

Serial No. 08
Regular List

HIGH COURT OF MEGHALAYA
AT SHILLONG

BA. No. 67 of 2023

Date of Decision: 28.12.2023

Smti. Binu Kharsati

Vs.

State of Meghalaya & Ors.

Coram:

Hon'ble Mr. Justice W. Diengdoh, Judge

Appearance:

For the Petitioner/Appellant(s)

: Mr. N. Syngkon, Adv.

For the Respondent(s)

: Mr. S. Sengupta, Addl. PP.

Mr. H. Kharmih, Addl. PP. for R 1-4.

None for R 5 & 6.

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| i) | Whether approved for reporting in
Law journals etc.: | Yes/No |
| ii) | Whether approved for publication
in press: | Yes/No |

JUDGMENT (ORAL)

1. Heard Mr. N. Syngkon, learned counsel for the petitioner, who has submitted that the notice issued upon the respondent Nos. 5 & 6, that is, the survivor and the complainant respectively have been affected, for which documents retrieved from the portal of the postal department, particularly referring to the Track Consignment as far as the issuance of such notices are concerned, have been produced before this Court,

wherein it was indicated that the said item, that is, the notice was confirmed delivered on 23.12.2023.

2. The learned counsel has submitted that affidavit of service could not be filed at this point of time and has prayed that the said copies produced before this Court may be taken note of, though in normal circumstances, this Court would insist in filing of affidavit of service, however, considering the fact that this is a vacation court, therefore, as a special consideration, the submission of the learned counsel is accepted and the prayer made is allowed. The said documents now marked as Annexure-X and Annexure-Y respectively are hereby brought on record. The respondent Nos. 5 & 6 are however not present in Court today.

3. On the merits of this petition, the learned counsel has submitted that the accused, brother of the petitioner herein was arrested on 30.12.2022 on the basis of an FIR filed by the respondent No. 6, wherein it was alleged that the said accused person had committed an act of rape upon the respondent No. 5 herein on 29.12.2022 at around 3:00 pm at Sumer Village in a jungle behind their house, that is, the house of the survivor. The FIR was accordingly taken cognizance of and Women P.S. Case No. 75 (12) 2022 under Section 3(a)/5(k)/6 POCSO Act was registered.

4. On completion of the investigation, the Investigating Officer has found that a case has been made out against the accused person under Section 3(a)/5(k)/6 POCSO Act and Section 376(2)(m) IPC.

5. It is the submission of the learned counsel for the petitioner that the accused person has been falsely implicated of the alleged offence and records would show that no such incident has ever occurred. In fact, from the observation made in the charge sheet, the Investigating Officer has clearly stated that the medical report would show that there was no recent tear or injury, meaning within the portion of the vagina of the alleged survivor and that the hymen is intact. This according to the learned counsel is a clear indication that there was no act of sexual assault or penetration involved.

6. The learned counsel has further submitted that the statement of the alleged survivor could not be or rather should not be fully relied upon by the Court or the authorities concerned, inasmuch as, a disability certificate has been issued and brought on record to indicate that the alleged survivor is not mentally sound, wherein she has been found to be diagnosed with mild mental retardation with 45% temporary disability.

7. The next limb of argument advanced by the learned counsel is that the accused person, although having been in custody for almost a

year, the progress of the trial is very slow, inasmuch as, no evidence has yet been recorded, thereby the provision of Section 35 of the POCSO Act, 2012 which stipulates that the proceedings before the POCSO Court should not take longer than 12 months, has not been complied with. In this regard, the learned counsel has also referred to the case of Shri. Edwos Syngkli v. State of Meghalaya & another, wherein vide order dated 06.11.2023 passed in BA. No. 36 of 2023, this Court while granting bail to the accused person therein had observed that Section 35 of the POCSO Act not being complied with, the accused person is therefore entitled to grant of bail.

8. Again, it is the submission of the learned counsel that the accused person is the sole earning member of the family with three minor children and any further incarceration would be an assault on his liberty and his legal rights as far as the defence of his case is concerned. It is therefore prayed that this petition may be allowed and the accused may be enlarged on bail with any conditions that this Court may deem fit and proper to impose.

9. Mr. S. Sengupta, learned Addl. PP appearing on behalf of the State respondent has submitted that in the charge sheet filed by the Investigating Officer, the Investigating Officer has clearly noted that the

survivor on being examined and her statement being recorded under Section 161 Cr.P.C, clearly indicates that the accused had forcible sexual intercourse with her many times and on 29.12.2022 at about 3:00 pm, he again had sexually assaulted her. This would clearly indicate that the accused person had committed sexual assault upon the survivor, and considering the severity of the offence involved, the prayer of the petitioner for grant of bail may not be allowed.

10. This Court has given due consideration to the submission made by the parties. The facts as stated hereinabove are not required to be repeated, however, on perusal of the petition, what could be understood is that the accused person on being arrested on 30.12.2022 is still in custody till date which is almost about 12 months. It is also a fact that as has been submitted by the parties that the trial before the learned Trial Court is proceeding and is at the stage of recording of evidence, though, no witnesses have yet been examined till date, including the survivor.

11. The submission and contention made by the learned counsel for the petitioner that there has been no sexual assault perpetrated upon the survivor basing the same mostly on the medical certificate which has indicated that there was no recent tear or injury within the portion of the vagina of the alleged survivor and that the hymen is intact and also the

fact that the survivor is not of a sound mind, therefore, her statement could not be relied upon, on this ground, the learned counsel contended that the accused is entitled to bail, can only be tested during the trial.

12. Apart from the fact that the provision of Section 35 of the POCSO Act has not been complied with, this Court is of the considered opinion that, prima facie, it could be medically established that no sexual assault has taken place, except after the complete evidence is recorded, upon which the Trial Court would then be in a position to appreciate the evidence on record, including the medical evidence. However, the fact that the charge sheet has been filed and investigation has been completed, it would serve no purpose for the accused to be held under custody as he is no longer required for questioning.

13. It is also a fact that the accused person ought to be given an opportunity to defend his case and that the purpose of grant of bail is to ensure that such liberty is accorded to a citizen of this country, even an accused person. However, the only consideration is that he is not to abscond or to violate any of the conditions set forth in this regard.

14. Accordingly, on consideration of the facts and circumstances, at this point of time, this Court is inclined to allow this petition and to direct that the accused person in question be released on bail on the

following conditions that:

- i) He shall not abscond or tamper with the witnesses or evidence, if any;
- ii) He shall not leave the jurisdiction of the State of Meghalaya without prior permission of the Trial Court;
- iii) He shall not come into contact with the survivor during the pendency of the case before the Trial Court;
- iv) He shall bind himself on a personal bond of ₹ 1,00,000/- (Rupees one lakh) only with one solvent surety of like amount to the satisfaction of the Trial Court;
- v) Violation of any of the conditions would render the bail granted to be cancelled on an application thereon.

15. In view of the above, this petition is accordingly disposed of.

No costs.

Judge

Meghalaya
28.12.2023
"D. Nary, PS"