Serial No.01
Supplementary List

HIGH COURT OF MEGHALAYA
AT SHILLONG

Crl.A.No.14/2023

Reserved on: 09.05.2024
Pronounced on: 28.06.2024

Shri Lios Swer Vs. State of Meghalaya

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

Appearance:

For the Appellant : Mr. A.S. Siddiqui, Sr.Adv with
Ms. A. Kharmyndai, Adv

For the Respondent : Mr. K. Khan, AAG with
Mr. S. Sengupta, Addl.P.P.
Mr. R. Gurung, GA

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 09.03.2023, passed by the Special Judge (POCSO) / Addl.DC(J), East Jaintia Hills District, Khilehriat, Meghalaya in Special (POCSO) Case No.36 of 2020 and the accused / Appellant herein was convicted by the Trial Court for the offence under Section 5(l)/6 of The Protection of Children from Sexual Offences Act, 2012 (in short 'POCSO Act, 2012') and Section 506 IPC and sentenced to undergo Rigorous Imprisonment for

a period of 10 years and to pay a fine of Rs.10,000/-, in default to undergo Simple Imprisonment for five months in respect of Section 5(l)/6 of POCSO Act, 2012 and to pay a fine of Rs.5,000/- for the offence under Section 506 IPC in default to undergo Simple Imprisonment for one month. In addition, compensation of Rs.3,00,000/- was directed to be paid by the accused to the victim girl.

Brief Prosecution Case:

2. A complaint was given by the mother of the victim girl on 22.06.2013 before Khliehriat Police Station, East Jaintia Hills District, stating that the accused, namely, Lios Swer, who is a Teacher & the step father of the victim girl, had committed aggravated penetrative sexual assault on her daughter aged about 12 years and also raped her on 17.06.2013. Based on the complaint, FIR (Ex.P1) in Khliehriat P.S.Case No.159 (06) 13 came to be registered on 22.06.2013 against the accused under Sections 376(2)(f)/506 IPC and thereafter, Section 6 of the POCSO Act, 2012 was included.

2.1. After investigation, initially, a charge sheet dated 03.12.2013 was laid before the Jowai ADM and after inclusion of Section 6 of the POCSO Act, 2012, the case was transferred to Special Judge (POCSO), Jowai and subsequently, after bifurcation of District Judiciary, the case was

tried by the Special Judge (POCSO) / Addl.DC(J), East Jaintia Hills District, Khilehriat, Meghalaya in Special (POCSO) Case No.36 of 2020 from 14.09.2020 and the Special Judge (POCSO), East Jaintia Hills District had taken cognizance of the case. The prosecution, in order to substantiate the commission of the offence against the accused, had examined as many as 7 witnesses and marked 8 documents. On the side of the accused, 3 witnesses were examined and one document (Ex.D1) and Paper Marks (D1 to D7) were marked. Both statements under Sections 161 & 164 Cr.P.C. were obtained from the victim girl (P.W.2). 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 offences and convicted him as stated supra.

3. The learned counsel for the appellant submitted that the appellant has been convicted solely on the basis of the evidence of the victim girl (P.W.2) and as per the settled law, the sole testimony must have a sterling quality and instil confidence in the mind of the Court. That apart, there were several contradictions and inconsistencies in the depositions of P.Ws.1 & 2, namely, mother of the victim girl and the victim girl herself. Moreover, there was no corroboration of the evidence of P.Ws.1 & 2 with the medical documents, as the Doctor (P.W.4) in her cross examination had

clearly opined that there was no external injury in the body of the victim girl (P.W.2) and there is a possibility of hymen being torn due to sports activities and other factors. The Doctor further opined that the presence of mild vaginal discharge at the time of examination might be on account of menstrual cycle during ovulation period. He further submitted that in the absence of medical corroboration, there was no sexual assault on the victim girl by the appellant herein. He also submitted that as per the evidence tendered by the appellant himself as D.W.1, P.W.1, who is his second wife was in a compromising state with one Nilu Nath, who is the brother of her late husband Kamal Nath in the year 2012 and upon enquiry, both had confessed to have been in illegal relationship with each other for long time. Thus, it was Nilu Nath, who could have sexually abused the victim girl and P.W.1, in connivance with Nilu Nath falsely implicated the appellant in this case. He pointed out that that there was a delay of five days in lodging the complaint and there was no explanation forthcoming for the delay in lodging a complaint and therefore, the presence of the victim girl at the time incident with the appellant is highly doubtful, as she was in her home town in Assam at that time.

3.1. Learned counsel for the Appellant also pointed out that there is no concrete evidence as to the age of the victim girl and in the absence of

relevant documents to prove the age of the victim girl, it should be vindicated through medical examination / documentary proof, which admittedly had not been in this case, as the mother of the victim girl was not sure about the age of the victim girl. 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."

Thus, he pleaded that there were several flaws committed by the prosecution and sought for interference by this Court in the conviction and sentence awarded by the Trial Court.

4. Per contra, learned counsel appearing for the State contended that the guilt of the accused had been established beyond reasonable doubt through the evidence of P.Ws.1 & 2, which is consistent with the medical evidence. The accused had committed aggravated sexual penetration on the victim girl not once, but four times, which is evident from the statement (Ex.P2) made under Section 164 Cr.P.C. by the victim girl. This statement is fortified by the evidence of Doctor (P.W.4), who had stated in her examination-chief that the finding is consistent with recent sexual intercourse / assault. The version of the victim girl (P.W.2) was duly supported by the evidence of P.W.1 (mother of the victim girl) that while she was sent out of the house, the victim girl was inside the house with the accused and she remained outside the house along with her just born baby for the whole night. He further contended that under Section 29 of the

POCSO Act, there is a presumption clause, which not only brings in the actual offender, but also the abettor and the burden is on the accused to prove the contrary. Similarly, under Section 30 of the POCSO Act, there is a presumption of *mens rea,* which is required to be discharged by the accused, when the foundational facts are established by the prosecution. He drew the attention of this Court to the judgment of the Apex Court in the case of ***Ganesan vs. State,*** reported in ***AIR 2020 SC 5019,*** wherein it was categorically held that there can be a conviction on the sole testimony of the victim / prosecutrix, when the deposition of the prosecutrix is found to be trustworthy, unblemished, credible and her evidence is of sterling quality. He also contended that when the victim girl came out of the house in the morning at about 6.30 am, she was found crying and on enquiry, she disclosed the fact that the accused had raped her and also threatened her with dire consequences and she wanted to go back to her home town at Karimganj, Assam. Thereafter, P.W.1, being helpless took her to Assam and again came back to Khliehriat for lodging complaint against the accused with the help of Headman and other Village Defence Party (VDP) and after medical examination, the complaint was preferred against the accused and therefore, the case of the prosecution cannot be simply thrown away on account of the delay of five days in lodging the complaint.

4.1. Learned Government Advocate appearing for the State also contended by referring to the judgment of the Apex Court in the case of ***Bharwada Bhoginbhai Hirjibhai Vs. State of Gujarat***, reported in ***(1983) 3 SCC 217,*** that the evidence of victim to the offence is of paramount importance and the Court cannot shrug off the case of the prosecution merely for want of strict corroboration.

> "11. In view of these factors the victims and their relatives are not too keen to bring the culprit to books. And when in the face of these factors the crime is brought to light there is a built-in assurance that the charge is genuine rather than fabricated. On principle the evidence of a victim of sexual assault stands on par with evidence of an injured witness. ***Just as a witness who has sustained an injury (which is not shown or believed to be self-inflicted) is the best witness in the sense that he is least likely to exculpate the real offender, the evidence of a victim of a sex offence is entitled to great weight, absence of corroboration notwithstanding. And while corroboration in the form of eye-witness account of an independent witness may often be forthcoming in physical assault cases, such evidence cannot be expected in sex offences, having regard to the very nature of the offence. It would therefore be adding insult to injury to insist on corroboration drawing inspiration from the rules devised by the courts in the western world*** (obeisance to which has perhaps become a habit presumably on account of the colonial hangover). We are therefore of the opinion that if the evidence of the victim does not suffer from any basic infirmity, and the 'probabilities factor' does not render it unworthy of credence, as a general rule, there is no reason to insist on corroboration except from the medical evidence, where, having regard to the circumstances of the case, medical evidence can be expected to be forthcoming, subject to the following qualification: ***Corroboration may be insisted upon when a woman having attained majority is found in a compromising position and***

> ***there is a likelihood of her having levelled such an accusation on account of the instinct of self-preservation. Or when the 'probabilities factor' is found to be out of tune***."

For all the afore-stated reasons, it was prayed that the present Criminal Appeal is liable to be dismissed.

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

6. According to the prosecution, the mother of the victim girl (P.W.1) had clearly deposed that since her daughter (P.W.2) continuously crying on the day of occurrence, she had enquired as to what happened on the last night, when she was with the accused inside the house. Due to her insistence, the victim girl narrated the entire incident to her, stating that she was raped by the accused and that she also informed that it was not the first time he indulged in such activity, on earlier occasion also, he had done the same act thrice. Based on her statement, a Police complaint was lodged against the accused and she was subjected for medical examination on 22.06.2013 around 3.45pm, wherein it was determined that she had experienced a recent sexual assault.

7. Let us analyze the statement made by the victim girl at various point of time so as to ensure whether the versions of the victim girl instil

confidence in the minds of this Court. In her 164 statement, she had deposed as under:

> "On Sunday night i.e. 16th June, 2013 my step father came home drunk and fought with my mother then he went to sleep. At around 3 O'clock in the morning, he came to my room and sleep with me, my mother also came to my room and chased him out but he started fighting again with her and chased her out of the house and closed the door. Then he called me to his room and threatened me not to shout otherwise he will kill me. I went to his room and he raped me. This is not the first time that he raped me he has already raped me four times before this and threatened me not to tell my mother otherwise he will kill both me and my mother. That's all."

In her examination-in-chief, she had elaborated the incident as under:

> "On the day of the incident I was at home at Khliehriat while my mother and my younger brother are outside as they had a quarrel with my step father Lios Swer who was intoxicated. I also came out of the house but my step father asked me to come back inside the house and enquired the whereabouts of my mother and I replied that I do not know.
>
> Then he asked me to go and sleep and he came and slept with me."

Her Cross Examination goes thus,

> "It is not a fact that my step-father Lios Swer did not commit penetrative sexual assault on me."

8. To corroborate the evidence of P.Ws.1 & 2 medically and scientifically, it is worthwhile to analyze as to what was the deposition of P.W.4 (Doctor) and the deposition of Scientific Officer (P.W.5) in-chief reads as follows:

"4. Upon opening the exhibit box the following items were found which were reportedly collected from the victim are as follows:-

i) One vulva swab marked as Ex-I
ii) One vaginal swab marked as Ex-II
iii) One anal swab marked as Ex-III
iv) One blood sample marked as Ex-IV

The following Exhibits reportedly collected from the accused person are:-

I) One blood sample marked as Ex-V.

5. I then examined the Exhibits using standard Forensic Biology procedure and the following result was obtained:-

After thorough and careful examination of Ex-I, II, III, neither blood nor semen was detected. Therefore, the question of comparison does not arise. Blood group 'A' was detected in Ex-IV while blood group 'B' was detected in Ex-V.

9. The Doctor (P.W.4) also opined that there is a possibility of recent sexual assault and in the Medical Report marked as Ex.P4, it has been stated as follows:

"11. Examination for injuries
(look for bruises, Systematic Physical torture injuries, Nail abrasions, Teeth bite marks, Cuts, Lacerations, head-injury, any other injury)

	Injury	Site	Size	Colour	Swelling	Simple/Grievous
1						
2			**NONE**			
3						
4						

12. Local Examination of genital parts:
A. Pubic hair combing

B. External Genitalia

i)	Labia Majora	Any swelling, tears, edematous, bruises or abrasions	**Abrasions present** on the inner side of Labia majora
ii)	Labia Minora	Scratch, bruising, fingernail marks tear, infection:	-
iii)	Fourchette	Bleeding, tear:-	Torn
iv)	Vulva	Any injury, bleeding, discharge:-	-
v)	Perineum	-	-

10. On a close reading of the evidence of P.W.4, it is apparent that the factum of sexual assault had been duly established and there was a proper medical corroboration with the evidence of witnesses. Moreover, the accused, while questioning him under Section 313 had not denied the accusations levelled against him, as his answers to the questions were mostly stereotyped, such as “it is not a fact” and “I did not rape her” and there was no attempt made by the accused to disprove the allegations leveled against him. Since the victim had washed her genitalia and clothes, the Scientific Officer (P.W.5) was not in a position to give the exact picture and therefore, the Medical Report alone could be relied upon to come to a conclusion.

11. Insofar as the plea raised in respect of delay in lodging complaint is concerned, it is not fatal to the case of the prosecution and there would be several formalities before preparation of FIR and it is the duty cast upon the Court to see whether all those formalities had been completed within a reasonable and there is no procedural lapse or undue

delay at any stage of the case. The Hon'ble Supreme Court, while dealing with a motor accident case in ***Ravi vs. Badrinarayan & Others***, reported in ***(2011) 4 SCC 693***, held as follows:

> "18. …The purpose of lodging the FIR in such type of cases is primarily to intimate the police to initiate investigation of criminal offences.
>
> 19. Lodging of FIR certainly proves factum of accident so that the victim is able to lodge a case for compensation but delay in doing so cannot be the main ground for rejecting the claim petition. In other words, although lodging of FIR is vital in deciding motor accident claim cases, delay in lodging the same should not be treated as fatal for such proceedings, if claimant has been able to demonstrate satisfactory and cogent reasons for it. There could be a variety of reasons in genuine cases for delayed lodgement of FIR. Unless kith and kin of the victim are able to regain a certain level of tranquillity of mind and are composed to lodge it, even if, there is delay, the same deserves to be condoned. In such circumstances, the authenticity of the FIR assumes much more significance than delay in lodging thereof supported by cogent reasons."

12. The argument of illicit relationship of the mother of the victim girl with one Nilu Nath, brother of her late husband is an afterthought and concocted story only with an intention to cover up his guilt, as rightly observed by the Trial Court.

13. When the testimony of the victim child inspires the confidence of this Court and is found to be reliable, there is no necessity for this Court to look for other corroborations.

14. The Court below has properly applied its mind and imposed Rigorous Imprisonment for a period of 10 years and to pay a fine of Rs.10,000/-, in default to undergo Simple Imprisonment for five months in respect of Section 5(l)/6 of POCSO Act, 2012 and to pay a fine of Rs.5,000/- for the offence under Section 506 IPC in default to undergo Simple Imprisonment for one month, which, in our considered opinion, does not warrant any interference by this Court, as the punishment should act as a deterrent so as to effectively handle offences against a child.

15. Finding that the prosecution has established the charges against the appellant, we do not find any ground to interfere with the judgment and order passed by the Court below.

16. It is very unfortunate that the appellant/accused, who is a Teacher and also the step father of the victim child, in the guise of providing shelter to her and her widowed mother, indulged in the commission of the offence of rape / sexual assault, which is unbecoming of a School Teacher.

17. The Hon'ble Supreme Court in the case of **Avinash Nagra Vs. Navodaya Vidyalaya Samiti and others,** reported in **(1997) 2 SCC 534** has observed as follows about teacher:

> "Before answering the question whether the order terminating the services of the appellant in terms of his

appointment letter is in violation of the Rules or the principles of natural justice, it is necessary to consider the need for the education and the place of the teacher in that behalf. Article 45 of the constitution enjoins the State to endeavour to provide free and compulsory education to all children, till they complete the age of 14 years. The Supreme Court has held that right to education is a fundamental right and the State is required to organise education through its agencies or private institutions in accordance with the law and the regulations or the scheme. The State has taken care of service conditions of the teacher and he owes dual fundamental duties to himself and to the society. As a member of the noble teaching profession and a citizen of India he should always be willing, self disciplined, dedicated with integrity to remain ever a learner of knowledge, intelligently to articulate and communicate the imbibe in his students, as social duty, to impart education, to bring them up with discipline, inculcate to abjure violence and to develop scientific temper with a spirit of enquiry and reform constantly to rise to higher levels in any walk of life nurturing constitutional ideals enshrined in Article 51 A so as to make the students responsible citizens of the country. The quality, competence and character of the teacher are, therefore, most significant to mould the institutions and to sustain them in their later years of life as a responsible citizen in different responsibilities."

10. Mahatma Gandhi, the Father of the Nation has stated that "a teacher cannot be without character. If he lacks it, he will be like salt without its savour. A teacher must touch the hearts of his students. Boys imbibe more from the teacher's own life than they do from books. If teachers impart all the knowledge in the world to their students but do not inculcate truth and purity amongst them, they will have betrayed them. ...

.....Dr.S.Radhakrishnan has stated that "we in our country look upon teacher as gurus or, as acharyas. An Acharya is one whose aachar or conduct is exemplary. He must be an example of Sadachar or good conduct. He must inspire the

pupils who are entrusted to his care with love of virtue and goodness. ....”

11. It is in this backdrop, therefore, that the Indian society has elevated the teacher as **“Guru Brahma, Gurur Vishnu, Guru Devo Maheswaraha”**. As Brahma, the teacher creates knowledge, learning, wisdom and also creates out of his students, men and women, equipped with ability and knowledge, discipline and intellectualism to enable them to face the challenges of their lives. As Vishnu, the teacher is preserver of learning. As Maheswara, he destroys ignorance. .....”

18. In yet another judgment in the case of **The Secretary, Sri Ramakrishna Vidhyalayam High School, Tirupparaithurai, Tiruchirapalli District Vs. State of Tamil Nadu, Rep.by Special Commissioner and Secretary to Government and others**, reported in **1990 WLR 62**, Madras High Court categorically held as follows:

“59. It is very lamentable state of affairs that in this country, a teacher who was considered as equal to God, should fall from the high pedestal to the lowest level. Our scriptures command the students to consider the teacher as a God (Acharya Devo Bhava). The term ‘Acharya’ in Sanskrit means a person who not only teaches lessons to students, but also ensures good conduct of his pupils. The more important part of the definition is that he shall himself practice what he preaches. In Sanskrit language, the term ‘Guru’ also means teacher. The syllable “Gu” represents darkness (symbolishing ignorance). The syllable “Ru” represents the removal thereof. Thus, a Guru is so called as he removes the darkness and the ignorance from the minds of the students. In fact, there is a saying that it is only with the blessings of a teacher that a person blossoms into a full man.”

As father and as teacher, the convict/appellant has accomplished negative roles and projected himself as a wrong figure to the society.

19. In the result, this **Crl.A.No.14 of 2023** stands dismissed. As ordered by the Trial Court, the compensation of Rs.3,00,000/- shall be paid by the accused to the victim girl.

(W.Diengdoh)
Judge

(S.Vaidyanathan)
Chief Justice

Meghalaya
28.06.2024
"Lam DR-PS"

PRE-DELIVERY JUDGMENT IN
Crl.A.No.14 of 2023