

GAHC030002392023



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : CrI.A./23/2023

Sh Lalfakzuala Hrahsel
Dawrpui Vengthar
Aizawl, Mizoram

VERSUS

State of Mizoram and 2 Ors.
Aizawl2:Smt F Lalnunhlimi
Child Team Member
Ramhlun Vengthar
Aizawl
Mizoram

3:Smt. Rachel laldingliani
R/o Zonuam
Aizawl
Mizoram

Advocate for the Petitioner : Mr B Lalramenga

Advocate for the Respondent : Ms. Linda L. Fambawl for R1

BEFORE
HONOURABLE MR. JUSTICE NELSON SAILO
HONOURABLE MR. JUSTICE ROBIN PHUKAN

Date of hearing : 31.07.2024
Date of Judgment : 16.08.2024

J U D G M E N T & O R D E R

(Nelson Sailo, J)

Heard Mr. B. Lalramenga, learned counsel for the appellant and Ms. Linda L. Fambawl, learned Public Prosecutor for the respondent No. 1. None appears for the respondent Nos. 2 & 3 despite notice.

[2.] This is an appeal against the Judgment & Order dated 09.03.2023, passed by the Court of the Presiding Officer, Fast Track Special Court, POCSO Act, Aizawl in S.C No. 14/2020 corresponding to Criminal Trial No. 257/2020, by which, the appellant was convicted under Section 4 of the POCSO Act and sentenced to imprisonment for a term of twenty (20) years.

[3.] The case of the prosecution in brief is that on 25.09.2019, a written FIR was received from the respondent No. 2 by Vaivakawn Police Station to the effect that the victim, aged 15 years, who was studying in Class-VIII at Helen Lowry School, had been raped by the appellant inside his shop named 'LCT Pharmacy' located at Vaivakawn, Aizawl. As such, Vaivakawn P.S Case No. 149/2019 dated 25.09.2019,

under Section 376(3) of the Indian Penal Code (IPC), read with Section 4 of the POCSO Act, was registered and the case investigated upon. Upon conclusion of the investigation, the Investigating Officer, finding a prima facie case established against the appellant, under the aforementioned Sections, filed the charge sheet. Following the same, charge was framed against the appellant, under the said Sections of law, by the Court of Special Judge, POCSO Act, Aizawl and to which, the appellant pleaded not guilty and claim to be tried. Accordingly, trial was conducted and during which, the prosecution side had examined as many as seven (7) prosecution witnesses, including the prosecutrix. The appellant was examined under Section 313 Cr.PC, and apart from cross-examining the prosecution witnesses, the appellant did not lead any defense evidence. Upon conclusion of the trial and after hearing the parties, the learned Trial Court convicted and sentenced the appellant in the manner as already indicated herein above.

[4.] Mr. B. Lalramenga, learned counsel submits that the alleged incident was said to have happened on 10.09.2019, but the FIR was lodged only on 25.09.2019. He submits that there is no explanation as to why there was delay in filing the FIR. He submits that such delay only leads to exaggeration of the version of the complainant and in appropriate cases, such delay is fatal to the case of the prosecution. Even in the instant case, since there are no explanation either in the FIR or in the report submitted by the Investigating Officer, the impugned Judgment

& Order of conviction and sentence, cannot be sustained and should be set aside even on this ground alone. In this connection, the learned counsel relies upon the case of *State of Andhra Pradesh -Vs- Madhusudhan Rao, (2008) 15 SCC 582* and *Manirul Islam -Vs- State of Assam & Anr., 2021 (3) GLT 128*.

[5.] Mr. B. Lalramenga, the learned counsel by referring to the evidence of PW Nos. 1 & 3 amongst others submits that the victim herself, her mother and their other relatives did not want to file the FIR and instead wanted to move on. However, the teacher of the victim i.e., PW-3 and the complainant (PW-1) who is from the Child Line Team, had proceeded to file the FIR despite there being no intention on the part of the victim and her family. Considering the same, it cannot be ruled out that the victim might have been tutored by the said witnesses.

[6.] Mr. B. Lalramenga, the learned counsel by referring to the evidence of the PW Nos. 1 & 2, submits that there are contradictions in their depositions, particularly as to how the victim landed up in the pharmacy where the appellant was working. Likewise, there are further contradictions in the evidence of the Doctor (PW-4) who had examined the victim after the filing of the FIR. He submits that according to PW-4, the victim informed her during the medical examination that the appellant had committed sexual intercourse with the victim several times before 10.09.2019. He therefore submits that on account of such inconsistencies and contradictions, the evidence of the prosecution cannot be relied upon to

convict the appellant under the charge framed against him and therefore, he may be given the benefit of doubt and acquitted. The learned counsel in support of his submission has relied upon the case of *Arbind Singh & Krihsna Nandan Singh & Ors. -Vs- State of Bihar, 1995 Supp (4) SCC 416*.

[7.] Mr. B. Lalramenga, the learned counsel further submits that in order to rely upon the evidence of the prosecutrix, the same should be trust worthy, unblemished and consistent. However, from the overall appreciation of the evidence of the prosecution witnesses, there are several inconsistencies and contradictions in their version and therefore, it cannot be said that the prosecution has proved their case with proof beyond reasonable doubt, warranting the conviction and sentence of the appellant. The prosecutrix herself cannot be said to be a sterling witness and therefore, the impugned conviction cannot be sustained on her evidence alone. In support of his submission, the learned counsel relies upon the case of *Santosh Prasad @ Santosh Kumar -Vs- The State of Bihar, (2020) 3 SCC 443*.

[8.] Mr. B. Lalramenga, learned counsel also submits that the Birth Certificate of the victim was also not proved in accordance with law. He submits that the same was also not produced in original and that there are inconsistencies and contradictions as to how the same was seized and from whom. Such being the position, the conviction of the appellant under Section 4(2) of the POSCO Act

cannot be sustained. He submits that under the circumstance, what would be attracted at the most would be Section 4(1) of the POCSO Act. In support of his submission with regard to the admissibility of the Birth Certificate as evidence, the learned counsel relies upon the case of *Vijay -Vs- Union of India & Ors., 2023 SCC OnLine SC 1585*. The learned counsel thus submits that the impugned Judgment & Order should be set aside and the appellant acquitted of the charge.

[9.] Ms. Linda L. Fambawl, learned Public Prosecutor, on the other hand, submits that although there is no specific statement made in the FIR or in the chargesheet regarding the reasons for the delay in filing the FIR, but the same can very well be appreciated from the depositions of the prosecution witness Nos. 1, 2 & 3. She submits that the victim comes from a broken family inasmuch as, her parents were separated and she was living only with her mother. She initially hesitated to speak out about the incident, but after a Legal Awareness Camp was conducted in her school, she upon realizing her situation informed one of her teacher in the school on the second day after the incident. The teacher in turn informed the workers of the Child Line, who then came to the school and interacted with the victim and thereafter, took necessary steps in the matter. She submits that it is in evidence that the victim was taken to the Children's Home called "Daffodils Haven" by those working with the Child Line. The mother of the victim was also summoned twice by the Child Welfare Committee (CWC) and it was only thereafter that a decision was

taken to submit the FIR. She therefore submits that the delay of 15 days in filing the FIR having clearly been explained from the sequence of events, the same does not vitiate the conviction and sentence of the appellant.

[10.] The learned Public Prosecutor further submits that the evidence of the prosecutrix/victim right from the beginning has been consistent which can be seen from her statements recorded under Section 164 Cr.PC and in her deposition before the Court during the trial. The victim befriended the appellant through Instagram on 07.09.2019. Thereafter, they met in the Church and took photographs on 08.09.2019. On 09.09.2019, the victim visited the appellant in the pharmacy at Vaivakawn where the appellant was working and on 10.09.2019, he committed rape upon the victim. The victim then informed her school teacher on 12.09.2019 and whereafter, appropriate steps were taken for filing of the FIR. The learned Public Prosecutor submits that there are no inconsistencies in the chain of events narrated by the victim and therefore, her statements alone being trustworthy, unblemished and inspiring confidence, the same is sufficient for establishing the charge framed against the appellant. The learned Public Prosecutor further submits that in view of such consistencies in the evidence of the victim, she is nothing short of a sterling witness. In so far as the Birth Certificate is concerned, the learned Public Prosecutor submits that the same was duly exhibited by the prosecution during the trial and wherein, the date of birth of the victim was shown to be

14.01.2005, and the same was not questioned by the defense in any manner. The appellant therefore cannot be permitted to raise such ground regarding the acceptability of the Birth Certificate to convict and sentence the appellant under Section 4(2) of the POCSO Act. She also submits that in the examination of the appellant under Section 313 Cr.PC, the appellant clearly admitted that the victim was a minor. She therefore submits that the appellant cannot be permitted to dispute the age of the victim at this stage. She thus submits that the appeal has no merit and the same should be dismissed. The learned Public Prosecutor in support of her submission relies upon the case of *Ganesan -Vs- State Represented by its Inspector of Police, (2020) 10 SCC 573*.

[11.] We have heard the submissions made by the learned counsels for the rival parties and we have also perused the materials available on record as well. The first ground taken by the learned counsel for the appellant is that there was delay in lodging the FIR. It may be seen that the alleged incident happened on 10.09.2019 and the FIR was lodged on 25.09.2019 after about 15 days. From the evidence of the prosecution witnesses, more particularly PW Nos. 1, 2 & 3, it can be seen that the victim after the incident, which happened on 10.09.2019, hesitated from informing her mother with whom she was living, about the incident. The school, where the victim was studying, had organized awareness camps to sensitize the students about POCSO Act, and therefore, realizing her situation, the

victim decided to inform her school teacher about the incident. The school teacher then informed the workers working in Child Line and they came over to the school on 13.09.2019. After interacting with the victim, the workers of the Child Line took the victim to the Children's Home "Daffodils Haven" as her mother was not in station. The evidence of the prosecution further goes to show that the mother of the victim was summoned by the CWC on two (2) occasions and that she and her family were not into filing of an FIR. However, with the assistance and counseling of the members of the Child Line, the FIR was filed on 25.09.2019. It may be apt to mention herein that Chapter-V of the POCSO Act provides for procedure for reporting of cases. Section 19 provides that any person, including the child, who has apprehension that an offence under the POCSO Act is likely to be committed or has knowledge that such an offense has been committed, has to provide such information to the Special Juvenile Police Unit or the Local Police. Section 21 of the same Act also provides for punishment for failure to report or record a case. Therefore, the submission made by the learned counsel for the appellant that the workers at the Child Line and the teacher of the victim prompted the victim and her family to file a case against the appellant is only misplaced and moreover, it is the duty of every upright citizen to report a crime committed against a person, especially when the same is against a minor.

[12.] The learned counsel for the appellant has also taken the stand that Child

witnesses are often being tutored and therefore no reliance can be placed on their testimony. Moreover, the evidence of the PW Nos. 1 & 2 being contradictory, the evidence of the prosecution therefore cannot be relied upon to convict the appellant. It may be seen that the evidence of the victim before the trial and during the trial when compared are consistent. As already reflected in the preceding paragraphs, the victim and the appellant got themselves acquainted with each other through Instagram on 07.09.2019 as per the evidence of the victim. Thereafter, they met up in a Church programme wherein, they had taken photographs together. The victim thereafter dropped by in the pharmacy where the appellant was working in Vaivakawn. Thereafter, when she dropped by again on 10.09.2019, the appellant had sexual intercourse with her against her will. This version of the victim has neither been falsified nor shaken by the defense. The Medical Examination Report of the victim also goes to show that the hymen of the victim was found to be torn, although the same was an old tear. An attempt has been made to discredit the evidence of PW-4 and PW-3 regarding the recurrence of the sexual intercourse and the place from where the victim landed up in the pharmacy on 10.09.2019 respectively. However, what can be seen is that the versions narrated by the PW-4 in her examination-in-chief are not derived from the Medical Examination Report which she had prepared after examining the victim. Therefore, the extended version of her story during the trial, in our considered view, cannot be accepted. The other inconsistencies pointed out from the evidence

of PW-3 also in our considered view are only minor and can be ignored having regard to the consistent stand taken by the victim herself before and during the trial. Therefore, the case of *Santosh Prasad @ Santosh Kumar* (supra) relied upon by the learned counsel for the appellant is only found to aid the case of the prosecution since the evidence of the victim inspires confidence, is trustworthy and unblemished. The case of *Arbind Singh & Krihsna Nandan Singh & Ors.* (supra) relied upon by the learned counsel for the appellant in the given facts and circumstances of the instant case is also found not to be applicable since as already stated, we find the evidence of the victim to be unblemished and consistent.

[13.] The learned counsel for the appellant has further raised a ground on the admissibility of the Birth Certificate on account of the same having not been proved in accordance with law. It may be noticed that during the entire trial proceedings, the defense have neither disputed the Birth Certificate nor taken a plea that the same was unacceptable for reasons whatsoever. The Birth Certificate was produced and exhibited by the prosecution during the trial as Exhibit M-1. However, without adverting to the admissibility or otherwise of the Birth Certificate, there is no dispute to the fact that the victim was a minor at the time when the alleged incident happened. The appellant himself in his examination under Section 313 Cr.PC clearly stated and admitted that the victim was a minor at the relevant time. As per the definition of 'Child' under Section 2 (d) of the POCSO Act, the same

means any person who is below the age of 18 years. Section 4(2) of the same Act provides for punishment for commission of penetrative sexual assault on a child below 16 years of age. The appellant in the instant case has been convicted under this Section. We also noticed that Section 4(1) of the POCSO Act provides for punishment for commission of penetrative sexual assault which can be understood to be for an offense committed against a child between 16 - 18 years of age. Having noticed the difficulty for determining the exact age of the victim as on the date of the alleged incident, we are of the considered view that the same gives rise to formulation of two (2) views. In other words, the victim may have been under 16 years of age at the relevant time and/or she may have been above 16 years of age but below 18 years of age. Under the circumstance, we are of the considered view that the view, which is favourable to the appellant, will have to be adopted going by the principles of criminal jurisprudence. Therefore, the conviction of the appellant, in our considered view, should be altered to one under Section 4(1) of the POCSO Act. Accordingly, the appellant is sentenced to imprisonment for a period of ten (10) years instead of twenty (20) years by setting off the term of imprisonment already undergone.

[14.] Having come to the above conclusion, reference to the other authorities relied upon is found to be not necessary. The appeal is accordingly disposed of as partly allowed.

JUDGE

JUDGE

Comparing Assistant