

GAHC030005332022



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

Case No. : CRL.A(J)/11/2022

Sh. Thatluna
S/o Suakliana (L)
P/A Phunchawng Mel-6

VERSUS

The State of Mizoram
Aizawl. 2:Smt. Lalnuntluang

Advocate for the Petitioner : Mr T Lalzekima (Amicus Curiae)

Advocate for the Respondent : P.P./Addl.PP, Mizoram

B E F O R E
HON'BLE MR. JUSTICE NELSON SAILO

Date of hearing & Judgment : 17.09.2024

JUDGMENT & ORDER (ORAL)

Heard Mr. T Lalzekima, learned Amicus Curiae for the appellant, Ms. Mary L Khiangte, learned Addl. Public Prosecutor for the State and Mr. Lalrokunga Pautu, learned Legal Aid Counsel for respondent No. 2 (Informant).

[2.] This is an appeal from Jail filed by the appellant against the Judgment & Order dated 04.04.2022 passed by the Court of Special Judge, Protection of Children from Sexual Offences Act, 2012 (POCSO Act), Aizawl convicting him under Section 6 of the POCSO Act and thereafter, sentencing him vide Order dated 20.04.2022 to undergo Rigorous Imprisonment for 10 years and to pay fine of Rs. 3000/- with a default clause.

[3.] The case of the prosecution in brief is that on 29.01.2019, a FIR was lodged before the Officer-in-Charge, Vaivakawn Police Station to the effect that on 27.01.2019, at around 12:00 PM, the accused/ appellant had sexually molested the victim and also on numerous occasions earlier. Therefore, the complainant sought for legal action against the appellant. Accordingly, Vaivakawn P.S Case No. 15/2019 dated 29.01.2019 was registered under Section 376 AB of the Indian Penal Code (IPC) read with Section 6 of the POCSO Act and investigated into. During the investigation, the appellant was arrested and his statements as well as the statements of other witnesses were recorded. Thereafter, upon the conclusion of the investigation, Charge Sheet No. 36/2019 was filed on 31.02.2019 by the Investigating Officer (IO) before the Court concerned and charge was framed against the appellant under Section 379 AB IPC, read with Section 9 of the POCSO Act on 09.04.2019. The appellant

denied the charge and claimed to be tried and therefore, trial was set to motion. During the trial, the prosecution examined as many as 8 (eight) prosecution witnesses (PWs) and they were cross examined by the defence. The appellant was examined under Section 313 Cr.P.C wherein, he denied the questions put to him. The appellant on his part did not produce and examine any defence witness. After the parties were heard, the learned Trial Court passed the impugned judgment & order convicting the appellant and sentenced him to imprisonment for a term as already stated in the preceding paragraph. The appellant being aggrieved has filed the instant appeal from Jail. This Court, besides calling for the records from the Trial Court, appointed an Amicus Curiae and a Legal Aid Counsel to represent the appellant and the complainant respectively.

[4.] Mr. T Lalzekima, learned Amicus Curiae submits that the learned Trial Court at paragraph No. 3 of the impugned Judgment & Order recorded that PW-1 had seen the appellant having sexual intercourse with the daughter with her own eyes but the same is contrary to the evidence of PW-1 since she had only stated that she had seen the appellant sleeping with the victim and that his pants was removed up to his knees and so were the pants of the victim. However, she has nowhere stated that she had witnessed the appellant having

sexual intercourse with the victim. Therefore, the narration of the events by the learned Trial Court is without any basis and misconceived.

[5.] Mr. T Lalzekima, learned Amicus Curiae further submits that the appellant in his appeal had stated that the case made out against him was only a fabrication in view of the fact that the complainant herself had affairs with other person and that in order to hide behind her mistakes, she made false allegations against the appellant. He has also stated that the learned Trial Court simply accepted almost the entire version of the victim which has resulted in the commission of injustice upon the appellant. The learned Amicus Curiae submits that the appellant in his examination under Section 313 Cr.P.C, had stated that on the day when the alleged incident was said to have occurred, he had gone to Aizawl during the Church service and he was dropped by his friend in his vehicle. He did not come back from Aizawl that day and he stayed back with one of his friends. In response to the query as to whether he adduced any evidence in his defence, he had stated that he would like to adduce his evidence by examining defence witnesses. The learned Amicus Curiae submits that there are however no materials to indicate that opportunity was given to the appellant to adduce his evidence.

[6.] The learned Amicus Curiae further submits that in the absence of any birth certificate produced before the Trial Court, it cannot be conclusively held that the victim was under aged at the time of the alleged incident and therefore, the provisions of the POCSO Act will not apply. He submits that although the an X-Ray test was conducted upon the victim to find out her age but the radiologist who conducted the test on being examined as PW-6 in his cross-examination stated that even under the test which they had conducted, it was not possible to ascertain the exact age of the victim. He therefore submits that without establishing the exact age of the victim, the conviction of the appellant under POCSO Act cannot be sustained and therefore, the impugned conviction and sentence of the appellant should be set aside and he should be set free.

[7.] Ms. Mary L Khiangte, learned Addl. Public Prosecutor, on the other hand, submits that the appellant cannot blow hot and cold about the incident. Referring to the appeal submitted by the appellant from Jail, she submits that the appellant clearly stated that he was not seeking to justify his crimes but at the same time, he says that the alleged crime has been fabricated and that false and incorrect statements have been made against him. She submits that having regard to the evidence led by the prosecution, and also the admission on the part of the appellant in his appeal petition, he has rightly been convicted by the

learned Trial Court. The learned Addl. Public Prosecutor further submits that as per the evidence of PW-1, PW-2 & PW-3, the alleged incident happened on 27.01.2019 which was a Sunday. PW-1 in her deposition before the Trial Court stated that on Sunday during the Church service as she was aware of the fact that the appellant would take the opportunity of her absence from home to assault the victim, she rushed back home only to find the appellant in bed with the victim. She found the pants of the appellant pulled down up to his knees and likewise, the pants of victim was also removed. The evidence of PW-1 during her cross-examination was not falsified by the defence and rather, her evidence was corroborated by the evidence of PW-2 & PW-3 who is the victim herself. She further submits that the version of the victim is also corroborated by the evidence of the other prosecution witnesses including the Investigating Officer and the Medical Officer who examined the victim as well as the appellant. She submits that the appellant in view of what was recorded in the FIR that the time of the incident being 12:00 PM has tried to take advantage of the same by stating that he had not committed any sexual assault upon the victim at around midnight of 27.01.2019 since he was away from home and had gone to Aizawl from Phunchawng.

[8.] The learned Addl. Public Prosecutor submits that there is no dispute

with regard to the date and time of the incident as it can be seen from the evidence of the PW-1, 2 & 3 that it was on Sunday, while the Church service was going on that the appellant tried to take advantage of the absence of the informant who is also the biological mother of the victim while the appellant is the stepfather of the victim. She submits that while the appellant as a stepfather of the victim is supposed to be a parent and a guardian and also to protect and look after the welfare of the victim, he instead has taken advantage of the situation to violate her which can only be considered to be inhumane. She submits that under the facts and circumstances and having regard to the evidence against the appellant, the conviction and sentence imposed upon the appellant should be upheld and the appeal be dismissed.

[9.] Mr. Lalrokunga Pautu, learned Legal Aid Counsel for respondent No. 2, while adopting the argument made by the learned Addl. Public Prosecutor submits that there is a consistency in the deposition of the informant (PW-1) and the victim (PW-3), inasmuch as the informant had clearly deposed that on Sunday while she was attending Church service, she went home early as she had some suspicion about the appellant taking advantage of her absence and when she arrived home, she found the appellant with the victim in bed with their pants down. Similar narration was also made by the victim herself in her

deposition before the Trial Court and therefore, the version of the victim inspires confidence and is trustworthy. Therefore, even her version alone is sufficient to uphold the conviction of the appellant. The learned counsel also submits that the appellant tried to deny his misdeeds by saying that he was playfully engaging with the victim. He submits that this particular expression has in fact been narrated both by the complainant as well as by the victim, which clearly shows that the appellant had indeed committed sexual assault upon the victim. He further submits that the appellant during his examination by the Medical Officer (PW-5) had also clearly revealed that the last date of commission of the alleged offence was 27.01.2019, which again corroborates with the other evidences of the prosecution and thereby leading to forming of a complete chain of evidence and pointing to the guilt of the appellant. He thus submits that the conviction and sentenced him upon the appellant should be upheld and the appeal should be dismissed. In support of his submission, the learned counsel has relied upon the case of *Rai Sandeep @ Dipu Vs. State NCT of Delhi*, (2012) 8 SCC 21 and *State of Himachal Pradesh Vs. Sanjay Kumar @ Sunny*, (2017) 2 SCC 51.

[10.] I have heard the submissions made by the learned counsels for the rival parties and I have perused the materials available on record.

[11.] The charge framed against the appellant is under Section 6 of the POCSO Act read with Section 379 AB IPC. In order to prove the charge, the prosecution examined as many as 8 (eight) prosecution witnesses. PW-1 who is the informant and not only the mother of the victim but the wife of the appellant in her examination-in-chief stated that the victim is her daughter from her earlier marriage and that since her husband is old and cannot work, she is the bread earner of the family. During the time of the incident, she was residing with the appellant, the victim and son who was born out of her marriage with the appellant. She did not recollect the exact date but it was a Sunday and in the month of January 2019 that the incident had occurred. She had earlier been informed by other villagers that they had suspicion about the activities of the appellant with the victim. The victim did not report the matter to her since the accused had threatened her with her life. On the day of the incident as it was a Sunday, she had gone to the Church but during the service, she came out suspecting that the appellant would take the opportunity to sexually assault the victim during the absence of other people. She therefore entered the house and saw the appellant and the victim sleeping on the bed. The appellant had removed his pants up to his knees and the pants of the victim were also removed. She then confronted the appellant but he denied saying that he was playfully engaging with the victim. She therefore told him to leave the house

and on the next day, she approached Vaivakawn Police Station where she was instructed to approach the Investigative Unit on Crime Against Women (IUCAW) and report the matter. Her narration was reduced in writing since she was illiterate and could only put her signature. The FIR was read over to her and she appended her signature. PW-1 stated that the victim was born on 19.05.2007 and she did not possess a birth certificate as she was born in Myanmar.

[12.] During the cross-examination, PW-1 stated that it was the fact that she was informed about the antecedents of the appellant on Thursday and that she had enquired about the incident from the victim. She also stated that she had reported the matter to her parents but since the appellant was knowledgeable, she wanted to catch him red handed. She further stated that she did not witness the actual act of sexual intercourse and that she and one of her female companion had physically checked the victim and they found her to sustain injury in her private part. The victim later narrated about the incidents to her.

[13.] PW-2 is the neighbour of the victim who stated in her examination-in-chief that the appellant is their neighbour at Phunchawng and the stepfather of the appellant. She frequently observed that the appellant used to give bath to the victim and on one occasion, she had seen the victim giving massage to the

accused through the door. On another occasions, she had also seen the appellant near the pig sty with the victim in front of him and the appellant thrusting his hips on the backside of the victim. She did not have the opportunity to tell the mother of the victim immediately since the appellant was always at home with the victim. On one occasion, she enquired from the victim as to what was the matter and she replied that the appellant was the bad man and that he would sexually assault her on several occasions. One day, the date which she did not recollect, the mother of the victim went to the Jhum field and she followed her and informed her about the appellant's behaviour. The mother of the victim said that she will try to catch the appellant red-handed. On the following Sunday, there was lot of commotion in the house of the appellant as his wife had allegedly caught the appellant during the commission of the offence. On the next day, they reported the matter to the police and since the wife of the appellant had asked him to leave the house, he could not be arrested. The appellant was later arrested on Tuesday. She went to the Police Station and the Police recorded her statements.

[14.] In her cross-examination, PW-2 stated that the appellant and the mother of the victim were living together and she did not know whether they were legally married or not. She stated that it was a fact that she did not see

the appellant sexually assault the victim and that she was not present while the wife of the appellant allegedly caught the appellant red-handed. She was informed by the wife of the appellant about the incident. She further stated that she accompanied the victim during her medical examination and when she enquired from the victim about the incident, she replied by saying that she was very afraid of the appellant.

[15.] The victim was examined as PW-3 and in her examination-in-chief, she stated that the appellant is her stepfather and after the incident, she was lodged in CPDTCCH, Saron veng, Aizawl. She did not remember the exact date of the incident. She said that she was earlier looked after by her grandmother but later, her mother who was already married to the appellant took her home. She further stated that about two to three years back, the appellant often sexually assaulted her by putting his finger and also inserting his penis in her private parts. She informed the matter to her aunty as she was afraid to inform her mother. Her aunty then informed her mother who did not believe that the appellant would do such a thing. However on one occasion, she confronted the appellant and the appellant said that he was only interacting with her playfully. PW-3 was also taken to Civil Hospital, Aizawl for medical examination and that her statements were recorded by the Magistrate. She stated that her date of

birth was 19.05.2007. In her cross-examination, she stated that it was a fact that when her mother is out of the house earning livelihood and on Sundays, the appellant used to assault her sexually. She further stated that the appellant even took her out at night and sexually assaulted her and that nobody was present nearby during such incidents. She further stated that the appellant threatened to kill her if she informed anybody. She also denied that she had been tutored or she had been made false statements.

[16.] The Doctor who examined the victim was examined as PW-4 who in her examination-in-chief stated that she is a Gynecologist and was on duty in Civil Hospital, Aizawl on 29.01.2019 when she received a requisition from the police for examination of the victim who was said to be about 11 years old. On examining her, she found the physical and mental health of the victim to be stable, sound and healthy. She did not find any sign of physical injury on the body of the victim and on examining her genital area, she found the hymen to be ruptured and the rupture was not fresh. She collected smear from vaginal area for investigation and the victim was also sent to the x-ray Department for determination of her age as she did not possess any birth certificate. Upon enquiring from the victim, she was informed that there was history of previous intercourse multiple times by the said person. She exhibited the medical

examination report and her signature as Exbt. P-2 & P-2(a). PW-4 in her cross-examination stated that the result of the vaginal smear was not submitted to her and therefore, she was not aware about it. Further, as the rupture of the hymen was healed and therefore, the age of the rupture could not be determined. She also stated that she could not state the exact age of the victim since she did not possess birth certificate.

[17.] The Doctor who examined the appellant was cited as PW-5 by the prosecution and in his examination-in-chief, he stated that he was on medical duty in the Emergency Department, Civil Hospital, Aizawl on 29.01.2019 when he received the requisition for medical examination of the accused as regards his fitness to keep him in judicial custody. Upon examining the appellant, he found him to be fit for judicial custody. He also received another requisition for medical examination of the appellant as he was alleged to have committed rape. Upon examining him, he found his physical and mental health to be normal and his genital organs to be fully developed. The penile erection could not be ascertained after physical examination and he found minimal stain present in the underwear. He also found the presence of smegma in the corona glans. On enquiry from the appellant, he stated that he had sexual intercourse with his stepdaughter for about 8 times at different interval starting from the week

before Christmas in 2018 till 27.01.2019. He stated that he was having erectile dysfunction and even if there was penetration, only a few centimeters can be penetrated. According to PW-5 in general conditions when there is no previous penetration, there was possibility of hymen rupture with minimum penetration. He exhibited the medical examination report and his signature as P-3 & P-3(a). In his cross-examination, he stated that during medical examination, the appellant could not attain penile erection and that before examining him, he had enquired about the history of the alleged offence. He also stated that in exceptional cases, penetration may not lead to hymen rupture.

[18.] PW-6 in his examination-in-chief stated that on 30.01.2019 he was posted as Radiologist in Civil Hospital, Aizawl and he received a requisition from the police for determining the age of the victim who was reported to be about 11 years of age. He conducted the age determination test by one of the prescribed method i.e. examination by way of X-ray. The X-ray of the pelvis of the victim was taken and upon examination of the result, it was determined that the age of the victim is 11 to 12 years. He exhibited the radiological finding in respect of the victim and his signature as Exbt. P-8 & P-8(a). In his cross-examination, he stated that it is a fact that the exact age cannot be determined by the X-ray method or any other method.

[19.] PW-7 in her examination-in-chief stated that in 2019, she was posted as JMFC in Aizawl and on 30.01.2019, she received an endorsement from CJM, Aizawl to record the statements of the victim. After complying with all the formalities of Section 154 Cr.P.C, she recorded the statements of the girl who was produced before her. She was around 11 years old and her statements were recorded in her own words. The girl signed her statements and PW-7 also put her signature as well. PW-7 exhibited the judicial statement of the victim and her signature as P-7 & P7(a). In her cross-examination, she stated that at the time of recording the statements of the victim, no one was present in her Court.

[20.] PW-8 is the I.O who conducted the investigation and in her examination-in-chief, she stated that during 2019, she was posted as Inspector in IUCAW. On 29.01.2019, a written FIR was submitted by the complainant to the effect that on 27.01.2019, her daughter aged about 11 years had been sexually assaulted in their residence at Phunchawng Mel-6. A case was registered at Vaivakawn Police Station and she was endorsed with the case. During investigation, it was learned that the appellant had sexually assaulted the victim several times and the last one being on 27.01.2019. She visited the place of occurrence and drew sketch map and arrested the appellant on 30.01.2019 from Bara Bazar as she had absconded after the filing of the

complaint. She interrogated the appellant and he admitted the commission of offence. She also examined the complainant and the victim and recorded their statements. She also examined reliable witnesses and recorded their statements. She sent the victim for medical examination and recording of judicial statements. The victim did not have a birth certificate and therefore, she made a requisition for age determination from Civil Hospital, Aizawl. Thereafter, she received report from the radiologist and the opinion given was that the victim was found to be 11 to 12 years of age. She also informed the Child Welfare Committee (CWC) within 24 hours from receiving the complaint. Upon finding a prima facie case under Section 376 AB IPC, read with Section 6 of the POCSO Act, she filed the charge-sheet. PW-8 exhibited the charge-sheet, her signature and the sketch map of the place of occurrence as Exbt. P, P-5(a) & P-6 respectively. In her cross-examination, she stated that she examined the complainant and the victim in the premises of IUCAW as per their choice. She stated that the victim disclosed the details of sexual assault on her and she received the medical examination report wherein the Doctor found old rupture in the hymen of the victim.

[21.] From the evidence led by the prosecution witnesses, more particularly the evidence of PW-1 & PW-2, it can be seen that their statements are

corroborated. In other words, PW-1 stated that she was informed earlier by the villagers that they had suspicion about the activities of the appellant with the victim. That on the day of last incident which was a Sunday, she went to Church and apprehending that the appellant will take advantage of her absence, she came out in the middle of the Church service and went home to find the appellant in bed with the victim with his pants up to his knees and also the pants of the victim removed. PW-2 stated that she followed PW-1 who was on her way to the Jhum field and informed her about the activities of the appellant on her daughter. Upon hearing what PW-2 had said, PW-1 said that she will try to catch the appellant red-handed and on the following Sunday, she found a lot of commotion in the house of the appellant and she came to learn that PW-1 had caught the appellant red-handed, while he was committing the offence. The victim also stated in her examination-in-chief that she informed the matter to her Aunty as she was afraid to inform her mother. Her mother did not believe that the appellant would do such a thing to the victim. However, on one occasion, she confronted the appellant and in reply, the appellant said that he was only playfully interacting with the victim. It can be seen that in this regard, the statements of the victim is corroborated by the statements of the PW-1 & 2 as well. The victim in her cross-examination had also stated that she was threatened by the appellant that he would kill her if she informed about the

matter to anybody.

[22.] As regards the age of the victim, it may be seen that as per the examination report after an X-ray of her pelvis was taken, the radiologist opined that her age could be determined as 11 to 12 years. The date of birth of the victim according to the PW-1 and PW-3, the victim herself is 19.05.2007. Therefore, as on the date of the last incident on 27.01.2019, the victim was around 11 years of age. Although the victim did not have a birth certificate but the finding of the radiologist has not been falsified or disproved by the defence during the trial. It is therefore clear that the victim was a minor at the time of commission of the offence.

[23.] The Apex Court in *State of Himachal Pradesh vs. Sanjay Kumar @ Sunny (supra)* observed that it was by now a well settled principle of law that the testimony of the victim in cases of sexual offences is vital and unless there are comparing reasons which necessitate looking for corroboration of a statement, the Courts should find no difficulty to act on the testimony of the victim of a sexual assault alone to convict the accused. However, her testimony has to inspire confidence and seeking corroboration to a statement before relying upon the same as a rule, in such cases, would literally amount to adding

insult to an injury. The victim of rape is not an accomplice and her evidence can be acted upon without corroboration. If the court finds it difficult to accept her version, it may seek corroboration from some evidence which lends assurance to her version.

[24.] Keeping the above principle in mind, it can be seen that the statements of the victim in the instant case is not only consistent but also corroborated by the other prosecution witnesses importantly, the evidence of PW-1 & PW-2. Therefore, upon considering the case in its entirety, this Court finds no ground to interfere with the impugned judgment & order and order of sentence.

[25.] The appeal is accordingly dismissed.

[26.] In appreciation of the valuable assistance rendered by the learned Amicus Curiae and the Legal Aid Counsel appearing for respondent No. 2, they shall be paid fees as per the rate prescribed in this regard. Registry shall send back the LCR immediately.

JUDGE

Comparing Assistant