

HIGH COURT OF MEGHALAYA
AT SHILLONG

Crl.A.No.10 of 2023 with
Crl.M.C. No. 39 of 2023
Crl.M.C. No. 40 of 2023

Reserved on : 28.02.2024
Pronounced on: 26.04.2024

Rinku Kumar Tyagi

....Appellant

Vs.

State of Meghalaya through
Superintendent of Police,
East Khasi Hills District, Meghalaya

...Respondent

Coram:

Hon'ble Mr. Justice S. Vaidyanathan, Chief Justice
Hon'ble Mr. Justice W. Diengdoh, Judge

Appearance:

For the Appellant : Ms. S. Nongsiej, Adv

For the Respondent : Mr. K. Khan, AAG with
Mr. S. Sengupta, Addl.PP
Mr. J. N. Rynjah, Adv

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| i) Whether approved for reporting in Law journals etc.: | Yes |
| ii) Whether approved for publication in press: | Yes |

JUDGMENT

(Made by the Hon'ble Chief Justice)

This Criminal Appeal is directed against the judgment and order dated 16.12.2021 and order of sentence dated 20.12.2021, passed by the Special Judge (POCSO), District and Sessions Court, Shillong in Special (POCSO) Case No.3/2016 and the accused / Appellant herein was convicted by the Trial Court for the offence under Section 4 of the

Protection of Children from Sexual Offences Act, 2012 (in short ‘POCSO Act, 2012’) and sentenced to undergo Life Imprisonment and to pay a fine of Rs.10,000/- and sentenced to undergo imprisonment for ten years under Section 366A of IPC and to pay a fine of Rs.10,000/-, in default to undergo Imprisonment for one month for each default. The Sentences were ordered to run concurrently and the total fine amount awarded as compensation was directed to be paid to the victim girl.

Brief Prosecution Case:

2. A complaint was given by the father (P.W.1) of the victim girl on 05.04.2013 before Madanrting Police Station, East Khasi Hills, stating that his daughter aged 14 years was found missing on 04.04.2013 at 6.45am. With the help of the mobile number provided by the complainant, the victim girl was secured along with the accused from Jirania, Agartala, Tripura. Based on the complaint, FIR (Ex.P1) in Madanrting PS Case No.27(4) 2013 came to be registered against the accused under Section 366A IPC.

2.1. After investigation, a charge sheet dated 13.05.2014 was laid and the Court of Chief Judicial Magistrate committed the case for trial to the Special Judge (POCSO), who framed the charges against the accused under Section 4 of POCSO Act, 2012 and Section 366A IPC. The prosecution, in

order to substantiate the commission of the offence against the accused, has examined as many as 9 witnesses and marked 6 documents. On the side of the defence, one witness was examined and no document was marked. Statements under Section 161 Cr.P.C. were obtained from the victim girl (P.W.8) and the accused. The accused was questioned under Section 313 Cr.P.C. and he denied the charges levelled against him. The Trial Court, after analyzing the evidence let in by the prosecution, found the accused guilty of the offence under Section 6 of the POCSO Act, 2012 and convicted him as stated supra.

3. Learned counsel for the Appellant submitted that it is a case of love affair and the victim girl (P.W.8) on her own volition, had left the house and married the accused, which is evident from the 161 statement of the victim girl. There is no concrete evidence as to the age of the victim girl and the evidence of the Doctor in respect of assessment of her age was inconsistent, as no birth certificate or any other documents had been produced on the side of the prosecution to prove the age of the victim girl. According to the Appellant, the age of the victim girl would be more than 17 years, which is evident from the deposition of the Doctor (P.W.4). Learned counsel for the appellant further submitted that though initially the case was registered under Section 366A IPC, subsequently, Section 4 of the POCSO Act, 2012 was included, while framing charges and in the absence

of such inclusion, the accused could have been acquitted from the charges. Learned counsel for the appellant also submitted that as per the version of the D.W.1, both the accused and the victim girl got married in a mandir (Temple) and the victim girl looked as if her age was between 19 and 20 years.

4. Learned counsel for the Appellant referred to a judgment of the Supreme Court in the case of *P.Yuvaprakash vs. State Rep. by Inspector of Police*, reported in *AIR 2023 SC 3525*, wherein the Apex Court had elaborately dealt with different aspects with regard to determination of the age of a juvenile as under:

“12. In view of Section 34(1) of the POCSO Act, Section 94 of the JJ Act, 2015 becomes relevant, and applicable. That provision is extracted 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.

13. It is evident from conjoint reading of the above provisions that wherever the dispute with respect to the age of a person arises in the context of her or him being a victim under the POCSO Act, the courts have to take recourse to the steps indicated in Section 94 of the JJ Act. The three documents in order of which the Juvenile Justice Act requires consideration is that the concerned court has to determine the age by considering the following documents:

- (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.

14. Section 94(2)(iii) of the JJ Act clearly indicates that the date of birth certificate from the school or matriculation or equivalent certificate by the concerned examination board has to be firstly preferred in the absence of which the birth certificate issued by the Corporation or Municipal Authority or Panchayat and it is only thereafter in the absence of these such documents the age is to be determined through "an ossification test" or "any other latest medical age determination test" conducted on the orders of the concerned authority, i.e. Committee or Board or Court. In the present case, concededly, only a transfer certificate and not the date of birth certificate or matriculation or equivalent certificate was considered. Ex. C1, i.e., the school transfer certificate showed the date of birth of the victim as 11.07.1997. Significantly, the transfer certificate was produced not by the prosecution but instead by the court summoned witness, i.e., CW-1. The burden is always upon the prosecution to establish what it alleges; therefore, the prosecution could not have been fallen back upon a document which it had never relied upon. Furthermore, DW-3, the concerned Revenue Official (Deputy Tahsildar) had stated on oath that the records for the year 1997 in respect to the births and deaths were missing. Since it did not answer to the description of any class of documents mentioned in Section 94(2)(i) as it was a mere transfer certificate, Ex C-1 could not have been relied upon to hold that M was below 18 years at the time of commission of the offence.

15. In a recent decision, in *Rishipal Singh Solanki v. State of Uttar Pradesh and Ors.*, MANU/SC/1081/2021 : 2021 (12) SCR 502 this Court outlined the procedure to be followed in cases where age determination is required. The court was dealing with Rule 12 of the erstwhile Juvenile Justice Rules (which is in *parimateria*) with Section 94 of the JJ Act, and held as follows:

20. Rule 12 of the JJ Rules, 2007 deals with the procedure to be followed in determination of age. The juvenility of a person in conflict with law had to be decided *prima facie* on the basis of physical appearance, or documents, if available. But an inquiry into the determination of age by the Court or the JJ Board was by seeking evidence by obtaining: (i) the matriculation or equivalent certificates, if available and in the absence whereof; (ii) the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof; (iii) the birth certificate given by a corporation or a municipal authority or a panchayat. Only in the absence of either (i), (ii) and (iii) above, the medical opinion could be sought from a duly constituted Medical Board to declare the age of the juvenile or child. It was also provided that while determination was being made, benefit could be given to the child or juvenile by considering the age on lower side within the margin of one year.

16. Speaking about provisions of the Juvenile Justice Act, especially the various options in Section 94(2) of the JJ Act, this Court held in *Sanjeev Kumar Gupta v. The State of Uttar Pradesh and Ors.* MANU/SC/0967/2019 : [2019] 9 SCR 735 that:

“Clause (i) of Section 94(2) places the date of birth certificate from the school and the matriculation or equivalent certificate from the concerned examination board in the same category (namely (i) above). In the absence thereof category (ii) provides for

obtaining the birth certificate of the corporation, municipal authority or panchayat. It is only in the absence of (i) and (ii) that age determination by means of medical analysis is provided. Section 94(2)(a)(i) indicates a significant change over the provisions which were contained in Rule 12(3)(a) of the Rules of 2007 made under the Act of 2000. Under Rule 12(3)(a)(i) the matriculation or equivalent certificate was given precedence and it was only in the event of the certificate not being available that the date of birth certificate from the school first attended, could be obtained. In Section 94(2)(i) both the date of birth certificate from the school as well as the matriculation or equivalent certificate are placed in the same category.”

17. In *AbuzarHossain @ Gulam Hossain v. State of West Bengal* [2012] 9 SCR 224, this Court, through a three-judge bench, held that the burden of proving that someone is a juvenile (or below the prescribed age) is upon the person claiming it. Further, in that decision, the court indicated the hierarchy of documents that would be accepted in order of preference.

18. Reverting to the facts of this case, the headmaster of M's School, CW- 1, was summoned by the court and produced a Transfer Certificate (Ex.C-1). This witness produced a Transfer Certificate Register containing M's name. He deposed that she had studied in the school for one year, i.e., 2009-10 and that the date of birth was based on the basis of the record sheet given by the school where she studied in the 7th standard. DW-2 TMT Poongothoi, Headmaster of Chinnasoalipalayam Panchayat School, answered the summons served by the court and deposed that 'M' had joined her school with effect from 03.04.2002 and that her date of birth was recorded as 11.07.1997. She admitted that though the date of birth was based on the birth certificate, it would normally be recorded on the basis of horoscope. She conceded to no knowledge about the basis on which the document pertaining to the date of birth was recorded. It is stated earlier on the same issue, i.e., the date of birth, ThiruPrakasam, DW-3 stated that the birth register pertaining to the year 1997 was not available in the record room of his office.

19. It is clear from the above narrative that none of the documents produced during the trial answered the description of "the date of birth certificate from the school" or "the matriculation or equivalent certificate" from the concerned examination board or certificate by a corporation, municipal authority or a Panchayat. In these circumstances, it was incumbent for the prosecution to prove through acceptable medical tests/examination that the victim's age was below 18 years as per Section 94(2)(iii) of the JJ Act. PW-9, Dr.Thenmozhi, Chief Civil Doctor and Radiologist at the General Hospital at Vellore, produced the X-ray reports and deposed that in terms of the examination of M, a certificate was issued stating "that the age of the said girl would be more than 18 years and less than 20 years". In the cross-examination, she admitted that M's age could be taken as 19 years. However, the High Court rejected this evidence, saying that "when the precise date of birth is available from out of the school records, the approximate age estimated by the medical expert cannot be the determining factor". This finding is, in this Court's considered view, incorrect and erroneous. As held earlier, the documents produced, i.e., a transfer certificate and extracts of the admission register, are not what Section 94(2) (i) mandates; nor are they in accord with Section 94(2) (ii) because DW-1 clearly deposed that there were no records relating to the birth of the victim, M. In these circumstances, the only piece of evidence, accorded with Section 94 of the JJ Act was the medical ossification test, based on several X-Rays of the victim, and on the basis of which PW-9 made her statement. She explained the details regarding examination of the victim's bones, stage of their development and opined that she was between 18-20 years; in cross-examination she said that the age might be 19 years. Given all these circumstances, this Court is of the opinion that the result of the ossification or bone test was the most authentic evidence, corroborated by the examining doctor, PW-9.”

5. Learned counsel for the Appellant quoted yet another judgment of the Supreme Court in the case of *Soundarajan vs. State*, reported in *AIR*

2023 SC 2136 to substantiate that charges must be framed with utmost care and proper application of mind.

“16. We find that, in this case, the charge has been framed very casually. The Trial Courts ought to be very meticulous when it comes to the framing of charges. In a given case, any such error or omission may lead to acquittal and/or a long delay in trial due to an order of remand which can be passed Under Sub-section (2) of Section 464 of Code of Criminal Procedure. Apart from the duty of the Trial Court, even the public prosecutor has a duty to be vigilant, and if a proper charge is not framed, it is his duty to apply to the Court to frame an appropriate charge.

17. The appeal is allowed. The impugned judgments are quashed and set aside, and the Appellant is acquitted of the offences alleged against him. The bail bonds of the Appellant stand cancelled.”

6. Learned counsel for the Appellant cited one more judgment of the High Court of Judicature at Patna passed on 29.03.2023 in the case of **Deepak Kumar vs. State of Bihar** in *Crl.A. (SJ) No.1011 of 2022*, to submit that in the absence of medical corroboration as to the age of a victim, then the benefit of doubt must be given in favour of the accused.

“16. Apparently, no exercise was carried out by the prosecution to establish that the victim was minor as on the date of occurrence by following the procedure prescribed under the Act in Patna High Court CR. APP (SJ) No.1011 of 2022 dt.29-03-2023 the light of reasoning put forth by the Supreme Court in case of [Jarnail Singh](#) (Supra). Further, in case of [Rajak Mohammad vs. State of H.P.](#) reported in (2018) 9 SCC 248 the Hon'ble Supreme Court has noted that the age determined on the basis of a radiological examination may not be an accurate determination and sufficient margin either way has to be allowed. The Supreme Court, taking into account the facts and circumstances of that case opined in the said case that the report of radiological examination left room for ample doubt with regard to the correct age of prosecutrix. In such case, the benefit of aforesaid doubt, naturally, must go in favour of the accused. In the case of [Sunil v. the State of Haryana](#) reported in AIR 2010 SC 392, the Hon'ble Supreme Court observed that conviction cannot be based on an approximate age of the victim. In [State of Madhya Pradesh vs. Munna @ ShambhooNath](#) reported in (2016) 1 SCC 696, the Hon'ble Supreme Court held that the evidence of approximate age of the victim would not be sufficient to any conclusion about the exact age of the victim.”

Thus, he pleaded that in all respects, the prosecution failed to prove the age of the victim girl and there were several inconsistencies and contradictions amongst witnesses produced by the prosecution and sought

for interference by this Court in the conviction and sentence awarded by the Trial Court.

7. Per contra, learned Additional Advocate General appearing for the State contended that both the victim girl and the accused loved each other and left the home. After the marriage, they had sexual intercourse, which had culminated into registration of FIR under POCSO Act, 2012. During the course of argument, he referred to Section 42A of the POCSO Act, 2012, which contemplates that the provisions of POCSO shall be in addition to and not in derogation of the provisions of any other Act and that the POCSO Act would supplant and would be in addition to the other criminal provisions and where there was any inconsistency, the provisions of POCSO would override any other law to the extent of inconsistency. The reason for referring to Section 42A of the POCSO Act, 2012 was that though Section 375 IPC Exception 2 became an anomaly, which permits non-consensual sexual intercourse by a husband with his wife between the ages of 15-18 years, the provisions of Section 42A of the POCSO Act, 2012 shall have overriding effect on the provisions of any such law to the extent of the inconsistency.

8. Learned Additional Advocate General appearing for the State further contended that as per the report (Ex.P4) given by the Doctor, after performing the above mentioned clinical examination, the findings are

consistent with recent sexual intercourse / assault. It was also contended that the age of the victim girl was clearly proved through dental examination (Ex.P2), as per which, her biological age would be 13 years and above. Thus, in all probabilities, the prosecution has proved the guilt of the accused without any room for suspicion through oral and documentary evidences. Thus, it was prayed that the present Criminal Appeal is liable to be dismissed.

9. We have carefully considered the submissions made on either side and perused the material documents available on record.

10. It was alleged by the prosecution that the accused had kidnapped the victim child to Tripura, who was a minor at the time of incident and had sexual intercourse attracting the provisions of Section 4 of the POCSO Act, 2012. From the evidence of the victim girl (P.W.8), there is no material to infer that the accused had forcibly carried away P.W.8, as it appears from the 161 statement of the victim girl that the victim girl (P.W.8) had voluntarily ran away with the accused by hiring a sumo to Guwahati and thereafter to Tripura. Such voluntary elopement of the victim minor girl with the accused will inure to the benefit of the accused is a million dollar question, because sufficient materials have been placed before us to show that the date of birth of P.W.8 is 16.08.1999 through the register of the school (Ex.P6), viz., P.W.8 was 14 years at the time of occurrence, and even

according to the medical evidence (Ex.P2), P.W.2 was 13 years and above at the time of incident. Therefore, consent has no relevance at all in this case, but, can at the most be considered as a mitigating factor, while deciding the question of sentence. Moreover, 161 statement of the P.W.8 is not an admissible evidence. Of course, there were inconsistencies in the depositions of the P.W.8 given before the Court while examining her in-chief and cross examination. On one hand, she had stated that there was a forcible physical relationship, on the other hand, she had deposed that there was no torture meted out at the hands of the accused and she got into the van on her own at the request of the accused without any compulsion. Though this Court may infer that there is a possibility of tutoring her at every stage, there is no other option for this Court, but to decide the case based on the testimony of the victim girl, as in a case of this nature, the deposition of the victim girl has evidentiary value.

11. The prosecution produced P.W.9, the Principal of Kendriya Vidyalaya, Happy Valley, Shillong, who, though during his cross examination had stated that old admission forms were destroyed in the year 2019, in his examination-in-chief, he had deposed as under:

“I have been posted as the Principal of Kendriya Vidyalaya, Happy Valley, Shillong since 22.08.2017.

I have produced the admission register maintained by the office of the Principal of Kendriya Vidyalaya for the year 2004 to 2006. The Volume number is 23.

As per the admission register, the date of birth of Miss Roshni Kumar, D/o.Mr.Ashok Kumar Rai and Mrs.Mona Devi, Bihar is 16.08.1999.

She was admitted in the school on 28.03.2005 into Class I. A transfer certificate, 223136 was issued to her on 10.05.2018.

EXHIBIT 6 is the entry no.2018/05 pertaining to Miss Roshni Kumar, D/O Mr.Ashok Kumar Rai and Mrs.Mona Devi of Bihar which indicates the date of birth as 16.08.1999.”

12.The judgment relied upon by the learned counsel for the Appellant in the case of *P.Yuvaprakash vs. State Rep. by Inspector of Police* (supra) may not be applicable to the facts of this case for the reason that with the report provided by the Doctors in this case, this Court is unable to come a definite finding as to the exact age of the victim girl, whereas the P.W.9 clearly deposed with the aid of various records and documents, such as Register (Vol.No.23) and Transfer Certificate (223136 issued to P.W.8 on 10.05.2018) that the date of birth of the victim girl was 16.08.1999.

13. Though learned counsel for the Appellant vehemently argued that there was no material produced to prove the sexual penetration on the part of the accused, a cursory glance at the medical examination report (Ex.P4) conducted on the victim girl (P.W.8) clearly shows that the hymen was torn. Thus, in all probabilities, all the legal parameters are against the accused and the prosecution has proved the charges against the appellant beyond doubt.

14. At this juncture, learned counsel for the Appellant pointed out that the complaint given by the father (P.W.1) against the accused has been withdrawn by him. Though based on the complaint of P.W.1, FIR was registered against the accused person, once a criminal case culminated into a registration of FIR, it would be considered as a crime against the State and therefore, withdrawal of the complaint alone is not a ground to plead that the accused is entitled for acquittal, as the Court may not be aware of the circumstances, by which the complainant had withdrawn the complaint.

15. However, the learned counsel for the Appellant prayed for reduction of sentence, by submitting that the proved facts show that the victim girl (P.W.8) and the accused were in love with each other and that P.W.8 had gone with the Appellant / accused only on her own consent. He has also submitted that P.W.8 is now married to another person and settled elsewhere, which is evident from her examination-in-chief, which reads as follows:

“11. I am married now and having two children and staying with my in-law at Bihar.”

16. The Parliament, in its wisdom, by way of insertion of Clause No.2 to Section 4 of the POCSO Act, 2012 vide Act 25 of 2019 amended the said Section, which reads as follows:

"4. Punishment for penetrative sexual assault –

(2) Whoever, commits penetrative sexual assault on a child below sixteen years of age shall be punished with imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of natural life of that person, and shall also be liable to fine."

17. Admittedly, in this case, the incident had taken place in the year 2013, i.e., much prior to the amendment being brought into force. The Trial Court had convicted and sentenced the accused to undergo Imprisonment for life, even though there was a provision under the Old Act to impose a punishment of seven years. It is purely a case of love affairs and nowhere, the victim girl deposed that it was the accused, who forcibly took her to Tripura and committed sexual assault, so as to attract Section 4 of the POCSO Act, 2012 and she has also conceded that she is married now and happily living in Bihar with two children. This Court has time and again held that Trial Court should not be mechanical in imposition of the punishment and must take into account the totality of circumstances coupled with the material evidence before imposing the maximum punishment adumbrated under the relevant provisions of the Act.

18. Taking into consideration the entire facts and circumstances of the case, we are of the view that interests of justice will be served, if the life imprisonment imposed under Section 4 of the POCSO Act, 2012 that has been awarded on the appellant is reduced to 10 years.

19. In the result, this Criminal Appeal is allowed in part and the conviction and sentence dated 16.12.2021 and order of sentence dated 20.12.2021, passed by the Special Judge (POCSO), District and Sessions Court, Shillong in Special (POCSO) Case No.3/2016 in respect of Section 4 of the POCSO Act, 2012 alone is modified to the extent that the Appellant shall undergo Rigorous Imprisonment for ten years and to pay a fine of Rs.10,000/-, in default to undergo Simple Imprisonment for another one month. The order of sentence imposed under Section 366A of IPC is hereby confirmed. As ordered by the Trial Court, the Sentences shall run concurrently and the total fine amount awarded as compensation is directed to be paid to the victim girl, if not already paid. It is made clear that the appellant shall be entitled for set off in accordance with Section 428 of the Code of Criminal Procedure for the period of detention already undergone by him. It is reiterated that except the reduction in the quantum of punishment in respect of Section 4 of the POCSO Act, 2012, the rest of the judgment of the Trial Court holds good in all other respects.

20. Before parting with this judgment, we want to emphasize that it is a case involving love affair and unfortunately, the male member has been made as a scapegoat to undergo imprisonment for the mistakes / abetment committed by the two. It is no doubt true that the offence under POCSO Act, 2012 has been made out to impose punishment on the accused /

appellant. While the so-called victim girl is leading a happy life, the accused / appellant has been undergoing incarceration and there is no provision under the Act to pardon a person, who has committed the offence out of ignorance. At the young age both had lust and infatuation.

21. Crl.M.C. No. 39 of 2023 and Crl.M.C. No. 40 of 2023 stand disposed of.

(W.Diengdoh)
Judge

(S.Vaidyanathan)
Chief Justice

Meghalaya
26.04.2024
"~~Lam~~ DR-PS"

PRE-DELIVERY JUDGMENT IN
Crl.A.No.10/2023