



Serial No.04
Regular List

HIGH COURT OF MEGHALAYA
AT SHILLONG

Crl.A.No.38/2023 with
Crl.M.C.No.110/2023

Reserved on : 14.05.2024

Pronounced on: 08.07.2024

Shri Pynchemalangki Bareh

... Appellant

-VS-

State of Meghalaya
through Public Prosecutor

... Respondent

Coram:

Hon'ble Mr. Justice S. Vaidyanathan, Chief Justice

Hon'ble Mr. Justice W. Diengdoh, Judge

Appearance:

For the Appellant : Mr. S.D. Upadhaya, Legal Aid Counsel

For the Respondent : Ms. S. Ain, GA
Mr. E.R. Chyne, GA

i) Whether approved for reporting in Law journals etc.: Yes

ii) Whether approved for publication in press: Yes

JUDGMENT

(Made by the Hon'ble Chief Justice)

This Criminal Appeal is directed against the judgment and order dated 16.06.2021, passed by the Special Judge (POCSO), District and Sessions Court, Khliehriat in Special (POCSO) Case No.9/2020 and the accused / Appellant herein was convicted by the Trial Court for the offences under Sections 506 of the Indian Penal Code and Section 3(a) of the Protection of Children from Sexual Offences Act, 2012 (in short 'POCSO



Act, 2012') punishable under Section 4 of the POCSO Act, 2012 and was sentenced as under:

Provision under which convicted	Sentence
Section 506 IPC	Two years of Rigorous Imprisonment
Section 4 of the POCSO Act, 2012	Twenty years Rigorous Imprisonment with a fine of Rs.5,000/-, in default to undergo Six Months Simple Imprisonment

The fine amount awarded as compensation was directed to be paid to the victim girl.

Brief Prosecution Case:

2. A complaint was given by the mother (P.W.1) of the victim girl on 27.11.2019 before Khliehriat Women Police Station, East Jaintia Hills, stating that his daughter aged 13 years was raped on 26.11.2019 by the appellant at Mokoidaling, Sutnga and on receipt of the complaint, a case was registered by the Officer-in-Charge of Khliehriat Women Police Station in Khliehriat Women P.S. Case No.49 (11)19 under Sections 3 and 4 of the POCSO Act, 2012 and the case was entrusted WPSI S.Kharsati for carrying out the investigation.

3. After investigation, a Charge Sheet dated 27.11.2019 was laid before the Court of Chief Judicial Magistrate and the case was committed to the Special Judge (POCSO) for trial and charges were framed against the accused under Section 506 IPC r/w Sections 3 and 4 of POCSO Act, 2012.

The prosecution, in order to substantiate the commission of the offence



against the accused, had examined as many as 14 witnesses and exhibited 11 material exhibits and one paper mark (Baptismal Certificate). A statement under Section 164 Cr.P.C. was obtained from the victim girl (P.W.1). 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 506 of the IPC and under Section 3(a) and Section 4 of the POCSO Act, 2012 and convicted him as stated supra.

4. The main argument advanced by the learned Legal Aid Counsel for the appellant was that there is no concrete evidence as to the age of the victim girl and the evidence of the Doctor in respect of assessment of her age was inconsistent, as no birth certificate or any other relevant documents had been produced on the side of the prosecution to prove the age of the victim girl. Learned Legal Aid Counsel for the appellant submitted that except relying on the Baptismal Certificate to prove the age of the victim girl, there was no other document to establish her age, as she was not subjected to any medical examination by the Trial Court, relating to her age. According to the Appellant, the age of the victim girl would be more than 18 years and in that case, the provisions of Section 376 IPC will only get attracted and the accused cannot be punished under the POCSO Act, 2012.



5. Learned Legal Aid Counsel for the Appellant referred to a judgment of the Supreme Court in the case of *P.Yuvaprakash vs. State Rep. by Inspector of Police*, reported in *AIR 2023 SC 3525*, wherein the Apex Court had elaborately dealt with different aspects with regard to determination of the age of a juvenile as under:

“12. In view of Section 34(1) of the POCSO Act, Section 94 of the JJ Act, 2015 becomes relevant, and applicable. That provision is extracted below:

94. Presumption and determination of age. - (1) Where, it is obvious to the Committee or the Board, based on the appearance of the person brought before it under any of the provisions of this Act (other than for the purpose of giving evidence) that the said person is a child, the Committee or the Board shall record such observation stating the age of the child as nearly as may be and proceed with the inquiry Under Section 14 or Section 36, as the case may be, without waiting for further confirmation of the age.

(2) In case, the Committee or the Board has reasonable grounds for doubt regarding whether the person brought before it is a child or not, the Committee or the Board, as the case may be, shall undertake the process of age determination, by seeking evidence by obtaining -

- (i) the date of birth certificate from the school, or the matriculation or equivalent certificate from the concerned examination Board, if available; and in the absence thereof;
- (ii) the birth certificate given by a corporation or a municipal authority or a panchayat;
- (iii) and only in the absence of (i) and (ii) above, age shall be determined by an ossification test or any other latest medical age determination test conducted on the orders of the Committee or the Board:

Provided such age determination test conducted on the order of the Committee or the Board shall be completed within fifteen days from the date of such order.

- (3) The age recorded by the Committee or the Board to be the age of person so brought before it shall, for the purpose of this Act, be deemed to be the true age of that person.

13. It is evident from conjoint reading of the above provisions that wherever the dispute with respect to the age of a person arises in the context of her or him being a victim under the POCSO Act, the courts have to take recourse to the steps indicated in Section 94 of the JJ Act. The three documents in order of which the Juvenile Justice Act requires consideration is that the concerned court has to determine the age by considering the following documents:

- (i) the date of birth certificate from the school, or the matriculation or equivalent certificate from the concerned examination Board, if available; and in the absence thereof;
- (ii) the birth certificate given by a corporation or a municipal authority or a panchayat;



(iii) and only in the absence of (i) and (ii) above, age shall be determined by an ossification test or any other latest medical age determination test conducted on the orders of the Committee or the Board.

14. Section 94(2)(iii) of the JJ Act clearly indicates that the date of birth certificate from the school or matriculation or equivalent certificate by the concerned examination board has to be firstly preferred in the absence of which the birth certificate issued by the Corporation or Municipal Authority or Panchayat and it is only thereafter in the absence of these such documents the age is to be determined through "an ossification test" or "any other latest medical age determination test" conducted on the orders of the concerned authority, i.e. Committee or Board or Court. In the present case, concededly, only a transfer certificate and not the date of birth certificate or matriculation or equivalent certificate was considered. Ex. C1, i.e., the school transfer certificate showed the date of birth of the victim as 11.07.1997. Significantly, the transfer certificate was produced not by the prosecution but instead by the court summoned witness, i.e., CW-1. The burden is always upon the prosecution to establish what it alleges; therefore, the prosecution could not have been fallen back upon a document which it had never relied upon. Furthermore, DW-3, the concerned Revenue Official (Deputy Tahsildar) had stated on oath that the records for the year 1997 in respect to the births and deaths were missing. Since it did not answer to the description of any class of documents mentioned in Section 94(2)(i) as it was a mere transfer certificate, Ex C-1 could not have been relied upon to hold that M was below 18 years at the time of commission of the offence.

15. In a recent decision, in *Rishipal Singh Solanki v. State of Uttar Pradesh and Ors.*, this Court outlined the procedure to be followed in cases where age determination is required. The court was dealing with Rule 12 of the erstwhile Juvenile Justice Rules (which is in *parimateria*) with Section 94 of the JJ Act, and held as follows:

20. Rule 12 of the JJ Rules, 2007 deals with the procedure to be followed in determination of age. The juvenility of a person in conflict with law had to be decided *prima facie* on the basis of physical appearance, or documents, if available. But an inquiry into the determination of age by the Court or the JJ Board was by seeking evidence by obtaining: (i) the matriculation or equivalent certificates, if available and in the absence whereof; (ii) the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof; (iii) the birth certificate given by a corporation or a municipal authority or a panchayat. Only in the absence of either (i), (ii) and (iii) above, the medical opinion could be sought from a duly constituted Medical Board to declare the age of the juvenile or child. It was also provided that while determination was being made, benefit could be given to the child or juvenile by considering the age on lower side within the margin of one year.

16. Speaking about provisions of the Juvenile Justice Act, especially the various options in Section 94(2) of the JJ Act, this Court held in *Sanjeev Kumar Gupta v. The State of Uttar Pradesh and Ors.* that:

“Clause (i) of Section 94(2) places the date of birth certificate from the school and the matriculation or equivalent certificate from the concerned examination board in the same category (namely (i) above). In the absence thereof category (ii) provides for obtaining the birth certificate of the corporation, municipal authority or panchayat. It is only in the absence of (i) and (ii) that age determination by means of medical analysis is provided. Section 94(2)(a)(i) indicates a significant change over the provisions which were contained in Rule 12(3)(a) of the Rules of 2007 made under the Act of 2000. Under Rule 12(3)(a)(i) the matriculation or equivalent certificate was given precedence and it was only in the event of the certificate not being available that the date of birth certificate from the school first attended, could be obtained. In Section 94(2)(i) both the date of birth certificate from the school as well as the matriculation or equivalent certificate are placed in the same category.”



17. In *Abuzar Hossain @ Gulam Hossain v. State of West Bengal* [2012] 9 SCR 224, this Court, through a three-judge bench, held that the burden of proving that someone is a juvenile (or below the prescribed age) is upon the person claiming it. Further, in that decision, the court indicated the hierarchy of documents that would be accepted in order of preference.

18. Reverting to the facts of this case, the headmaster of M's School, CW- 1, was summoned by the court and produced a Transfer Certificate (Ex.C-1). This witness produced a Transfer Certificate Register containing M's name. He deposed that she had studied in the school for one year, i.e., 2009-10 and that the date of birth was based on the basis of the record sheet given by the school where she studied in the 7th standard. DW-2 TMT Poongothoi, Headmaster of Chinnasoalipalayam Panchayat School, answered the summons served by the court and deposed that 'M' had joined her school with effect from 03.04.2002 and that her date of birth was recorded as 11.07.1997. She admitted that though the date of birth was based on the birth certificate, it would normally be recorded on the basis of horoscope. She conceded to no knowledge about the basis on which the document pertaining to the date of birth was recorded. It is stated earlier on the same issue, i.e., the date of birth, Thiru Prakasam, DW-3 stated that the birth register pertaining to the year 1997 was not available in the record room of his office.

19. It is clear from the above narrative that none of the documents produced during the trial answered the description of "the date of birth certificate from the school" or "the matriculation or equivalent certificate" from the concerned examination board or certificate by a corporation, municipal authority or a Panchayat. In these circumstances, it was incumbent for the prosecution to prove through acceptable medical tests/examination that the victim's age was below 18 years as per Section 94(2)(iii) of the JJ Act. PW-9, Dr.Thenmozhi, Chief Civil Doctor and Radiologist at the General Hospital at Vellore, produced the X-ray reports and deposed that in terms of the examination of M, a certificate was issued stating "that the age of the said girl would be more than 18 years and less than 20 years". In the cross-examination, she admitted that M's age could be taken as 19 years. However, the High Court rejected this evidence, saying that "when the precise date of birth is available from out of the school records, the approximate age estimated by the medical expert cannot be the determining factor". This finding is, in this Court's considered view, incorrect and erroneous. As held earlier, the documents produced, i.e., a transfer certificate and extracts of the admission register, are not what Section 94(2) (i) mandates; nor are they in accord with Section 94(2) (ii) because DW-1 clearly deposed that there were no records relating to the birth of the victim, M. In these circumstances, the only piece of evidence, accorded with Section 94 of the JJ Act was the medical ossification test, based on several X-Rays of the victim, and on the basis of which PW-9 made her statement. She explained the details regarding examination of the victim's bones, stage of their development and opined that she was between 18-20 years; in cross-examination she said that the age might be 19 years. Given all these circumstances, this Court is of the opinion that the result of the ossification or bone test was the most authentic evidence, corroborated by the examining doctor, PW-9."

6. Learned Legal Aid Counsel for the Appellant quoted yet another judgment of the Supreme Court in the case of *Soundarajan vs. State*, reported in *AIR 2023 SC 2136* to substantiate that charges must be framed with utmost care and proper application of mind.

"16. We find that, in this case, the charge has been framed very casually. The Trial Courts ought to be very meticulous when it comes to the framing of charges. In a given case, any such error or omission may lead to acquittal and/or a long delay in trial due to an order of



remand which can be passed under sub-section (2) of Section 464 of Code of Criminal Procedure. Apart from the duty of the Trial Court, even the public prosecutor has a duty to be vigilant, and if a proper charge is not framed, it is his duty to apply to the Court to frame an appropriate charge.

17. The appeal is allowed. The impugned judgments are quashed and set aside, and the Appellant is acquitted of the offences alleged against him. The bail bonds of the Appellant stand cancelled.”

7. Learned counsel for the Appellant cited one more judgment of the High Court of Judicature at Patna passed on 29.03.2023 in the case of **Deepak Kumar vs. State of Bihar** in **Crl.A. (SJ) No.1011 of 2022**, to submit that in the absence of medical corroboration as to the age of a victim, then the benefit of doubt must be given in favour of the accused.

“16. Apparently, no exercise was carried out by the prosecution to establish that the victim was minor as on the date of occurrence by following the procedure prescribed under the Act in Patna High Court CR. APP (SJ) No.1011 of 2022 dt.29-03-2023 the light of reasoning put forth by the Supreme Court in case of Jarnail Singh (Supra). Further, in case of Rajak Mohammad vs. State of H.P. reported in (2018) 9 SCC 248 the Hon'ble Supreme Court has noted that the age determined on the basis of a radiological examination may not be an accurate determination and sufficient margin either way has to be allowed. The Supreme Court, taking into account the facts and circumstances of that case opined in the said case that the report of radiological examination left room for ample doubt with regard to the correct age of prosecutrix. In such case, the benefit of aforesaid doubt, naturally, must go in favour of the accused. In the case of Sunil v. the State of Haryana reported in AIR 2010 SC 392, the Hon'ble Supreme Court observed that conviction cannot be based on an approximate age of the victim. In State of Madhya Pradesh vs. Munna @ Shambhoo Nath reported in (2016) 1 SCC 696, the Hon'ble Supreme Court held that the evidence of approximate age of the victim would not be sufficient to any conclusion about the exact age of the victim.”

Thus, he pleaded that in all respects, the prosecution failed to prove the age of the victim girl and there were several inconsistencies and contradictions amongst witnesses produced by the prosecution and sought for interference by this Court in the conviction and sentence awarded by the Trial Court.

8. Per contra, learned Government Advocate appearing for the State contended that as per the Medical Report (Ex.P1) given by the Doctor, the



hymen was not intact and there was a partial penile and penetration of the vagina. It was also contended that the age of the victim girl was clearly proved through Papermark-I, as per which, her date of birth was 05.03.2006 and was baptized on 18.09.2016. Thus, in all probabilities, the prosecution has proved the guilt of the accused without any room for suspicion through oral and documentary evidences. Thus, it was prayed that the present Criminal Appeal is liable to be dismissed.

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

10. It was alleged by the prosecution that the accused had aggravated sexual intercourse with the victim girl, who was stated to be a minor at the time of incident, attracting the provisions of Section 4 of the POCSO Act, 2012. The only ground urged by the learned Legal Aid Counsel for the appellant to assail the judgment was that there was no proper determination of the age of the victim girl. The prosecution produced the Baptismal Certificate (Papermark-I) in the form of birth certificate, which was issued by the Khasi Jaintia Presbyterian Assembly on 18.09.2016, wherein it was stated as follows:

“This is to certify that Smti. BARILIN son/daughter of Shri. DILANG MARNIANG was born on 5th March 2006 and was baptized on 18th Sept. 2016 at the Sutnga Presbyterian Church by Rev. R. Pyrngap.”



11. As per the Baptismal certificate, she was only 13 years old at the time occurrence and it cannot be lost sight of the fact that except the said certificate, the prosecution had neither produced any witness to prove the genuineness of the certificate nor taken any steps to subject the victim girl for medical examination. However, as per the statement of the victim girl (P.W.1) under Section 164 Cr.P.C., the factum of sexual intercourse had been duly established by the prosecution. In the statement, the victim girl had stated as follows:

“On 26/11/2019 at around 3:30 pm I went to a hill top with my male friend whose name I do not know however I call him Lad to play. Then all of a sudden Shri Rowi Bareh came and held me from the back and forcefully pulled me to a near by jungle. In the jungle Shri Rowi Bareh then forcefully pulled off my pants and then he took off all his clothes. Shri Rowi Bareh then got on top on me and held me down. I could not move as he held me down tightly. Shri Rowi then inserted his penis into my vagina and my vagina was hurting. I tried to scream however Shri Rowi held me by my mouth and threatened me saying that he will strangle me and throw my body into the coal mines. Shri Rowi told me that he will drop me home however he lied and he forcefully made lay down on one stone again so I took one stone and I hit Shri Rowi on the head and he was bleeding. While Shri Rowi was putting on his clothes I got my chance to escape. Shri Rowi followed me from behind till I reached near my house. On reaching our house as we have one dog and as my dog was barking at Shri Rowi so he fled away.

On reaching home I narrated the story to my mother and my Elder Sister. At the time of the incident I did not know the name of the accused person however it was later that my mother told me that his name was Shri Rowi Bareh.

That is all I have to say.”



Though this Court may infer owing to non-production of relevant document to prove the age of the victim girl, this Court must give weightage to the evidence of the victim girl, as in a case of this nature, the deposition of the victim girl has evidentiary value. Even as per the deposition of P.W.2 (mother of the victim girl), the girl was born on 05.03.2006 and her evidence finds support from the examination of the Doctor in-chief (P.W.9), who had deposed that “the blood stained in the vaginal swab is not menstrual blood, since the victim has not attained menarche”. Thus, it was clearly proved by the fact that she was only 13 years old at the time of incident and the material produced throws light that there was a sexual penetration on the part of the accused, which is evident from the medical examination report (Ex.P1) / clinical findings, conducted on the victim girl (P.W.1) to the effect that “Hymen torn, partial penile, penetration of the vagina”. Thus, in all probabilities, all the legal parameters are against the accused and the prosecution has proved the charges against the appellant beyond doubt.

12. Learned Legal Aid counsel for the Appellant prayed for reduction of sentence, on the ground that in the absence of concrete evidence, it cannot be inferred that she was below 18 years so as to book the case against the accused under the POCSO Act, 2012.



13. The Parliament, in its wisdom, by way of insertion of Clause No.2 to Section 4 of the POCSO Act, 2012 vide Act 25 of 2019 amended the said Section, which reads as follows:

“4. Punishment for penetrative sexual assault –

(2) Whoever, commits penetrative sexual assault on a child below sixteen years of age shall be punished with 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.”

14. Learned Legal Aid Counsel fairly conceded that the incident had taken place in the year 2019, i.e., after the amendment being brought into force and as per the amendment, the Trial Court had also convicted and sentenced the accused to undergo Imprisonment for twenty years. However, this Court under Section 42 of the POCSO Act, 2012 has got power to reduce the sentence, if there is any inconsistency. Section 42A of the POCSO Act, 2012 reads as under:

“42A. Act not in derogation of any other law.—The provisions of this Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force and, in case of any inconsistency, the provisions of this Act shall have overriding effect on the provisions of any such law to the extent of the inconsistency.”

15. Learned Legal Aid Counsel for the appellant went on to add that though the Trial Court rendered a finding as to the admissibility of the Baptismal certificate as per Section 35 of the Evidence Act, it is mandatory on the part of the Trial Court to corroborate such evidence medically as per



the dictum laid down by the Supreme Court in the case of *P.Yuvaprakash vs. State Rep. by Inspector of Police* (supra).

16. Though the argument of the learned Legal Aid Counsel for the appellant looks attractive at the first blush, when seen in depth, especially on a close scrutiny of Sections 42 and 42A of the POCSO Act, 2012, in case of any inconsistency between the offences committed under the POCSO Act, 2012 and the IPC, the provisions of the Act, which contemplate higher punishment alone will prevail. Even for the sake of argument, if it is taken that the victim girl is above 18 years in the absence of any concrete evidence, on account of variability between the provisions, the punishment under the POCSO Act, 2012 can only be imposed on the accused. If looked at that perspective, the contention of the appellant has to be necessarily rejected, as Section 4 of the POCSO Act, 2012 contemplates minimum twenty years of punishment. For better understanding, Section 42 of the POCSO Act, 2012 is reproduced below:

“42. Where an act or omission constitutes an offence punishable under this Act and also under sections 166A, 354A, 354B, 354C, 354D, 370, 370A, 375, 376, 376A, 376AB, 376B, 376C, 376D, 376DA, 376DB [376E, section 509 of the Indian Penal Code (45 of 1860) or section 67B of the Information Technology Act, 2000 (21 of 2000) then, notwithstanding anything contained in any law for the time being in force, the offender found guilty of such offence shall be liable to punishment under this Act or under the Indian Penal Code as provides for punishment which is greater in degree.”



17. That apart, the Trial Court had clearly described in writing as to how it had taken into account the Baptismal Certificate for the determination of the age of the victim girl with reference to the judgments of the Supreme Court in the case of *Harpal Singh and another vs. State of Himachal Pradesh*, reported in *AIR 1981 SC 361* and *Luis Caetano Viegas vs. Esterline Mariana R.M.A Da' Costa, AIR 2003 SC 630*. Hence, we find that there is no infirmity in the judgment and order of the Trial Court, warranting our intervention in respect of reduction of punishment.

18. In the result, this Criminal Appeal is dismissed and the conviction and sentence dated 16.06.2021, passed by the Special Judge (POCSO), District and Sessions Court, Khliehriat is hereby upheld.

19. CrI.M.C.No.110 of 2023 stands disposed of.

(W.Diengdoh)
Judge

(S.Vaidyanathan)
Chief Justice

PRE-DELIVERY JUDGMENT IN
CrI.A.No.38/2023 with
CrI.M.C.No.110/2023