Serial No.03
Regular List

HIGH COURT OF MEGHALAYA
AT SHILLONG

Crl.A.No.37/2023 with
Crl.M.C.No.106/2023

Reserved on: 29.05.2024
Pronounced on: 08.07.2024

Shri Thoura Darnei … Appellant

Vs.

State of Meghalaya through the Public Prosecutor … Respondent

Coram:

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

Appearance:

For the Appellant : Mr. S.D. Upadhaya, Legal Aid counsel

For the Respondent : Ms. S. Ain, GA with
Mr. E.R. Chyne, 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 11.03.2021, passed by the Special Judge (POCSO), East Jaintia Hills District, Khilehriat, Meghalaya in Special (POCSO) Case No.13 of 2020 and the accused / Appellant herein was convicted by the Trial Court for the offence under Section 5(m) of The Protection of Children from Sexual Offences Act, 2012 (in short 'POCSO Act, 2012') punishable under Section 6 of the POCSO Act, 2012 and sentenced to undergo Rigorous Imprisonment for a period of 10 years and to pay a

fine of Rs.5,000/-, in default to undergo Simple Imprisonment for six months. The fine amount was directed to be given to the victim girl.

Brief Prosecution Case:

2. A complaint was given by the father of the victim girl on 29.05.2017 before Saipung Police Station, East Jaintia Hills District, Khliehriat, Meghalaya, stating that the accused, namely, Thoura Darnei had committed aggravated penetrative sexual assault on her daughter aged about 4 years and also raped her on 28.05.2017. Based on the complaint, FIR (Ex.P1) in Saipung P.S.Case No.05 (05) 2017 came to be registered on 29.05.2017 against the accused under Section 354 IPC r/w Section 6 of the POCSO Act, 2012.

2.1. After investigation, a charge sheet dated 29.05.2017 was laid under Section 5/6 of the POCSO Act, 2012 and upon transfer of the case in Special Sessions Case No.31 of 2017, from the file of the Special Judge (POCSO), West Jaintia Hills District, Jowai on 21.08.2020, the Special Judge (POCSO), East Jaintia Hills District had taken cognizance of the case in Special (POCSO) Case No.13 of 2020. 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 accused, neither witnesses were examined nor documents marked. No statement under Section 164 Cr.P.C. was obtained from the victim girl (P.W.5), since she was only 4 years old at the time of incident. 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. The learned Legal Aid Counsel for the appellant submitted that a false case has been foisted against the appellant without any conclusive proof against the accused and there were several inconsistencies and discrepancies in the evidence of witnesses, namely, P.Ws.1, 2, 5, 6 and 7, who are father, Doctor, victim girl, mother and Forensic Expert respectively. It was further submitted that the victim girl (P.W.5) was not subjected to any cross examination and when the Court recorded her statement, the usual procedures had not been followed so as to ascertain her capacity to tender evidence.

4. The learned Legal Aid Counsel for the appellant also submitted that the Court below erred in punishing the appellant / accused under Section 6 of the POCSO Act, 2012, as there is absolutely no proof to establish that there was a penetrative sexual assault against the victim child. As per the evidence of P.W.2 (Doctor), there was no visible injury in the private part of the victim girl, thereby contradicting the evidence of P.Ws.1, 5 and 6 and therefore, it leads to draw an inference that there was no aggravated sexual assault and no offence under Section 6 of the POCSO

Act, 2012 had been committed by the accused, rather it will only constitute an offence of sexual assault under Section 7 of the POCSO Act, 2012.

5. The learned Legal Aid Counsel for the appellant went on to add that as per the deposition of P.W.2 in his cross examination, who had examined the victim child, except finding a swelling in the lower lips of the victim girl, which is simple in nature, there was no abnormality detected and the hymen was also intact. Though the appellant was convicted solely on the basis of the medical report, in the absence of sign of penetrative sexual assault, it does not support the case of the prosecution. Thus, there was no corroboration of evidences of P.Ws.1, 5 & 6 with the medical documents. Thus, he pleaded that there were several contradictions in the case of the prosecution and sought for interference by this Court in the conviction and sentence awarded by the Trial Court.

6. Per contra, learned Government Advocate appearing for the State contended that the victim girl (P.W.5) in her examination-in-chief had clearly deposed that the accused, with the promise of giving cards with photographs to play, took her to his house and instead of giving cards, he pushed her on the bed, removed her pant and inserted his penis into her private part. The Doctor (P.W.2) in his examination categorically deposed that after clinical examination, the findings are consistent with recent sexual assault. Thus, the evidence of P.Ws.1, 5 & 6 had duly been fortified by the medical examination. The Apex Court in the case of ***State of U.P.***

Vs. Babul Nath, reported in ***(1994) 6 SCC 29*** observed that even an attempt to penetration will constitute the offence. The relevant Paragraph No.8 is extracted below:

> "8…….From the explanation reproduced above it is distinctly clear that ingredients which are essential for proving a charge of rape are the accomplishment of the act with force and resistance. To constitute the offence of rape neither Section 375 of I.P.C. nor the explanation attached thereto require that there should necessarily be complete penetration of the penis into the private part of the victim/prosecutrix. ***In other words to constitute the offence of rape it is not at all necessary that there should be complete penetration of the male organ with emission of semen and rupture of hymen. Even partial or slightest penetration of the male organ within the labia majora or the vulva or pudenda with or without any emission of semen or even an attempt at penetration into the private part of the victim would be quite enough for the purpose of Sections 375 and 376 of I.P.C. That being so it is quite possible to commit legally the offence of rape even without causing any injury to the genitals or leaving any seminal stains…."***

7. Learned Government Advocate appearing for the State further contended that when the deposition of the prosecutrix is found to be trustworthy, unblemished, credible and of sterling quality in terms of the judgment of the Apex Court in the case of ***Ganesan vs. State***, reported in ***(2020) 10 SCC 573***, there is no other corroboration required to prove the guilt of the accused. The prosecution was able to prove the presumption clause provided under Section 29 of the POCSO Act beyond reasonable doubt through various depositions and evidences. As per Section 29 of the POCSO Act, 2012, burden shifts on the accused to prove his innocence and there was no explanation offered by him to the questions posed to him

under Section 313 Cr.P.C., 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. He drew the attention of this Court to the judgment of the Apex Court in the case of ***Bharwada Bhoginbhai Hirjibhai Vs. State of Gujarat***, reported in ***(1983) 3 SCC 217,*** wherein it was categorically held 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***."

Thus, it was prayed that the present Criminal Appeal is liable to be dismissed.

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

9. The victim child in this case was aged about four years only, at the time of the incident as stated by the father of the victim girl (P.W.1) in the complaint. The incident had taken place on 28.05.2017 in the evening and on that day, the accused had deceivably called the victim child to his house and raped her by sealing her mouth with his hand. The victim child was examined as P.W.5, who stated in Biate Language, which was interpreted by a local resident and her evidence is reproduced below for better understanding:

> "I studying in class Nursery at B.P.C.Synod School at Lura Village. One day while I was walking near my house I met the accused person Shri.Thoura Darnei and he called me to go along with him and also promise that he will give me cards with photographs to play if I go along with him. Thereafter, he took me to his house and on reaching his house he did not give me the cards. [**Victim states in Biate Language "Ane Pom a Jalmun ah a ne zalpui a, ki tuman a khek a, a ne del a, a tuman a khek a ki bai puan in a hup pek a, ikhek thei mang a kha nung a ne siat pui"**] "instead he carried me on the bed took off my pant, slept on top of me, gagged my mouth with a cloth and

I could not screamed and thereafter, he inserted his penis into my private part".

After he finish, he sent me back home. On reaching home, my mother saw me that I could not walk properly and asked what had happened to me and I narrated the incident to my mother."

The complaint was given by P.W.1 (father of the victim girl) on the next day, based on which, a case was registered in Saipung P.S.Case No.05 (05) 2017. P.W.1 had deposed before the Court in his examination-in-chief as under:

"….On reaching home the victim was not at home and she came back after ½ hour and I saw that the victim was weak and cannot walk properly and holding her private part. Immediately I enquire from her as to what had happened to her and she told that the accused Thaura Darnei took her to his house gagged her mouth and rape her., She also stated that there is pain in her private part. Thereafter I went to the headman to report about the incident and to get a vehicle to take her to the doctor. After getting the vehicle I along with the brother of my wife went to Saipung Dispensary for Medical Examination of the victim. After medical examination at Saipung Dispensary the victim was referred to Khliehriat CHC. The Police came to Saipung Dispensary took us to Khliehriat CHC.

On reaching Khliehriat CHC the victim was again medically examined and also gave medicine. After the victim was medically examined we went to Khliehriat Police Station. The next day the Police took us to DC office Khliehriat but since the magistrate was not there, we went back home…"

10. In addition to the deposition of P.W.1, the mother of the victim girl (P.W.6), who noticed different gestures on the behaviour of the victim girl at first also entered into the witness box and stated that upon

seeing some fluid in the private part of the victim girl and on enquiry, she had revealed that the accused had raped her. When the delirious act was reported to the father of the accused, he, instead of condemning his son / accused pacified her and advised her to clean the private part of the victim girl with boiled water. Since she had to take care of her other minor children, she reported the entire episode to her husband so as to lodge a complaint against the accused.

11. To corroborate the evidence of P.Ws.1, 5 & 6 medically and scientifically, it is worthwhile to analyze as to what was the deposition of P.W.7 (Scientific Officer) and the deposition of Scientific Officer in-chief reads as follows:

> "1) Semen was not detected in Ex-A. Ex-Agave positive, weak reaction for blood but it was insufficient for further test.
>
> 2) Semen was not detected in Ex-B, however **human blood is detected in Ex-B and belongs to blood group-A**.
>
> 3) Ex-C belongs to blood group A.
>
> 4) Ex-A does not contain any foreign hairs.
>
> **5) Semen was not detected in Ex-E, however human blood was detected in Ex-E and it belongs to blood group A.**
>
> **6) Ex-D is identified as human pubic hairs**. Blood was not detected in Ex-D. The exhibit was insufficient for further tests.

Blood present in Ex-B viz., long pant of victim, Ex-E namely, underwear of the accused **and Ex-C viz., blood sample of the accused belongs to blood group A."**

12. Even though there is no conclusive opinion rendered by the Scientific Officer (P.W.7) as to whom the blood group belongs to, it was duly established that it was the accused, who was present on the particular day and a human pubic hair was traced and sent for Forensic Science Laboratory for the purpose of identification and as per the report of Forensic Science Laboratory (Ex.P5), the pubic hair was asserted to belong to a human. The Doctor (P.W.2) also opined that there is a possibility of recent sexual assault and in the Medical Report marked as Ex.P2, 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	Swelling	Lower Lips				Simple
2						
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	**Private Part stained with white discharge and bleeding the Fourchette seen i.e. tenderness**
ii)	Labia Minora	Scratch, bruising, fingernail, marks tear, infection:	
iii)	Fourchette	Bleeding, tear:-	
iv)	Vulva	Any injury, bleeding, discharge:-	
v)	Perineum	-	

From the above, this Court finds no missing link or discrepancy in the case of the prosecution and there was a proper corroboration of statements of witnesses with the documentary evidence. Therefore, no other inference can be drawn than the one that it was the accused, who molested the victim girl.

13. It is true that the victim child's statement under Section 164 Cr.P.C. was not recorded for the reason that a child of 4 years may not have a high standard of maturity level to explain the ill act of the accused. However, her evidence before the Court was quite natural and cannot be said to be a tutored one. That apart, the Legal Aid Counsel, who appeared before the Court below for the accused, had not chosen to cross examine the victim girl and thus, no attempt was made to discredit the evidence of the victim child by way of cross-examination.

14. It will be apposite to take note of the judgment of the Apex Court in ***State of Punjab v. Gurmit Singh: 1996 Crl. L.J. 1728*** in this regard. The Apex Court has cautioned that in cases involving sexual assault/molestation, a duty is cast upon the Court to deal it with utmost carefulness and sensitivity and minor contradictions or insignificant discrepancies in the statement of the prosecutrix should not be a ground for throwing out the case of the prosecution. The relevant paragraph of the judgment is extracted as under:

> "7. ... The testimony of the victim in such cases is vital and unless there are compelling reasons which necessitate looking for corroboration of her statement, the courts should find no difficulty to act on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable. Seeking corroboration of her statement before relying upon the same, as a rule, in such cases amounts to adding insult to injury. Why should the evidence of a girl or a woman who complains of rape or sexual molestation, be viewed with doubt, disbelief or suspicion? The court while appreciating the evidence of a prosecutrix may look for some assurance of her statement to satisfy its judicial conscience, since she is a witness who is interested in the outcome of the charge levelled by her, but there is no requirement of law to insist upon corroboration of her statement to base conviction of an accused. The evidence of a victim of sexual assault stands almost at par with the evidence of an injured witness and to an extent is even more reliable. Just as a witness who has sustained some injury in the occurrence, which is not found to be self-inflicted, is considered to be a good witness in the sense that he is least likely to shield the real culprit, the evidence of a victim of a sexual offence is entitled to great weight, absence of corroboration notwithstanding. Corroborative evidence is not an imperative component of judicial credence in every case of rape. Corroboration as a condition for judicial reliance on the testimony of the prosecutrix is not a requirement of law but a guidance of prudence under given circumstances. It must not be overlooked that a woman or a girl subjected to sexual assault is not an accomplice to the crime but is a victim of another person's lust and it is improper and undesirable to test her evidence with a certain amount of suspicion, treating her as if she were an accomplice. Inferences have to be drawn from a given set of facts and circumstances with realistic diversity and not dead uniformity lest that type of rigidity in the shape of rule of law is introduced through a new form of testimonial tyranny making justice a casualty. Courts cannot cling to a fossil formula and insist upon corroboration even if, taken as a whole, the case spoken of by the victim of sex crime strikes the judicial mind as probable."

15. 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.

16. Learned Legal Aid Counsel for the appellant submitted that there are absolutely no signs of penetrative sexual assault, as the report only shows that there could have been a recent sexual assault. The said submission of the learned Legal Aid Counsel cannot be countenanced on the ground that the victim child had described the incident, when she deposed before the Court and she had specifically stated in the local language that the appellant had inserted his penis into her private part. Section 3 of the POCSO Act explains penetrative sexual assault and Section 3(a) of the POCSO Act makes it clear that there is no requirement that the penis should have completely penetrated the vagina. Hence, sexual assault as described by the victim child clearly satisfies the requirement under Section 3(a) of the POCSO Act. As rightly argued by the learned Government Advocate with reference to the judgments of the Apex Court in the case of ***Madan Gopal Kakkad vs. Naval Dubey and another***, reported in ***(1992) 3 SCC 204*** and ***State of U.P. Vs. Babul Nath*** (supra) observed that an attempt to penetrate itself is sufficient to constitute the offence of rape.

17. By referring to Section 7 of the POCSO Act, 2012, an attempt has been made on the side of the appellant that there was no penetration into her vagina and the accused had only touched her private part with his penis and therefore, the accused can at the most be punished only under Section 7 of the POCSO Act, 2012. If this interpretation is accepted, it will give a wrong

signal to others that the private part of a female can be touched with penis and only insertion in the vagina is impermissible that will alone amount to commission of offence, which is not the intent of the provisions of the POCSO Act, 2012. The interpretation that is attempted to be given by the learned Legal Aid Counsel for the appellant goes beyond the scope of Section 7 of the POCSO Act. In a tender age, there is no possibility for a child to have an idea about a sexual assault and according to the child, a physical assault like hitting or pinching is a matter of concern. In the instant case, going by the description given by the victim child about the incident and carefully considering the evidence of P.Ws.2 & 7 and the medical and forensic science laboratory reports marked as Ex.Ps.2 & 5, we are convinced that the victim child was subjected to penetrative sexual assault.

18. The victim child was four years old at the time of incident and hence, the offence of aggressive penetrative sexual assault is clearly established under Section 5(m) of the POCSO Act, which is punishable under Section 6 of the POCSO Act, 2012.

19. The answer given by the appellant, when he was questioned under Section 313 Cr.P.C., is only the *ipse dixit* of the appellant and he had not answered anything to rebut the presumption / accusation levelled against him, in the absence of which, this Court has no other option, but to presume that the offence has been committed. In the present case, the appellant has not discharged the burden that was cast on him under Section

29 of the POCSO Act and hence, the legal presumption is that the prosecution has proved the offence under Section 5(m) of the POCSO Act.

20. The Court below has properly applied its mind and imposed the punishment of Rigorous Imprisonment for a period of 10 years with a fine of Rs.5,000/-, in default to undergo Simple Imprisonment for six months, in view of the fact that the incident had happened prior to the amendment dated 16.08.2019, 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. It is not known as to why Police had not booked a case against the family members of the accused, more particularly, father of the accused, who, disbelieving the words of the mother of the victim girl (P.W.6), concealed the accused in his house and informed her that the accused was not present in the house, which amounts to harbouring the offender, punishable under Section 212 of IPC. As per the version of P.W.6 before the Court, during search by the elders of the village in the house of the accused, he was found hiding under a table and once the accused denied the charges, what necessitated him to hide under the table. Moreover, he had also accepted his guilt in his 161 statement, of course, statement under Section 161 cannot be taken to be an admissible evidence.

21. 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.

22. In the result, this **Crl.A.No.37 of 2023** stands dismissed. As ordered by the Trial Court, the fine amount shall be paid to the victim child, if already not paid, in addition to the payment of compensation of Rs.7,00,000/- (Rupees Seven Lakhs only) by the State to the victim child.

23. Crl.M.C.No.106 of 2023 stands disposed of.

(W.Diengdoh)
Judge

(S.Vaidyanathan)
Chief Justice

PRE-DELIVERY JUDGMENT IN
Crl.A.No.37/2023 with
Crl.M.C.No.106/2023