

GAHC020003432020



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

Case No. : CRL.REVN/6/2020

K. ONLEN
S/O LATE TINGJALAL KUKI,
PRESENTLY RESIDING IN LERIE COLONY, KOHIMA

VERSUS

STATE OF NAGALAND
NAGALAND, KOHIMA

Advocate for the Petitioner : A. ZHO

Advocate for the Respondent : GOVT ADV NL

BEFORE
HON'BLE MR. JUSTICE BUDI HABUNG

Date of hearing : 17.05.2024

Date of Judgment : 23.07.2024

JUDGMENT & ORDER (CAV)

Heard Mr. A. Zho, learned counsel for the petitioner. I have also heard Ms. V. Suokhrie, learned P.P for the State of Nagaland.

2. This is a criminal revision filed by the petitioner under section 397/401 of the Code of Criminal Procedure, 1973 assailing the judgment and order dated 14.07.2020 passed by the Special Judge, Phek Nagaland in Sessions Case No.01/2020 in GR No.02/20 arising out of Phek PS Case No.01/20 under section 10 of the Protection of Children from Sexual Offence Act 2012 (for short POCSO, Act), section 509 of IPC and section 29 of the Police Act, whereby and by which the accused Zaphet Kuki has been convicted and sentenced to undergo 6 years imprisonment and a fine of Rs.5000/- for offence under section 10 of the POCSO Act; one year imprisonment and fine of Rs.1000/- for offence under section 509 of the IPC and one month imprisonment under section 29 of the Police Act with default clauses.

3. The brief fact of the case leading to the filing of this petition is that on 18.01.2020 a written FIR was received from one Veshekho Vese (PW-3) by the OC Phek PS, Nagaland against the accused/appellant alleging therein that on the said date at around 9.25 AM, the accused a Havildar DEF Phek,

posted at Linyu check gate while in uniform molested and attempted rape on his minor daughter while she was alone at home and requested for taking necessary action. On receipt of the said written FIR, a case was registered being W.P.S Case No.01/2020 under section 509 IPC read with section 4 of the POCSO Act and section 29 of the Police Act and investigated into.

4. After completion of investigation, the I.O laid charge-sheet against the accused to face trial for offence under section 509 IPC r/w with section 4 of the POCSO Act and section 29 of the Police Act. After taking cognizance of the case and on hearing the parties on 17.4.2020, the accused was discharged from the allegation for offence under section 4 of the POCSO Act. However, he was charged for commission of offence under section 10 of POCSO Act, r/w 509 of IPC and section 29 of the Police Act. The charges were explained to the accused to which he pleaded not guilty and claimed trial.

5. To establish its case, the prosecution has examined altogether 8 prosecution witnesses. The accused was examined and his statement recorded under section 313 of the Cr.P.C, where the accused denied having committed the charged offences against the victim. However, the accused did not examine any witness in his defense.

6. On completion of the trial and upon consideration and hearing the parties the learned trial Court by the impugned judgment and order dated 14.07.2020 convicted the accused

and sentenced him to undergo imprisonment for 6(six) years and to pay a fine of Rs. 5,000/- only for offence U/S 10 of POCSO Act. Further the accused has also been convicted and sentenced to undergo imprisonment for 1(one) year and to pay a fine of Rs. 1000/-only for offence under Section 509 IPC and 1(one) month imprisonment for offence u/s 29 of the Police Act with default clauses.

7. It is the said conviction and the order of sentences which has been assailed in this Criminal Revision Petition amongst others on the following grounds: -

- a) That the learned Judge, Special Court Phek has convicted the accused based on perverse and illegal findings without appreciating the facts as well as the law.
- b) That the learned Judge, Special Court Phek failed to understand that under section 24 of POCSO Act, 2012, it is mandatory to record the statement of the minor child (victim) by a woman police officer in the rank of Sub-Inspector of Police.
- c) That the learned Judge, Special Court Phek failed to appreciate the fact that woman police officer who recorded the statement of the child is Assistant Sub-Inspector of police below the rank of Sub-Inspector of Police who is not competent in the eye of law.
- d) That the learned Judge, Special Court Phek has completely failed to appreciate that the learned Public Prosecutor could

not produce any evidence why section 24 of POCSO Act was not explained.

e) That the learned Judge, Special Court Phek failed to appreciate the law that under section 35 of the POCSO Act, 2012 it is mandatory for the Special Court to record the evidence of the child within 30 days from the date of taking cognizance of the offence by the Special Court.

f) That the learned Judge, Special Court Phek had taken cognizance of the offence on 8/4/2020 but recorded the statement only on 18/5/2020 which means after a lapse of 10 days after the mandatory period of 30 days. There was no explanation for the delay on the part of the Special Court.

g) That the learned Judge, Special Court Phek has miserably failed to appreciate the law laid down by the Apex Court that if the law prescribes to do things in a particular manner should be done in that manner.

h) That the learned Judge, Special Court Phek failed to appreciate the fact that the victim and the medical Doctor had given contradictory statements regarding medical examination of the victim.

8. Apart from the above ground, the learned counsel for the petitioner submits that it is the settled law that any exercise of powers, specially which impacts valuable right of persons can be affected only after strict compliance with statutory provisions. In the present case, the accused person's valuable rights have been deprived for not complying with the

mandatory provisions of section 24 and 35 of the POCSO Act,2012.

9. The learned counsel for the revisionist further submits that the age of the victim has not been proved. No where in the entire deposition on oath by the victim, her father PW-3, her mother PW-2 have stated that the victim at the time of the incident was a minor. Although, the birth certificate of the minor victim was seized and exhibited by the I.O of the case during the trial, the content of the said birth certificate was not proved by the I.O of the case and in fact, the I.O cannot prove the age of the victim. It has to be proved by the victim or her parents.

10. It is the further submission of the learned counsel for the revisionist that although the learned trial Court in its judgment at paragraph 10 observed that from the appearance of the victim, she found her to be a child, but the determination of age is governed by the Juvenile Justice (Care and Protection of Children) Act,2015 (in short, the JJ Act,2015). It is also submitted that the learned trial Court in the said paragraph of the judgment observed that during her evidence, the victim disclosed that on the date of the incident, she was aged about 15 years and was studying in 8th class. However, nowhere in the entire evidence on oath, the victim has stated that she was a minor and her age is about 15 years. And in that view of the matter, the finding of the learned trial Court is perverse.

11. For the reasons stated above, the learned counsel for the revisionist prays for quashing and setting aside the impugned judgment and order dated 14.07.2020 passed by the learned trial Judge and set the accused/convict at liberty.

12. The learned counsel for the petitioner further submits that the convict has so far suffered a sentence of about 5 years, out of total sentence of 6 years imprisonment. Hence, prayed that the substantive sentence awarded to the convict for the offence under section 10 of the POCSO Act may be reduced to the period already undergone by him.

13. Per contra, the learned P.P. while defending the judgment and order dated 14.7.2020 passed by the learned trial Judge submits that the I.O of the case submitted charge-sheet against the accused on being found prima facie materials against him. Thereafter, the learned trial Court has framed charge against the accused under section 10 of the POCSO Act, 2012, section 509 of IPC and section 29 of the Police Act. After completion of the trial of the case and upon hearing the parties, the trial Court has convicted and sentenced the accused for offences under section 10 of the POCSO Act, 2012, section 509 of IPC and section 29 of the Police Act.

14. The learned P.P. further submits that during the entire cross-examination, the defence did not rebut the evidence adduced by the prosecution witness and the defense had never raised any question regarding the age of the victim. The age of the victim being minor child has been proved by

the I.O of the case by exhibiting the birth certificate of the victim. However, during the entire trial period and cross-examination, the defense side had never raised question doubting the minority of the victim. The date of birth in the birth certificate has been corroborated by Aadhar card of the victim child where the date of birth of the victim child has been recorded as on 25.03.2006 which is same with the date of birth in the birth certificate. Apart from the minority of the victim being proved by the I.O. of the case by exhibiting birth certificate, the learned trial Judge has also observed that from the appearance of the victim, she found her to be a child. As the accused failed to raise any question regarding the age of the victim during the trial, it stood proved that the victim was minor child at the time of occurrence, and the same cannot be raised before this Court in the revision.

15. Heard the submissions advanced by both the learned counsel for the parties. I have also carefully gone through the contentions made in the memo of appeal and materials available on record.

16. The sole ground raised by the revisionist is that under section 24 of POCSO Act,2012, it is mandatory to record the statement of the minor child victim by woman police in the rank of Sub Inspector and that having not been complied, the valuable rights of the accused/convicts has been deprived. It is also seen that during the hearing, the learned counsel for the petitioner raised that although the birth certificate of the victim

seized by the IO was exhibited before the trial Court as Ext-4 and her Aadhar card as Ext-P, but the contents of the same have not been proved. It is also submitted that the content of the birth certificate cannot be proved by the I.O. of the case as he is merely an outsider who does not know about the age of the victim. However, in the entire memo of appeal, the petitioner/revisionist did not raise any question regarding the age of the victim or any question doubting the minority of the victim child. Continuing with his submission regarding the age, the learned counsel for the petitioner submits that with regard to the question about the age of the minor victim, the onus lies upon the prosecution to prove the same. However, in the instant case, the birth certificate was produced by the I.O, but the contents were not proved by him. In support of his submission, the learned counsel for the revisionist placed reliance upon the decision of the Division Bench of the Gauhati High Court in the case of **Manirul Islam vs State of Assam and Others** reported in **2021 (3) GLT 128**. The relevant paragraph is quoted here below:-

"32. In the present case, the prosecution had made an attempt to prove the document Ext-A through PW-1 and it appears that the defense side did not raise any objection when the document was marked as an exhibit. Therefore, in so far, the admissibility of Ext-A is concerned, the said question must be answered in favour of the prosecution. That, however, would not automatically absolve the prosecution from the requirement in law to establish the truthfulness of its contents. The PW-1 being the informant in this case, had nothing to do with the birth of the child or the Department of Health Services, Assam. Therefore, in our opinion, he was not competent to prove the contents of Ext-A. Viewed from that perspective, the PW-1 could not have vouched for the

truthfulness of the contents of Ext-A. Therefore, in the light of the doctor's opinion (PW-5), which is to the effect that the age of the victim was between 18 years to 20 years, we are of the view that the prosecution has failed to show that the victim was below 18 (eighteen) years on the date of occurrence."

17. The learned counsel for the petitioner further submits that determination of the age of victim is governed by section 94 of the JJ Act, 2015. Section 94 of the JJ Act 2015 is quoted herein 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."

18. However, in the instant case, the prosecution side has

exhibited age certificate and the Aadhar card of the victim which shows that the victim was minor aged between 14-15 years being born on 25.03.2006. Apart from that the learned trial court also recorded that in appearance also the victim appears minor.

19. Be that as it may, since the accused has neither raised any question before the trial court doubting the minority age of the victim child nor has raised any question regarding the age of the victim or made any prayer for setting aside the impugned judgment taking the age question as ground in the instant revision petition. In such circumstances, this Court feels it is not necessary to discuss the same as it would amount to travelling beyond the pleadings.

20. However, on perusal of records, it appears that the victim in her police statement, statement before the Magistrate u/s 164 Cr.P.C, before the doctor during medical examination and in her deposition before the trial court had stated her age to be between 14-15 years. And she has been consistent in her statement regarding her age in all her statements. The father in his FIR also stated that his victim daughter is minor. The IO of the case had seized the birth certificate and Aadhar card of the victim and exhibited the same during trial as Ext.P-4 respectively. In both the documents, the date of birth of the victim girl is same and shown as on 25.03.2006. The record reveals that the Aadhar card of the victim was obtained on 30.08.2013 and the birth

Registration on 12.07.2017. Thus, both the documents were obtained much before the occurrence of the incident. The doctor in his medical examination report also recorded the age of the victim as 14 years and reiterated the same in his deposition. The above evidences are sufficient to show the age of the victim that she was minor at the time of occurrence being born on 25.03.2006. The above evidence has not been disproved or rebutted by the defense side during trial. In absence of any contrary evidence that the victim was not born on 25.03.2006 and that she was not minor at the time of occurrence, I have no reason to disbelieve the same.

21. The case cited by the petitioner in the ***Manirul Islam vs State of Assam and Others*** (Supra) is different from the case in hand as in that case, the doctor in his report had recorded that the age of the victim was between 18 years to 20 years and the prosecution failed to show that the victim was below 18 years on the date of occurrence. But in the instant case, as seen above, the date of birth of the victim as recorded in the birth certificate and the Aadhar card are clear and same. It shows that the victim was minor at the time of occurrence aged between 14-15 years being born on 25.03.2006. And, the said facts has not been controverted or questioned anywhere during the entire trial period. Thus, it is clear that the victim being bellow the age of 18 at the time of incident was a child as per section 2 (d) of POCSO Act. Accordingly, this point is decided against the petitioner.

22. In so far as the question regarding non compliance of the provisions under section 24 and 35 of the POCSO Act,2012 is concerned, it is found that during the entire investigation and trial proceeding, the accused or the victim had never raised any objection before the I.O nor before the trial Court for any violation of any provision of the Act. On perusal of the records, it appears that the statement of the victim child was recorded as per the procedure and there is also no record showing that the I.O of the case or the Court has violated any procedure laid down in the Act. And regarding the recording of evidence of the victim child, there was no any delay on the part of the police or the Court. The FIR was filed on 08.01.2020; the case was submitted into charge sheet on 16.03 2020 well within the period of 90 days. The case was taken into cognizance on 08.4.2020; Charge against the accused was framed on 17.04.2020; and the case was finally disposed of on 14.07.2020 convicting and sentencing the accused for charged offences. Thus, the entire trial of the case was completed within a period of 5(five) months. Further, even if there was some delay in recording statement of the victim or trial, the same cannot be the ground for quashing of the judgment and order passed by the trial Judge on merit. Moreover, considering the facts and circumstances of the case and considering that there is a lack of sufficient lady police officers in the State of Nagaland, some discrepancies with regard to the posting of lady police officer may occurred,

however, the same does not vitiate the prosecution case as a whole, and as such the same cannot be the ground for setting aside the order passed on merit. Thus, this point is also decided against the petitioner.

23. The learned counsel for the petitioner submits that the convict has so far suffered a jail term of about 5 years in execution of the sentences, out of total sentence of 6 years imprisonment. In such circumstances, it is prayed that the substantive sentence awarded to the convict for the offence under section 10 of the POCSO Act may be reduced to the period already undergone by him. The learned public prosecutor submits that there is no such prayer in the revision petition, hence, the same can of be granted in as much as the convict has not even completed the minimum terms of five years.

24. It is not disputed that the occurrence has taken place in the year 2020 and the accused/convict has so far undergone a period of about four and half years' incarceration in execution of the sentences against him, out of total sentence of six years imprisonment, and so also suffered the mental agony and trauma of protracted trial and his subsequent termination of services. Thus, looking to the over-all circumstances and the fact that the convict has remained behind the bars for considerable time, it will be just and proper if the sentence awarded by the trial court for offence under Sections 10 of POCSO Act, is reduced to the minimum period of five years.

25. Accordingly, the criminal revision petition is partly allowed. While maintaining the accused's conviction and sentence for offence under Sections 10 of POCSO Act, section 509 IPC and section 29 of Police Act, the sentence awarded to him for aforesaid offences is hereby reduced to the period of five years. The amount of fine and default clause therein is hereby maintained.

26. The judgment and order dated 14.07.2020 stands modified accordingly.

27. Criminal Revision stands disposed of in terms above.

JUDGE

Comparing Assistant