

GAHC030003552021



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

Case No. : CrI.A./18/2021

H. Lalhmingmawia r/b Lalremdika
S/o Lalnunkima
R/o Saichal, Saitual District

VERSUS

State of Mizoram and Anr.
Aizawl, Mizoram 2:Zothanmawi

Advocate for the Petitioner : Mr. Victor L Ralte
Advocate for the Respondent : P.P./Addl.PP, Mizoram for R1

BEFORE
HONOURABLE MR. JUSTICE MICHAEL ZOTHANKHUMA
HONOURABLE MRS. JUSTICE MARLI VANKUNG

JUDGEMENT

Date : 22-02-2024
(*Michael Zothankhuma, J*)

Heard Mr. Victor L. Ralte, learned counsel for the appellant and Mrs. Linda L. Fambawl, learned Additional Public Prosecutor.

2. The present appeal has been filed against the Judgment & Order dated 09.08.2021 passed by the Court of Judge, Special Court, POCSO Act, in FPSC (CPI)

POCSO 2/2021 arising out of AC No. 48/2015 arising out of Criminal Trial No. 496/2015, by which the appellant has been convicted under Section 6 of the POCSO Act and sentenced to undergo Rigorous Imprisonment for a term of 15 years with a fine of Rs. 5000/-, i.d. of payment of fine, Simple Imprisonment for 1 (one) month.

3. The facts of the case in brief is that an FIR dated 05.11.2014 was submitted by the informant (PW-1), the mother of the victim to the OC, Ngopa Police Station. The FIR stated that her daughter (victim), a student of Class IV in Government Primary School, Saichal was raped by her teacher (the appellant), in the school class room and inside the office. The appellant inserted his finger inside her private parts and the victim was afraid of revealing the matter as the appellant had threatened her. Pursuant to the FIR, NOP PS Case No. 33/2014 dated 05.11.2014 under Section 376(2)(i)(k)/506 IPC r/w Section 6 of the POCSO was registered against the appellant. Investigation of the case was initiated and the victim was sent for medical examination. After concluding his investigation, the Investigating Officer having found a *prima facie* case under Section 372(2)(i)(k)/506 IPC r/w Section 6 of the POCSO Act against the appellant, charge sheet was submitted. The case was committed to the District & Sessions Judge, Aizawl.

4. The learned District & Sessions Judge, Aizawl thereafter framed charge under Section 376(2)(i)(k) IPC, to which the appellant pleaded not guilty and claimed to be tried. The case was then transferred to the District & Sessions Judge, Champhai, as

Champhai Judicial District was thereafter carved out from the Aizawl Judicial District. The Court of the District & Sessions Judge, Champhai transferred the case for disposal to the Fast Track Special Court, (Rape & POCSO Act, 2012), Champhai, hereinafter referred to as the "FTSC". Thereafter, the learned FTSC recorded the evidence of 13 prosecution witnesses and 2 defence witnesses. After examining the appellant under Section 313 Cr.P.C., the learned Trial Court came to a finding that the child was a victim of aggravated penetrative sexual assault as she was only 11 years at the time of the alleged incident. The appellant was found liable to be convicted under Section 6 of the POCSO Act, 2012, as the offence committed by the appellant came within the provisions of Section 3 & Section 5 (m) of the POCSO Act, 2012. The learned Trial Court thereafter, as stated in the foregoing paragraphs, convicted the appellant under Section 6 of the POCSO Act and sentenced him accordingly.

5. The learned counsel for the appellant submits that there was an error in the judgment of the learned Trial Court in convicting the appellant in view of the fact that:-

1) the Baptismal Certificate relied upon by the prosecution to prove the age of the victim could not be admissible in evidence, inasmuch as, the certificate was apparently issued on 27.06.2023, while the date of birth of the victim was recorded therein as 19.02.2004,

2) that while charge had been framed under Section 376(2)(i)(k) IPC, the conviction and sentence of the appellant had been done under Section 6 of the POCSO Act, 2012,

3) the form recording the examination of the appellant under Section 313 Cr.P.C. was not signed by the Special Judge. He accordingly submits that the appellant should be acquitted of the charge framed against him and consequently, the impugned judgment and order passed by the learned Trial Court should be set aside.

6. Mrs. Linda L. Fambawl, the learned Additional Public Prosecutor submits that the appellant is a habitual offender, as he had sexually molested a number of girl students of the school in which he was a teacher. Further, he had been convicted in several of the cases registered against him. She also submits that the date of birth of the victim girl is 09.02.2004, as can be seen from the Baptismal register being maintained by the Mizoram Presbyterian Church, Saichal and the admission register of the school in which the victim girl was studying, shows that her date of birth was 19.02.2004. She accordingly submits that the impugned judgment and order should be upheld.

7. We have heard the learned counsels for the parties.

8. On perusing Exhibit No. M-1, we find that the Baptismal Certificate of the victim shows that she was born on 19.02.2004. However, the date of issuance of the

Baptismal Certificate has been shown as 27.06.2004. This appears to be an error made by the concerned issuing authority, as the copy of the Baptismal registered which has been submitted today, shows the date of birth of the victim as 19.02.2004. The school admission register shows the age of the victim girl as 19.02.2004. This aspect of the matter had not been brought to the notice of the learned Trial Court. The charge sheet submitted by the Investigating Officer shows that he found a *prima facie* case under Section 376(2)(i)(k)/506 IPC r/w Section 6 of the POCSO Act against the appellant. However, the Court of the District & Sessions Judge, Aizawl had framed charge against the appellant only under Section 376 (2)(i)(k) IPC and not under Section 6 of the POCSO Act.

9. With regard to the third contention of the appellant's counsel, we find that the Special Judge, POCSO did not give his signature in the form, with which he had recorded the statement of the appellant under Section 313 Cr.P.C. Besides the above issues, we find that while the District & Sessions Judge, Aizawl had framed charge under Section 376(2)(i)(k) IPC, the trial of the case was conducted by the FTSC constituted for cases of Rape & POCSO Act, 2012. Section 2(l) defines Special Court to mean a court designated under section 28 of the POCSO Act. Section 28 of the POCSO Act provides that for the purpose of providing speedy trial, the State government shall in consultation with the Chief Justice of the High Court, by notification in the Official Gazette, designate for each district, a court of Session to be a Special Court, to try the offences under the POCSO Act, 2012. Section 28(2) IPC

provides that while trying an offence under the POCSO Act 2012, the Special Court can also try an offence other than the offence referred to sub section (1), which the accused may, under the Court of Criminal Procedure, 1973 be charged at the same trial. Thus, while a Special Court, POCSO Act is to try cases under the POCSO Act exclusively, the Special Court can also try other additional charges in respect of other laws, provided that the charge under the POCSO Act is also made against the accused. In the present case, no charge under the POCSO Act has been framed against the appellant and as such, the said case should ordinarily have been tried by a Sessions Court, other than a Special Court constituted under the POCSO Act. Further, the First Schedule to the Cr.P.C. provides that cases under Section 376 IPC are triable by a Court of Session.

10. Though it appears that the trial of the case by the learned Special Court, POCSO is without jurisdiction, we find that out of the 2 FTSC, Aizawl, which were created, the FTSC which tried the present case has been constituted for cases of rape and for cases under the POCSO Act, vide Notification No. A.45011/2/2020-LJE dated 17.06.2020 issued by the Secretary to the Govt. of Mizoram, Law & Judicial Department, which is as follows:-

“In supersession of this Department’s Notification No.C.18015/432/2019-LJC/176 dt. 30.12.2019 and in the interest of public service, and as per the directions given by the Hon’ble Supreme Court of India in Suo Moto Writ Petition (Criminal) No. 1 of 2019, and with the approval of the Gauhati High Court vide letter No. HC. VII-13/2019/7129/A dt. 29.11.2019, the Governor of Mizoram is pleased to constitute 3

(three) Fast Track Special Court in Mizoram as shown below with effect from 30.12.2019.

1) 1 (one) Exclusive Court for cases under POCSO Act in Aizawl

2) 1 (one) Fast Track Special Court for cases of rape and/or under POCSO Act in Aizawl

3) 1 (one) Fast Track Special Court for cases of rape and/or under POCSO Act in Aizawl

This issues with the approval of Government of Mizoram, General Administration Department vide I.D. No. GAD 330/2020 dt. 3.6.2020."

11. In view of the learned Trial Court making errors, inasmuch as, despite the issue of rape being proved, the appellant was convicted under Section 6 of the POCSO Act, though charge was not framed under Section 6 of the POCSO Act, beside there being some technical defect with the learned Judge not giving his signature in the form used for recording the appellant's statement under Section 313 Cr.P.C., we are of the view that the case should be remanded back to the learned Trial Court for denovo trial. However, the evidence already adduced can be considered by the learned Trial Court, with the condition that either of the parties can adduce further evidence and can make further cross-examination of witnesses.

12. Accordingly, the impugned Judgment & Order is set aside. The case is to remanded back to the learned trial court, who shall take up the criminal proceeding from the stage of framing of charge. The prosecution, in the meantime is also allowed to submit supplementary charge sheet, if required.

13. The appeal is accordingly disposed of. Send back the LCR.

JUDGE

JUDGE

Comparing Assistant