the side of the defence, two witnesses were examined and no document was marked. Statement under Section 164 Cr.P.C. (Ex.P6) was obtained from the victim girl (P.W.2). 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. Learned counsel for the Appellant / accused, amidst several points raised in the appeal, assailed the judgment and order of the Trial Court on the sole ground that the appellant has been convicted purely on the basis of the evidence of the victim girl (P.W.2) and as per the settled law, the sole testimony must have a sterling quality and instil confidence in the mind of the Court. Moreover, there was no corroboration of the evidence of P.W.2 with the medical document. He submitted that there were several contradictions and inconsistencies in the depositions of P.W.2 between her Section 164 Cr.P.C. statement, chief and cross examinations. He also pointed out that even as per the version of the Doctor (P.W.7), who

examined the victim girl, she had opined that there was no abnormality found in her vital part and the hymen was intact, as there was no possibility of penetration in the private part of the victim girl. The Doctor further opined that even though there was redness and white discharge on the vaginal part of the victim girl, it could have been due to unhygienic infection. He further submitted that in the absence of medical corroboration, there was no sexual assault on the victim girl by the appellant herein. He also submitted that there was a delay of two days in lodging the complaint and there was no explanation forthcoming for the delay in lodgement of the complaint. Thus, he pleaded that there were several flaws committed by the prosecution and sought for interference by this Court in the conviction and sentence awarded by the Trial Court.

4. Per contra, learned Government Advocate appearing for the State contended that by no stretch of imagination, it can be said that the evidence of P.W.2 is inconsistent, as the prosecution had, beyond reasonable doubt, established its case that it was the accused, who had committed aggravated sexual penetration on the victim girl by means of both oral and documentary evidence. He further contended that under Section 29 of the POCSO Act, there is a presumption clause, which not only brings in the actual offender, but also the abettor and the burden is on the accused to prove the contrary. Similarly, under Section 30 of the

POCSO Act, there is a presumption of *mens rea*, which is required to be discharged by the accused, when the foundational facts are established by the prosecution. He drew the attention of this Court to the judgment of the Apex Court in the case of *Ganesan vs. State*, reported in *AIR 2020 SC 5019*, wherein it was categorically held that there can be a conviction on the sole testimony of the victim / prosecutrix, when the deposition of the prosecutrix is found to be trustworthy, unblemished, credible and her evidence is of sterling quality. He also contended that since the victim girl was complaining of stomach ache and pain in her vagina, on enquiry with the victim girl and after medical examination, the complaint was preferred against the accused and therefore, the case of the prosecution cannot be simply propelled through the air on account of the delay of two days in lodging the complaint and prayed that the present Criminal Appeal is liable to be dismissed.

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

6. According to the prosecution, the mother (P.W.1) of the victim girl (P.W.2) had clearly deposed both in her chief as well as cross-examinations that pursuant to the severe stomach pain being complained of by her daughter on 02.11.2017 at night, she was taken to the Community

Health Centre, Sohiong on the following day, wherein she was medically examined by a Lady Doctor. During such examination, her daughter informed the doctor that she was raped by the accused, who is none other than her maternal uncle. Based on her statement, a Police complaint was lodged and the victim girl was subjected for medical examination at the Ganesh Das Hospital by the Police. P.W.1 further deposed that she was present all along, when her daughter was examined. Apart from P.W.1, there were several witnesses produced by the prosecution, among whom, the evidence of P.W.3, who is the aunt of the victim girl, weighs much importance and when she was cross examined, she had deposed that on coming to know of the sexual assault by the accused, as revealed to her by the victim girl, she had seen the private part and noticed that there was redness in the private part.

7. Other witnesses, namely, P.W.4 and P.W.5, who are Staff Nurses in Ganesh Das Hospital deposed that on the day, victim was brought for medical examination and they witnessed that the doctor collected the biological samples from the victim and both P.W.4 and P.W.5 had signed the seizure list which was exhibited as Ex.P3. Similarly, P.W.6 and P.W.8, Lab Technicians in the Civil Hospital deposed that on the day the accused was brought to the hospital by the police personnel and they collected the biological samples from the accused on being inculcated by

the doctor, which was then handed over to the police in a sealed and packed condition. Both the P.Ws.6 & 8 signed in the seizure, which was exhibited as Ex.P4.

8. The main thrust of argument advanced by the learned counsel for the appellant was that conviction was inflicted on the appellant, owing to the sole testimony of the victim girl and the said testimony is not corroborated with the medical evidence. It was further argued that the sentence awarded to the accused may be reduced, as there was no evidence of penetrative sexual assault committed by the accused. In support of his submission, he relied on the relevant passage of the deposition of Doctor (P.W.7), who, in her statement, had categorically deposed as under:

“Chief Examination

1 to 6...

7. On general examination I found that there is no abnormality detected. All her vitals were in normal limit.

8 to 10”

“Cross-Examination

1 & 2...

3. During my examination mild redness around the vaginal area and white discharge was detected on the victim.

4. I agree that the redness and white discharge of the vaginal areas may be due to some other factors like unhygienic, infection.

5. I state that even though there is no torn in the hymen and in this case as a victim was just 5 years old, there may not be penetration, but it could be superficial.

6....”

9. P.W.7 clarified in her cross-examination, stating that there is no torn in the hymen and as the victim was just 5 years old, there may not be penetrative assault, which could only be superficial. Learned counsel for the appellant has projected this part of examination to vindicate that there was no aggravated penetrative sexual assault on the victim at all and the offence under Section 6 of the POCSO Act, 2012 will not get attracted in the case on hand.

10. Before going into the veracity of the argument put forth by the learned counsel for the Appellant, let us analyse the statement made by the victim girl at various point of time so as to ensure whether the versions of the victim girl instil confidence in the mind of this Court. In her 164 statement, she had deposed as under:

“My uncle (“marit) Rajing raped me. He raped me near the veranda of thei’s house. He raped me in my vagina (and she pointed towards her vagina to show the place he raped her). He did eh eh. He beat me with a stick (and she pointed to her bump indicating the place where he beat her.) He inserted a stick in my vagina. He pinched me. He

told me that if I told people he would give me to the police. I told my sister (“kong”). After that he went home. This is all that I have to say.”

In her examination-in-chief, she had elaborated the incident as under:

“1 & 2.

3. I want Marit should be punish because he has done wrong thing to me.

5...

6. Marit had inserted his private part after making me like down in my private part and when he inserted it pain and I cried. The accused thereafter ran away.....”

Her Chief Examination goes thus,

“1 to 4...

5. On the day of the incident my mother was at home. A person can be heard from the place of occurrence to my house...”

11. Even though the victim girl had repeatedly deposed that the accused had inserted his private part into her vagina, a careful analysis of the evidence unearths that there may be a superficial penetration, on account of which, hymen was intact and not torn. It was further stated in response to the deposition of P.W.3 that unhygienic factors may be a reason for white discharge and other symptoms around the vaginal area. Even P.W.3 in her deposition, had stated that she did not see the incident and upon enquiry with the victim girl, she had noticed redness

in the private part of the victim girl. Thus, we could visualize that there was no medical corroboration with the evidence of witnesses, as, except the victim girl, no one had been produced on the side of the prosecution to establish the offence of sexual assault on the victim girl. At the same time, the theory of the prosecution version cannot be brushed aside on the reasoning that the accused, while questioning him under Section 313 had not denied that he was not present at the scene of occurrence, as he had stated that he was having conversation with the girl at the relevant point of time during dusk hours. Of course, there are slight contradictions and inconsistency between the medical and the ocular testimony, which alone cannot be the basis for doubting the case of the prosecution.

12. Insofar as the plea raised in respect of delay in lodging complaint is concerned, it is not a fatal to the case of the prosecution and there would be several formalities before preparation of FIR and it is the duty cast upon the Court to see whether all those formalities had been completed within a reasonable and there is no procedural lapse or undue delay at any stage of the case. The Hon'ble Supreme Court, while dealing with a motor accident case in **Ravi vs Badrinarayan & Others**, reported in **(2011) 4 SCC 693**, held as follows:

“21. The purpose of lodging the FIR in such type of cases is primarily to intimate the police to initiate investigation of criminal offences. Lodging of FIR certainly proves factum of accident so that the victim is able to lodge a case for compensation but delay in doing so cannot be the main ground for rejecting the claim petition. In other words, although lodging of FIR is vital in deciding motor accident claim cases, delay in lodging the same should not be treated as fatal for such proceedings, if claimant has been able to demonstrate satisfactory and cogent reasons for it. There could be variety of reasons in genuine cases for delayed lodgment of FIR. Unless kith and kin of the victim are able to regain a certain level of tranquility of mind and are composed to lodge it, even if, there is delay, the same deserves to be condoned. In such circumstances, the authenticity of the FIR assumes much more significance than delay in lodging thereof supported by cogent reasons.”

13. Now, the question before us is whether the Trial Court is justified in convicting the accused to undergo imprisonment for a period of 18 years and to pay a fine of Rs.20,000/-, in default to undergo Simple Imprisonment for another 3 months, albeit contradictions and inconsistencies found in the evidence of witnesses, especially when the entire case rests on the sole testimony of the victim girl. The period of punishment prescribed for the offence committed under Section 6 of The POCSO Act, 2012, prior to the amendment dated 16.08.2019 is as under:

“6. Punishment for aggravated penetrative sexual assault –
Whoever, commits aggravated penetrative sexual assault, shall be punished with rigorous imprisonment for a term **which shall not be less than ten years** but which may

extend to imprisonment for life and shall also be liable to fine.”

Subsequently, the Parliament in its wisdom modified the period of punishment for the offence committed under Section 6 of The POCSO Act, 2012, by way of substitution and amendment by Act 25 of 2019, which is extracted hereunder:

“6. Punishment for aggravated penetrative sexual assault –

(1) Whoever, commits aggravated penetrative sexual assault, shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of natural life of that person, and shall also be liable to fine, or with death.

(2) The fine imposed under sub-section (1) shall be just and reasonable and paid to the victim to meet the medical expenses and rehabilitation of such victim.”

14. It is not known as to why the Trial Court had convicted and sentenced the accused to undergo Rigorous Imprisonment for a period of 18 years. Admittedly, the commission of the offence had taken in the year 2007, namely, prior to the amendment of the Act and the minimum punishment that may be imposed on the proved offence was only not less than 10 years and as such, the Trial Court had mechanically imposed the punishment, when there was no

corroboration with the medical evidence to connect the accused with the alleged offence of aggravated penetrative sexual assault, except with the sole testimony of the victim girl and the own statement of the accused under Section 313 to prove his presence on that day so as to draw presumption under Section 29 of the POCSO Act, 2012. In our considered opinion, the Trial court could have been carried away by the new enactment and proceeded to impose such punishment on the accused.

15. Taking into consideration the entire facts and circumstances of the case, we are of the view that interests of justice will be served, if the period of imprisonment for a period of 18 years that has been awarded on the appellant is reduced to 10 years.

16. In the result, this Criminal Appeal is allowed in part and the conviction and sentence passed by the Court below dated 08.07.2022 and the order of sentence dated 11.07.2022, passed by the Special Judge (POCSO), Shillong in Special POCSO Case No.5 of 2018 is modified to the extent that the Appellant shall undergo Rigorous Imprisonment for ten years and to pay a fine of

Rs.20,000/-, in default to undergo Simple Imprisonment for another 3 months. As ordered by the Trial Court, the fine amount shall be disbursed to the victim girl, if not already paid. It is made clear that the appellant shall be entitled for set off in accordance with Section 428 of the Code of Criminal Procedure for the period of detention already undergone by him. Except the reduction in the quantum of punishment, the rest of the judgment of the Trial Court holds good in all other respects.

(W.Diengdoh)
Judge

(S.Vaidyanathan)
Chief Justice

Meghalaya
07.03.2024
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PRE-DELIVERY JUDGMENT IN
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