Serial No. 01
Regular List

HIGH COURT OF MEGHALAYA
AT SHILLONG

Crl.A. No. 21 of 2024

Date of Decision: 30.09.2024

Shri. Elbert Marak
S/o Shri. Nikin Sangma
R/o Village, Sarjoan Balapara
P.S: Boithalangso,
District: Karbi- Anlong, Assam

……Petitioner

-VERSUS-

1. State of Meghalaya
Through Public Prosecutor

..….Respondent

Coram:

Hon'ble Mr. Justice W. Diengdoh, Judge
Hon'ble Mr. Justice B. Bhattacharjee, Judge

Appearance:

For the Petitioner/Appellant(s) : Mr. S.D. Upadhaya, Legal Aid Counsel

For the Respondent(s) : Mr. N.D. Chullai, AAG with
Mr. E.R. Chyne, GA

i) Whether approved for reporting in Law journals etc.: Yes/No

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

J U D G M E N T

Per W. Diengdoh, (J):

1. The judgment and order dated 01.04.2021 passed by the learned Special Judge (POCSO), East Jaintia Hills District whereby the

appellant herein was sentenced to undergo 7 years of rigorous imprisonment with fine of ₹ 5000/- (rupees five thousand) only, in default of payment of fine, to further undergo 1(one) month simple imprisonment for an offence committed under Section 361 IPC and further 10 years rigorous imprisonment with fine of ₹ 10,000/- (rupees ten thousand) only and also in default of payment of such fine, to further undergo another 3(three) months simple imprisonment for an offence punishable under Section 6 POCSO Act is assailed herewith in this instant appeal.

2. Briefly, the facts of the case is that on an FIR lodged by one Smti. Durga Kanai before the Officer In-Charge, Khliehriat Police Station, East Jaintia Hills District, on 17.11.2016 with the information that her daughter who was staying at a place called Kseh, on 16.11.2016 while on her way home, was accompanied by three boys, two of whom had since went on to their respective homes, one of them, Shri. Elbert Marak along with her daughter did not return home that night and is found missing. Hence the complaint.

3. On the basis of such information, the police accordingly registered the FIR as Khliehriat P.S. Case No. 298(11) 16 under Section 361 IPC and an investigator was assigned to conduct the investigation. The Investigating Officer (IO), in course of investigation had recovered the said daughter, who was a minor at the relevant time along with Shri. Elbert Marak from a place called Wahsarang. Thereafter, on completion of the investigation, the IO found that a well-established case under Section 361 IPC read with Section 6 of the POCSO Act is made out against the accused Elbert Marak and he is sent up to face trial before the Special Court (POCSO).

4. In course of trial, the case being re-registered as Special Case No. 14 of 2020, the learned Special Judge has examined five witnesses and has also exhibited certain material evidence including documents produced by the Prosecution. After due procedure is complied with, on the basis of the findings thereon, the Court has found it fit to find the accused person guilty on the said two charges, that is, under Section 361 IPC and Section 6 of the POCSO Act and he was accordingly sentenced to face imprisonment as aforementioned.

5. Mr. S.D. Upadhaya, learned Legal Aid Counsel (LAC), appearing for the appellant has submitted that though the factual aspect of the matter as regard the relationship of the survivor and the appellant is not disputed, however the circumstances surrounding the whole episode has to be looked into to come to any conclusion as to the guilt or innocence of the appellant herein.

6. The learned LAC has submitted that the complainant/mother of the survivor in her deposition as PW1 has stated that "…*One Saturday my daughter went to stay with her father at Lum Mynkseh and on Sunday she left Lum Mynkseh at around 4:30 PM along with Elbert Marak, Ajay Langstang and another boy whom I know as Hunde brother of Elbert Marak*…." In her cross examination this witness has admitted that the accused person/appellant is her neighbour and he used to visit their house frequently as he is a close friend of her children.

7. The survivor who has deposed before the trial court as PW2 has also stated that "…O*n the day of the incident my elder sister Anika Kanai requested Ajay Langstang, Admission Marak and Elbert Marak to drop me home…*" "…*The accused person Elbert Marak asked me to*

go alongwith him and promise to give me some eatable so I went along with him to his friend place but I do not know the place…" In her cross examination the survivor has admitted to her relationship with the appellant when she stated that "…W*e consider Elbert as a family member. My parent respect and trust the accused person. It is a fact that I am not scared of the accused person and I trust him*…" She has further stated that "…*It is a fact that I have stated before the doctor who medically examined me that I am in a relationship with the accused person Elbert*…" To interpret the above statements is but to come to only one conclusion that is, that it is not a fact that the appellant had enticed or kidnapped the survivor. Therefore, there is no reason as to why the appellant should be convicted and sentenced as was done so under Section 361 IPC, submits the learned LAC.

8. The learned LAC has further submitted that the main thrust of the argument on behalf of the appellant is to question the age of the survivor since there is nothing on record nor has it been proven in course of evidence that the survivor is actually 12 years of age and that she was a minor at the time when the incident took place. Even if one takes the statement of PW1 who has stated that "…*The victim girl was 12 years old at the time of the incident and studying in Class III (Three)...*", such statement has been made without any documentary proof of age. This fact was also reiterated by the IO who has deposed as PW5, when in his deposition he has stated that "…*The age of the victim was given by her mother. It is a fact that no documents are there to substantiate the age of the victim*…" Under such circumstances, the determination of the age of the survivor has to be carried out according to the procedure laid down under Section 9 and 94 of the Juvenile Justice (Care and Protection of Children) Act, 2015. The case of Jarnail

Singh v. State of Haryana, (2013) 7 SCC 263 has been cited by the learned LAC in support of this contention.

9. On the findings of the trial court that the appellant had committed sexual assault on the person of the survivor, the learned LAC has submitted that on careful scrutiny of the evidence rendered by PW4 who is the Doctor who has medically examined the survivor at the relevant point of time, what is apparent is that though this witness has given her opinion that upon examination of the survivor a case of recent sexual intercourse can be made out, however in the cross-examination, this witness has admitted that "…*It is a fact I mentioned in my report that the hymen is torn with old tear and I want to state that the old tear is more than a week…*". Since the appellant and the survivor were together from 16.11.2016 to 18.11.2016 therefore, there could not have been any sexual intercourse or sexual assault as alleged taking into account the statement of PW4.

10. In view of the above, the learned LAC has submitted that the learned trial court has come to a wrong finding without careful appreciation of the evidence on record and also without due application of mind and as such, the impugned judgment and conviction is liable to be set aside and quashed by this Appellate Court.

11. However, the learned LAC has further submitted that in view of the fact that the appellant has already undergone imprisonment of about 8 years or so, no fruitful purpose would be served if this Court remits the matter to the trial court for de novo trial to determine the age of the survivor.

12. In support of his argument, the learned LAC has cited the following authorities.

i. Sunil v. State of Haryana, (2010) 1 SCC 742, para 23, 24 and 27;

ii. Massauddin Ahmed v. State of Assam, (2009) 14 SCC 541, para 10, 11, 14, 17 and 18; and

iii. Shri. Amit Kumar Gupta v. State of Meghalaya & Ors., High Court of Meghalaya order dated 08.12.2021 in Crl. A. No. 1 of 2021, para 49, 50, 51, 52, 55, 58 and 69.

13. Per contra, Mr. N.D. Chullai, learned AAG while defending the impugned judgment and order on behalf of the State respondent has submitted that the argument and contention of the appellant through the learned LAC is without basis and cannot be accepted by this Court.

14. On the contention that no case has been made out to convict the appellant under Section 361 IPC the learned AAG has submitted that the survivor in her deposition before the Court has clearly stated that "*…The accused person Elbert Marak asked me to go alongwith him and promise to give me some eatable so I went along with him to his friend place…*". This act of the appellant in offering eatables to the survivor can only mean one thing that is, enticement. The word "entice" involves an idea of inducement or allurement in another through exciting hopes or desire in order to attract the child to go with the offender. To elaborate on this contention, the learned AAG has placed reliance on the case of State of Kerela v. Arumugham & Anr. 2023 SCC Online Ker 4983, para 14, 15 and 17.

15. As to the challenge that the age of the survivor has not been determined, the learned AAG has submitted that the mother of the survivor in her deposition as PW1 has clearly stated in her

examination-in-chief that the age of the survivor was 12 years at the time of the incident. This statement has not been contradicted in cross-examination by the defence/appellant and no suggestion was ever put to the witness that the survivor was not a minor at the time of the incident. Even when the doctor who had medically examined the survivor had recorded her age as 12 years, this statement in evidence has also not been challenged by the defence counsel and as such, the appellant cannot come at this stage to raise the issue of confirmation of age of the survivor.

16. On the contention of the appellant that the learned trial court has come to the conclusion that the appellant had committed sexual assault on the survivor on the relevant date, which fact was also corroborated by none other than the accused/appellant himself in his examination under Section 313 Cr.P.C, the learned AAG has submitted that though the appellant has stated that the act of sexual intercourse was with the consent of the survivor, however the survivor being a minor at the relevant point of time, such consent even if proven to be true, will not hold good in law as it is well settled that consent by a minor is immaterial in sexual relationship.

17. This Court has duly considered the argument of the respective parties, the facts of the case have been enumerated hereinabove and reference to the same would be to the contextual aspect only.

18. The appellant it appears, has only stressed on the issue of age determination of the survivor to content that since the age of the survivor has not been established through evidence, it is the prerogative of the appellant to seek determination of the same even at this stage of the proceedings.

19. The appellant has however failed to put forward any argument as far as the determination of age of the survivor is concerned to say that according to him she was of majority age at the relevant period, no definite or even estimated age of the survivor has been proffered. Be that as it may, this Court will look into this aspect of the matter before proceeding further.

20. Whenever there is a challenge to the age of a survivor in cases of this kind, as has been laid down under the relevant statutes and rules in a number of judicial pronouncements by the Apex Court and various High Courts, the accepted procedure for determination of age is found under Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules, 2007 which in turn derives its authority from Section 94 of the Juvenile Justice (Care and Protection of Children) Act, 2000. In fact, it is pertinent to mention here that when it comes to the issue of determination of age of a victim of crime, the authority set out in the case of Jarnail Singh (supra) also cited by the learned LAC would elucidate this aspect prominently, reference being made to para 22 and 23 of the same which are reproduced herein below as:

> "22. On the issue of determination of age of a minor, one only needs to make a reference to Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules, 2007 (hereinafter referred to as "the 2007 Rules"). The aforestated 2007 Rules have been framed under Section 68(1) of the Juvenile Justice (Care and Protection of Children) Act, 2000. Rule 12 referred to hereinabove reads as under:
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> > "**12.** ***Procedure to be followed in determination of age*****.**–(1) In every case concerning a child or a juvenile in conflict with law, the court or the Board or as the case may be, the Committee referred to in Rule 19 of these Rules shall determine the age of such juvenile or child or a juvenile in

conflict with law within a period of thirty days from the date of making of the application for that purpose.

(2) The court or the Board or as the case may be the Committee shall decide the juvenility or otherwise of the juvenile or the child or as the case may be the juvenile in conflict with law, prima facie on the basis of physical appearance or documents, if available, and send him to the observation home or in jail.

(3) In every case concerning a child or juvenile in conflict with law, the age determination inquiry shall be conducted by the court or the Board or, as the case may be, the Committee by seeking evidence by obtaining–

(a)(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;

(b) and only in the absence of either (i), (ii) or (iii) of clause (a) above, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child. In case exact assessment of the age cannot be done, the court or the Board or, as the case may be, the Committee, for the reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering his/her age on lower side within the margin of one year,

and, while passing orders in such case shall, after taking into consideration such evidence as may be available, or the medical opinion, as the case may be, record a finding in respect of his age and either of the evidence specified in any of the clauses (a)(i), (ii), (iii) or in the absence whereof, clause (b) shall be the conclusive proof of the age as regards such child or the juvenile in conflict with law.

(4) If the age of a juvenile or child or the juvenile in conflict with law is found to be below 18 years on the date of offence, on the basis of any of the conclusive proof specified in sub-rule (3), the court or the Board or as the case may be the Committee shall in writing pass an order stating the age and declaring the status of juvenility or otherwise, for the purpose of the Act and these rules and a copy of the order shall be given to such juvenile or the person concerned.

(5) Save and except where, further inquiry or otherwise is required, inter alia, in terms of Section 7A, Section 64 of the Act and these Rules, no further inquiry shall be conducted by the court or the Board after examining and obtaining the certificate or any other documentary proof referred to in sub-rule (3) of this Rule.

(6) The provisions contained in this Rule shall also apply to those disposed of cases, where the status of juvenility has not been determined in accordance with the provisions contained in sub-rule(3) and the Act, requiring dispensation of the sentence under the Act for passing appropriate order in the interest of the juvenile in conflict with law."

23. Even though Rule 12 is strictly applicable only to determine the age of a child in conflict with law, we are of the view that the aforesaid statutory provision should be the basis for determining age, even of a child who is a victim of crime. For, in our view, there is hardly any difference insofar as the issue of minority is concerned, between a child in conflict with law, and a child who is a victim of crime. Therefore, in our considered opinion, it would be just and appropriate to apply Rule 12 of the 2007 Rules, to determine the age of the prosecutrix VW, PW 6. The manner of determining age conclusively, has been expressed in sub-rule (3) of Rule 12 extracted above. Under the aforesaid provision, the age of a child is ascertained, by adopting the first available basis, out of a number of options postulated in Rule 12(3). If, in the scheme of options under Rule 12(3), an option is expressed in a preceding clause, it has overriding effect over an option expressed in a subsequent clause. The highest rated option available, would conclusively determine the age of a minor. In the scheme of Rule 12(3), matriculation (or equivalent) certificate of the concerned child, is the highest rated option. In case, the said certificate is available, no other evidence can be

> relied upon. Only in the absence of the said certificate, Rule 12(3), envisages consideration of the date of birth entered in the school first attended by the child. In case such an entry of date of birth is available, the date of birth depicted therein is liable to be treated as final and conclusive, and no other material is to be relied upon. Only in the absence of such entry, Rule 12(3) postulates reliance on a birth certificate issued by a corporation or a municipal authority or a panchayat. Yet again, if such a certificate is available, then no other material whatsoever is to be taken into consideration, for determining the age of the child concerned, as the said certificate would conclusively determine the age of the child. It is only in the absence of any of the aforesaid, that Rule 12(3) postulates the determination of age of the child concerned, on the basis of medical opinion."

21. This Court would agree with the learned LAC that none of the above steps were taken to determine the age of the survivor herein, however, since no challenge was made to the assertion of the PW1, who is the mother of the survivor when she has stated that the age of the survivor at the relevant period of time was 12 years of age, the same being also referred to by PW4, the Doctor who has reiterated that the age of the survivor was 12 years according to what the mother has stated to her, in the absence of any confrontation by the accused/appellant in the cross-examination of such witnesses, this Court has to accept the fact that the age of the survivor at the relevant point of time was 12 years of age. Another factor which may have been missed out in observation is the further assertion of the PW1 that at that point of time, her daughter was studying in class III (Three), which could not be expected of a girl of 18 years or so to be studying is such class under normal circumstances.

22. Having held that the survivor was a minor at the time when the incident took place, also taking note of the fact that she has clearly stated in her deposition as PW2 that the appellant had promised to give

her some eatables if she go along with him, which she eventually did and did not return home until after two days or so, this piece of evidence would only prove that the minor child was enticed by the appellant to accompany him without the consent of the parent who are her lawful custodians.

23. The case of Arumugham (supra) relied upon by the learned AAG to canvass the issue of enticement is found relevant by this Court, when a perusal of para 14, 15 and 17 of the same, duly reproduced herein, set in juxtaposition with the facts of the case of the appellant, only one conclusion can be drawn, that is, that the survivor in this case has indeed been enticed by the appellant to accompany him, thus attracting the provision of section 361 IPC. The findings of the learned Trial Court in this respect cannot be faulted.

> "14. The Supreme Court later considered the scope of expressions 'takes' and 'entice' in State of Haryana v. Raja Ram (1973) 1 SCC 544: AIR 1973 SC 819 = 1973 KHC 478. In that case, the Apex Court held thus:-
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> > "The object of this section seems as much to protect the minor children from being seduced for improper purposes as to protect the rights and privileges of guardians having the lawful charge or custody of the minor wards. The gravamen of this offence lies in the taking or enticing of a minor under ages specified in this section, out of the keeping of the lawful guardian without the consent of the guardian. The words "takes or entices any minor…out of the keeping of the lawful guardian of such minor" in Section 361, are significant. The use of the word "Keeping" in the context connotes the idea of charge, protection, maintenance and control: further the guardian's charge and control appears to be compatible with the independence of action and movement in the minor, the guardian's protection and control of the minor being available, whenever necessity arises. On plaint reading of this section the consent of the minor who is taken or enticed is wholly immaterial: it is only the guardian's

consent which takes the case out of its purview. Nor is it necessary that taking or enticing must be shown to have been by means of force or fraud. Persuasion by the accused person which creates willingness on the part of the minor to be taken out of the keeping of the lawful guardian would be sufficient to attract the section."

15. In Shahjahan v. State of Kerela (2010 (4) KHC 294) this Court considered expressions 'takes' and 'entices', contained in Section 361 of IPC, in paragraph 20 of the judgment, which reads thus:-

> "20. There is and can be difference between the expressions "takes" and "entices" in S. 361 I.P.C. in certain cases, the meaning may overlap also. The expression "takes" may ordinarily refer to the gross physical act of taking away manually. But the expression must cover not merely the gross overt act of physically carrying away a minor. Subtle variants of the act of taking must also fall within the sweep of the expression 'takes' in S. 361 I.P.C. it would be incorrect to assume that 'taking' is a culpable act which can take place only without consent of the minor. A rule of the thumb that if the consent of the minor is there, the contumacious act of "taking" can never take place would be too unrealistic and impermissible. This distinction between "take" and "entice" cannot certainly be consent and absence of consent of the minor. Several subtle varieties of taking may take place with the consent of the minor and without the actual physical act of moving the minor. 'Enticing' a minor in language simply means luring or tempting or prompting a minor to move out of the custody of the guardian. Here also no gross physical act is necessary. Assurance given to a minor that if she comes out of the keeping of the guardian, the minor shall be protected and patronised must also necessarily fall within the range of contumacious conduct under S. 361. In short to me it appears that the expression "takes" and "entices" must together cover all acts by which it is ensured by the offender that the minor moves out of the keeping of the lawful guardian. To give true effect to the purpose of rational of the penal provision in S. 361 I.P.C., those expressions must be given such a comprehensive and exhaustive sweep."

17. That statutory provision and the precedence referred to above lead us to conclude thus:-

(1) The consent of the minor who is taken or enticed is wholly immaterial.

(2) It is only the guardian's consent which takes the case out of the purview of the penal provision.

(3) It is not necessary that the taking or enticing must be shown to have been by means of force or fraud. Persuasion by the accused person, which creates willingness on the part of the minor to be taken out of the keeping of the lawful guardian, will be sufficient to attract the section.

(4) With the consent of the minor, without any element of fraud, force or deceit, the minor can be moved out of the custody of the guardian, and that would attract the expression 'takes' or 'entice' under Section 361 of IPC."

24. Coming to the culmination of the charge against the appellant, that is, the allegation of sexual assault, the law under the POCSO Act, is very clear, any form of sexual exploitation against the person of a minor will attract the rigors of the relevant provisions of the POCSO Act, depending on the gravity of such act, it may entail punishment either under Section 4 or 6 of the said Act.

25. A reading of the whole body of evidence would give a picture of the relationship between the appellant and the survivor, inasmuch as what is evident is that they are known to each other, the survivor is also comfortable in the company of the appellant and according to her she was in a relationship with him. The survivor has however also related the sequence of events right from the time the appellant enticed her to follow him to an unknown place, later on she said that the place was a labour camp about three hours journey from her home. As she relates the fact that the appellant has committed penetrative sexual assault on her, the appellant has failed to refute such assertion when she was cross-examined by him, or rather his defence counsel. As has been indicated hereinabove, the fact that there has been sexual intercourse

between the two of them was fortified by the evidence of the Doctor as PW4.

26. In the light of such evidence, the statement of the survivor who is the victim of the crime, more particularly in cases of sexual assault where more often than not, no eye-witnesses could be found, in the facts and circumstances of this case, we find that the statement of the survivor has to be believed.

27. Consequently, on a final analysis of the evidence on record and on appreciation of the impugned judgment and order, we find that the same has been rendered taking everything into consideration. Thus, no infirmity can be found in such order, the same is hereby upheld.

28. This appeal is therefore found to be devoid of merits and is accordingly dismissed.

29. Appeal disposed of. No costs.

30. The lower court records to be sent back.

(B. Bhattacharjee)
Judge

(W. Diengdoh)
Judge