Serial No.04
Regular List

HIGH COURT OF MEGHALAYA
AT SHILLONG

Crl.A.No.9/2021

Date of Order: 30.05.2022

Alan Sohshang	Vs.	State of Meghalaya & anr

Coram:

Hon'ble Mr. Justice Sanjib Banerjee, Chief Justice
Hon'ble Mr. Justice W. Diengdoh, Judge

Appearance:

For the Appellant : Mr. KC Gautam, Adv with
Mr. W.M. Sangma, Adv

For the Respondents : Mr. K Khan, PP with
Mr. S. Sengupta, Addl.PP

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

ii) Whether approved for publication in press: Yes/No

JUDGMENT: (per the Hon'ble, the Chief Justice) (Oral)

The appellant has been convicted for having committed an offence punishable under Section 6 of the Protection of Children from Sexual Offences Act, 2012 and sentenced to rigorous imprisonment for 10 years. In addition, the appellant has been fined Rs.10,000/- and required to suffer a further month's simple imprisonment upon failing to pay the fine.

2. Several grounds have been raised by the appellant in assailing the judgment of conviction of February 24, 2021 and the resultant sentence. For a start, the appellant says that the foundational fact for

invoking the provisions of the Act of 2012 was not established as the age of the survivor was not ascertained. In such regard, the appellant says that it was only a photocopy of the birth certificate that was relied upon though the appellant had indicated that the appellant perceived the survivor to be 18 years old and the appellant also claimed that the survivor had informed the appellant that she was 18 years old.

3. The second ground urged is the delay in the lodging of the first information report on or about April 11, 2016 when the incident complained of was in early January of 2016. While on the aspect of delay, the appellant seeks to bring out the perceived contradiction in the statements rendered by the survivor and her mother as to when the survivor informed the mother of the alleged incident of January, 2016. The appellant reads the survivor's testimony to imply that she had complained of the incident to her mother a week after it occurred; while the mother consistently claimed in her several statements that she came to know of the incident only on April 8, 2016.

4. Though there was a clear confession of the appellant recorded by a Judicial Magistrate under Section 164 of the Code of Criminal Procedure, 1973, the appellant claims to have retracted the statement. At any rate, the appellant asserts that the manner in which such statement was extracted was in complete derogation of the safeguards indicated in the relevant

provision. In particular, the appellant claims that the appellant was given no time to reflect on the statement.

5. The appellant also points out that though the FIR was lodged by the father and mother of the survivor jointly, the father of the survivor was neither questioned by the investigating officer nor was the father cited as a witness. The appellant submits that an adverse inference should be drawn from such fact and it must be understood that the father did not support the case of the prosecution.

6. Finally, the appellant refers to a line in the testimony of the survivor at the trial. Upon a question being put to the survivor in course of her cross-examination, the survivor admitted that she had been tutored by her mother before she came to court. The appellant suggests that the entire edifice of the case falls in the light of the candid admission on the part of the survivor that she had been tutored to make her statement in court.

7. Several judgments have been cited on the legal aspects canvassed by the appellant. A judgment reported at (2003) 3 SCC 21 *(Bhagwan Singh v. State of MP)* has been placed for the observation therein that the safeguards indicated in Section 164 of the Code must be stringently followed before a confessional statement is recorded and unless the trial court finds all parameters of the provision adhered to, it should not take into account the purported confessional statement. On similar lines a later judgment reported at (2011) 2 SCC 490 *(Rabindra Kumar Pal alias Dara*

Singh v. Republic of India) has been placed for the summary of the law evident at paragraph 64 of the report.

8. An incidental argument made pertains to the language in which the statement of the appellant was recorded by the Judicial Magistrate in course of the confession. The appellant says that while the appellant is alleged to have spoken in Khasi language, the statement recorded is in English and it was the English statement that may have been read out to the appellant before his signature was obtained at the foot of the document. The appellant relies on a judgment reported at (2000) 10 SCC 296 *(Mohd. Ayubdhar v. State of NCT of Delhi)* where the Supreme Court frowned on such practice of recording the statement in a language other than the one it was rendered in and obtaining the maker's signature thereon.

9. On the effect of tutored child witnesses and the evidentiary value of their statements, the appellant has relied on a judgment reported at (2011) 4 SCC 786 *(State of Madhya Pradesh v. Ramesh)* and another at (2019) 13 SCC 516 *(State of Madhya Pradesh v. Rajaram alias Raja)*.

10. The FIR in this case was quite clear in its allegation that the incident had taken place in January, 2016 and it was reported to the mother by the survivor on April 8, 2016, whereupon the complaint came to be lodged two or three days thereafter. The delay in lodging the FIR was sought to be explained, though in rather terse language, to the extent practicable at such initial stage.

11. The survivor was medically examined shortly after the FIR came to be lodged. The medical examination did not reveal the signs of any injury, particularly in the private parts of the survivor. However, the medical examiner found the hymen to be torn. The medical examiner was later called as a witness and supported the report furnished by such examiner.

12. In the survivor's statement recorded before a Judicial Magistrate under Section 164 of the Code, she claimed that it was a Monday in January, 2016 that the appellant "came out of nowhere and pulled me by my hands and pulled me to his bedroom" after the survivor had come out of the washroom. She indicated that the appellant and she then resided in the same building with her staying "upstairs" and the appellant staying below. The survivor recounted that she resisted the appellant but the appellant asked her not to be afraid and took off her clothes. The survivor claimed that she struggled "but could not get myself free and then he destroyed me, he had sexual intercourse with me". For good measure, the 13-year-old girl indicated that the incident that she described "is the first incident" and the appellant had threatened her that if he saw her going around with any other men, the appellant would beat her and the other men.

13. The mother of the victim also made a statement under Section 164 of the Code when she confirmed that she came to know of the incident only on April 8, 2016. She said that since her relevant daughter studied in

Nongkasen, such daughter stayed with her elder sister. She revealed that it was only when the survivor came home that on April 8, 2016 the mother noticed something different about her and on the survivor being questioned, she narrated the incident to the mother.

14. In course of her deposition in court, the mother of the survivor repeated what she had said in the FIR and also in course of her statement recorded under Section 164 of the Code. In her cross-examination, the only significant question was whether she was aware of the incident earlier since the survivor claimed that the survivor had narrated the incident to her mother one week after it happened. However, there is something anomalous in how the question was put and why the mother was specifically asked if the survivor had informed the mother of the incident one week after it happened.

15. This is because in the survivor's statement recorded under Section 164 of the Code, she did not allude to the time when she narrated the matter to anyone. In the survivor's deposition in court, she did say that she had narrated the incident to her mother one week after it happened and, ordinarily, the mother who was examined as PW 1 could not have been confronted with a question pertaining to the deposition of PW 2, who was the survivor. However, it appears from the records that, rather unusually, the mother was cross-examined on October 25, 2017 though the survivor PW 2 had been examined prior to that on May 31, 2017 and the cross-

examination of the survivor also took place on October 25, 2017. Ordinarily, the entire examination-in-chief and cross-examination of a witness is completed before another witness is called and such procedure should, by and large, be adhered to unless there is any special cause to depart therefrom, when the reasons for such departure should be specifically recorded. However, implicit in the question as to whether the incident of January, 2016 was narrated to the mother a week after its occurrence was the admission on the part of the appellant that it was the survivor who narrated the matter to her mother, thus ruling out the possibility of the mother having planted the charge or the allegation in the head of the minor girl. At any rate, there was no motive attempted to be ascribed to the mother for seeking to falsely implicate the appellant. There was no animosity between the appellant and the family of the survivor.

16. As to the description of the incident, the survivor repeated the essence of the statement that she had rendered under Section 164 of the Code. She also narrated that the appellant committed penetrative sexual assault when she felt pain and even bled. There is no doubt that the survivor testified that "after a week from the incident ... I narrated the entire incident to my mother". She also indicated that two or three days thereafter the mother went to the police along with other family members.

17. The survivor also stated, as it is recorded in her cross-examination that "It is a fact that I was tutored by my mother before deposing in court today".

18. The Judicial Magistrate who recorded the statements of both the survivor and the appellant herein was clear in his testimony. Such person reiterated almost the entirety of the confessional statement that was made by the appellant. There was no meaningful cross-examination of such witness, except that he was asked whether the appellant had admitted before him that the appellant had raped the survivor. Since the appellant had not used the word "rape" in his confessional statement, the medical practitioner denied that the appellant had admitted to committing rape. However, the Magistrate maintained that the appellant had unequivocally admitted to having had penetrative sex with the survivor. And, sex with a minor amounts to statutory rape.

19. The doctor who examined the survivor corroborated his report by stating that he found that the hymen was torn but there was no sign of any other injury. However, the trained medical examiner indicated that the age of the survivor, according to the medical examiner, was 12 to 14 years at the time that he examined her though he admitted that he did not conduct any scientific examination to ascertain the age of the girl.

20. The sister of the survivor, in whose residence the survivor stayed since it was more convenient for her to attend school therefrom, was also

examined. Such sister indicated that she did not know the exact date of the incident but her minor sister had narrated on April 8, 2016 that she was sexually assaulted by the appellant herein in January of that year.

21. The investigating officer testified that that she had obtained the birth certificate of the survivor and she had confirmed on the basis of the photocopy that it was the birth certificate of the survivor who was 13 years old at the time of the commission of the offence. The investigating officer also indicated that the appellant was in judicial custody when the prayer was made for recording his confessional statement.

22. The examination of the appellant under Section 313 of the Code was conducted in a rather detailed manner. The entire evidence of each witness was accurately summarised, with the material parts thereof being emphasised, and presented to the appellant herein for his comment. Most of his answers were that he had not committed anything wrong or that he had not done the things as alleged or that he disagreed with the relevant testimony.

23. However, it is the answer to the seventh question which was put to the appellant that is of relevance in the present context. The trial court read out in full detail the confessional statement that the appellant had made and in respect whereof the relevant Judicial Magistrate had testified, including the fact that the appellant had been granted sufficient time to reflect on his statement and the fact that the Magistrate also asserted that

the appellant gave his statement voluntarily. In answer to the wholesome question, which included the material parts of the deposition of the Judicial Magistrate summarised with exemplary precision, the appellant had this to say:

> "It is not a fact that I had slept with the victim five times and I did not have any sexual intercourse with the victim. However, I know the victim girl".

24. It is at this stage that it is necessary to notice the confessional statement of the appellant as recorded by the Judicial Magistrate. The appellant claimed that he got to know the survivor in December, 2015 and that the survivor called the appellant several times from her sister's cellphone for the appellant to buy her fruits and other eatables. The appellant recounted that during the new year the appellant accompanied the survivor and her other family members to a picnic and the appellant proposed to the survivor to be the appellant's girlfriend to which the survivor apparently consented. The appellant claimed in course of his statement that he gave the survivor a key to the appellant's tenanted premises (which comprised a kitchen and a bedroom) and asked the survivor to help out with his daily chores. The appellant maintained that the survivor often came to his room and had dinner with him. The appellant categorically stated that during the month of January, the appellant slept with the survivor and that the two had slept together five times. For good

measure, the appellant articulated that there was sexual intercourse on all five occasions. The appellant then went on to say the following:

> "I thought she looked young but when I asked her she said she was 18 (eighteen). Some people informed me that she was young so I stopped touching her from the month of March. It's not that I'm avoiding her and I want her to finish her studies. I have never threatened her because I love her".

25. In the backdrop of such material that was before the trial court, it is now to be assessed whether the trial court erred in finding the appellant guilty and convicting him for the offence punishable under Section 6 of the Act of 2012. The grounds raised by the appellant as recorded hereinabove are dealt with in *seriatim*.

26. There is no doubt that there was no ossification test conducted on the survivor nor any scientific attempt made to ascertain her age. At the same time, a photocopy of the birth certificate of the survivor was relied upon, though there was no explanation as to why the photocopy was submitted and not the original. In other words, secondary evidence was accepted without any explanation as to why the original was not available. On the other hand, despite the medical examiner admitting that no specific test had been conducted on the survivor to ascertain her age, his expert view was that the girl-child was aged between 12 and 14 at the time the offence was said to have been committed. The investigating officer also asserted that she had verified the birth certificate or a photocopy thereof with the records and she was satisfied as to the authenticity of the birth

certificate. There was no challenge to such aspect of the investigating officer's deposition with any appropriate suggestion in the cross-examination.

27. More importantly, the survivor appeared to the trial court to be a minor. In most situations, it is the trial court which is the best judge as even ossification tests have a range both on the positive and the negative side. The confessional statement of the appellant also revealed that the appellant came to know that the survivor was a minor and which is why the appellant asserted that he stopped touching the survivor from the month of March, 2016. In course of the trial, there was no defence case made out to question the minority of the survivor. Apart from the fact that there is no merit in such ground urged at this stage, in the absence of the appellant demonstrating or attempting to demonstrate to the contrary – or even raising a cogent dispute in such regard – it must be accepted that the survivor in this case was a minor.

28. As to the delay in filing of the FIR, the very document itself indicates the reason which was elaborated upon later by the mother, one of the persons who lodged the FIR, in course of her statement under Section 164 of the Code and thereafter in her deposition in court. According to the mother, which statement was corroborated by the elder sister of the survivor at whose residence the survivor resided at the relevant time, the

incident was narrated to the mother only on April 8, 2016 and the FIR came to be lodged within three days thereafter.

29. There is no doubt that the survivor clearly asserted that she informed her mother of the incident within a week of the first occurrence. However, the statement of a witness has to be taken in its totality and a few apparently discordant words cannot be picked out in isolation to discredit the entire testimony. There is no evidence that the survivor visited her mother prior to April, 2016. In such a scenario, particularly when the relevant statement of the survivor is clarified by her immediate subsequent statement, it would be erroneous to read into the survivor's assertion that she had narrated the incident to her mother by or about the second week of January. It may be remembered that after asserting that she had narrated the incident to her mother within a week of the occurrence, the survivor went on to add that after two or three days thereafter, meaning after two or three days following her narration of the incident to her mother, the family lodged the complaint with the police. The second part of the statement would corroborate what the mother and sister of the survivor had testified: that the girl narrated the incident to her mother on April 8, 2016 and the complaint came to be lodged within or about three days thereafter. In all probability what the survivor may have tried to assert was that within a week of her coming to her mother's place, she narrated the incident to the mother upon being questioned.

30. There is no real contradiction between the testimonies of the survivor and her mother. Indeed, it is evident that the sister of the survivor was not told of the incident and she claimed that she came to know of the incident after it was narrated to her mother on April 8, 2016.

31. In the light of the recording of the confessional statement of the appellant in the printed form which is followed in this State, there can be little doubt that the procedure under Section 164 was strictly followed by the Judicial Magistrate. The Judicial Magistrate also asserted in course of his testimony that he had ascertained whether the statement made by the appellant was voluntary or not and that he had given sufficient time to the appellant to reflect on the matter. On behalf of the appellant it is pointed out that the appellant had been produced before the relevant Judicial Magistrate at 1:45 pm and was released at 2 pm after the statement was recorded. It is true that the usual time for reflection is generally more than 30 minutes or an hour or even more. It must also be remembered that here was a trained Judicial Officer who was recording the confessional statement under Section 164 of the Code, fully aware of the stringent conditions attached thereto. While it may not be reflected in the recording of the statement that the Judicial Officer asked the appellant whether he would reflect on his statement or whether he would want to retract the same, once a Judicial Officer, who had no axe to grind against the appellant, asserts that the appellant was afforded sufficient time to reflect

and the Judicial Magistrate was under the impression that the statement had been voluntarily made and was not likely to be retracted, that should be the end of the matter.

32. It may also be noticed that there was no attempt at retraction of the statement rendered to the Judicial Magistrate. The entire testimony of the Magistrate was indicated to the appellant herein in course of his examination under Section 313 of the Code. The appellant did not claim that he had not made the statement before the Magistrate. The appellant did not indicate that he was coerced into making the statement. The appellant did not assert that he was not given adequate time to reflect on the statement that he had made. If there had been a retraction, for such retraction to be meaningful and believable there ought to have been a corresponding justification for having made the confession in the first place. The appellant's response at the stage of his examination under Section 313 of the Code did not amount to a retraction as it was merely a denial of some of the statements attributed to the appellant in course of his confession without any attempt to deny that he had made the statement before the Judicial Magistrate. To repeat, the appellant's response to the seventh question put to him in course of his examination under Section 313 of the Code was a far cry from a retraction, leave alone a credible retraction.

33. It is equally irrelevant that the father of the survivor was not called as a witness. A question was put to the investigating officer in her cross-examination that the father had not been cited as a witness since the father may not have supported the case of the prosecution. However, this was mere conjecture. One of the informants, namely, the mother, had been cited as a witness. It was not as if the father was an eye-witness to the commission of the offence, that the withholding of the father would lead to any adverse inference of the kind asserted by the appellant herein.

34. Finally, there is no merit in the appellant's contention that the survivor had been tutored by her mother and, as such, her testimony should be discarded. The word "tutored" appears in the testimony and, it is more likely than not, that such word in its Khasi translation may have been used and has been incorporated in the statement. As to whether a witness has been tutored or not has to be ascertained with reference to the other evidence on record. In the present case, the veracity of the material parts of the survivor's statement have to be ascertained from the original description of the incident rendered in her first statement. That was the statement recorded under Section 164 of the Code and there was no departure by the survivor in her description of the incident that took place on that Monday in early January of 2016 when she testified in court.

35. Indeed, much is sought to be made out of nothing in the word "tutored" appearing in the survivor's response to a question put to her in

the cross-examination. Tutored can imply several things, including being asked to present oneself in a particular manner on a formal occasion or before a court of law. Here was a 14-year-old girl who was due to testify in court as to how she had been violated by a much older man. Her testimony was the equivalent of the girl-child baring herself and virtually shedding her clothes while describing the incident. She was extremely vulnerable, particularly as girl-children in this country grow up being ashamed of their bodies. If the mother had counselled the 14-year-old as to how she should maintain her poise in court or how she should be courageous enough to truly narrate the incident, she was, indeed, tutored; but not tutored in the sense that would require the court to take offence or discard her evidence. A rape victim suffers not only the trauma of being raped but she has to re-live the trauma in describing the incident in detail and being subjected to cruel cross-examination. It was just as well that the mother had prepared the survivor to go through the daunting and fearful experience in front of strangers in the stifling atmosphere of a courtroom.

36. The entire evidence in this case revolves around the narration of the incident by the survivor and the corroboration of the surrounding circumstances by her mother and sister. In addition, there is the confessional statement of the appellant which matches the essential allegation of the survivor. Once so much is seen, there is very little reason or need to look elsewhere. On the basis of the material that was available

before the trial court, there was almost no room for doubt that the minor survivor had suffered penetrative sexual assault committed by the appellant. The appellant admitted to the commission of the act and there was no retraction by the appellant of his confessional statement, notwithstanding the answers that he gave in course of his examination under Section 313 of the Code.

37. There is no merit in any of the grounds asserted by the appellant. However, the precedents cited by the appellant need to be noticed.

38. In the case of *Bhagwan Singh*, there were previous disputes between the family of the accused and the family of the victim and there was even a civil case in which an injunction had been obtained. The conviction in this case hinged on the testimony of a six-year-old child whom the trial court found to be confused and dithering at the time of his testimony. In such context, when noticing the recording of the alleged confessional statement of the principal accused, the court found that there was a retraction of his confession in writing in course of his examination under Section 313 of the Code. In addition, it was the admitted position that such person was handcuffed and was produced from police custody at the time that his confessional statement was recorded. It was also the admitted position that no attempt was made by the Judicial Magistrate to ascertain whether the accused was making the confession voluntarily. Indeed, the relevant Magistrate admitted that no specific question in such

regard was put to the concerned person. These are not the facts of the present case. There is no doubt that an element of strictness has to be followed while recording a confessional statement. In this case the Magistrate followed the due procedure and testified to the same without being contradicted.

39. In the case of *Dara Singh,* paragraph 64 of the judgment merely indicates the several conditions which are provided in Section 164 of the Code.

40. In the case of *Mohd. Ayubdhar*, the court disbelieved the recording of the confessional statement since the first cassette recording the same had been destroyed by the relevant official without any explanation as to why it had been so destroyed. Secondly, it was the admitted position and as was evident from the recording that there was no warning given to the maker of the statement that it would be used against him and no attempt to ascertain whether the statement was voluntarily made.

41. Of the two judgments pertaining to tutored witnesses, in the first case of *Ramesh*, the special circumstances indicated at paragraph 5 of the report were the real reasons why the witness appeared to be tutored. Such facts do not arise here. In the second case of *Rajaram*, a child witness had not rendered any statement against the accused during the initial statement made and it was later evident that the child witness had been coerced by

the police to make a statement against the accused. It was on the basis of such material that the relevant statement was discarded as having been tutored or obtained upon coercion and, thus, having no evidentiary value. Again, such facts do not apply in the present case. The tutoring of the survivor by her mother may have been mere counselling as to how the survivor should conduct herself in court. There does not appear to be any tutoring in the manner in which she narrated the incident. The essential testimony of the survivor in court was a veritable reproduction of the original statement made by the survivor under Section 164 of the Code.

42. There is no denying the legal propositions noticed in the judgments cited. However, on facts, there is nothing in the present case that would attract the applicability of the principles.

43. For the aforesaid reasons, there is no merit in the appeal and the judgment and order of conviction cannot be faulted. The several grounds raised by the appellant before the trial court were specifically dealt with, including the grounds repeated in course of this appeal. The trial court was satisfied as to the genuineness of the statement of the survivor. And, at the end of the day, that is what matters most. The survivor came through as being genuine and truthful. The commission of the offence by the appellant was established beyond reasonable doubt. The sentence passed is in accordance with law.

44. Crl.A.No.9 of 2021 fails and the same is dismissed.

45. An authenticated copy of this judgment and order be immediately made over to the appellant free of cost.

(W. Diengdoh)
Judge

(Sanjib Banerjee)
Chief Justice

Meghalaya
30.05.2022
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