Serial No.01
Regular List

HIGH COURT OF MEGHALAYA
AT SHILLONG

Crl.A.No.13/2023

Reserved on : 13.06.2024
Pronounced on: 08.07.2024

Shri Andrew Rani ... Appellant

-vs-

State of Meghalaya represented by the Commissioner & Secretary to the Department of Home (Police), Government of Meghalaya, Shillong – 793 001. ... Respondent

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Coram:

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

Appearance:

For the Appellant : Mr. M. Sharma, Legal Aid Counsel with Ms. T. Buam, Adv

For the Respondent : Mr. K. Khan, AAG with Mr. S. Sengupta, Addl.PP

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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 dated 27.04.2022 and the order of sentence dated 29.04.2022, passed by the Special Judge (POCSO), East Khasi Hills District, Shillong in Special (POCSO) Case No.10/2013 and the accused/Appellant herein was convicted by the Trial Court for the offence under Section 376(2) IPC and sentenced to undergo rigorous imprisonment for twenty five years and to

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pay a fine of Rs.1,00,000/-, in default to undergo one year imprisonment. The total fine amount awarded as compensation was directed to be paid to the victim girl.

Brief Prosecution Case:

2. An FIR was given by the mother (P.W.1) of the victim girl (P.W.2) on 07.12.2012 before the Officer-in-Charge, Pasture Beat House, Polo, East Khasi Hills District, Shillong, stating that her daughter aged 4 years was raped on 05.12.2012 by one Arup Baruaa, a Juvanile. On receipt of the FIR, the Officer-in-charge of Sadar Police Station registered a case vide Sadar P.S. Case No.217 (12)12 under Section 376(2)(f) IPC. Subsequently, the victim girl (P.W.2) was sent for medical examination and during interaction with the victim girl by her aunt, it was disclosed by her that the accused also involved in the commission of offence and when it was reported to the Police by the family members about the statement made by the victim girl and also the confrontation of the accused herein, the Investigating Officer had informed the complainant that there was no necessity to register one more FIR against the accused, as the subsequent development can be investigated along with the earlier FIR.

3. After investigation, a Charge Sheet No.141/2013 dated 26.08.2013 was laid before the Court of Chief Judicial Magistrate and thereafter, the case was committed to the Special Judge (POCSO) for trial,

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who framed the charges against the accused under Section 377 and Section 5(m)/6 against the child in conflict with law and under Section 376(2)(f) and Section 5(m)/6 against the accused. The prosecution, in order to substantiate the commission of the offence against the accused, has examined as many as 10 witnesses and marked 7 documents. On the side of the accused, though two witnesses were examined, no document was marked. Statements under Section 164 Cr.P.C. were obtained from P.W.1, the victim girl (P.W.2) and Master Aibanjop Jarian (P.W.10). 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 offenceunder Section 3(a)/5(l)(m)/6 of the Act of 2012 and under Section 375(a) falling under 375 (sixthly)/376(2)(j)(n) IPC, 1860 convicted him as stated supra.

4. Learned Legal Aid Counsel for the appellant submitted that there was no corroboration of the depositions of witnesses as also the statement of the victim girl (P.W.2) and the award of sentence was solely on the basis of the evidence of P.W.2 (mother). The victim girl was subjected for medication examination twice on 07.12.2012 and 21.05.2013 respectively and both the results revealed that the hymen of the victim girl was intact. Learned Legal Aid Counsel further submitted that there was no penetrative sexual assault on the victim girl, which is evident from the statement of the

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victim girl that she did not feel any pain, when the accused attempted to insert his private part into her vagina and thus, the statements of the witnesses were not corroborated with the two medical reports. Moreover, the statement under Section 164 Cr.P.C. was obtained from the witnesses after two years of the alleged incident.

4.1. Learned Legal Aid Counsel also submitted that there was a previous enmity between the families of the victim girl and the accused, which was deposed by the defence witnesses and the same was not taken note of by the Trial Court. The name of the accused was not found mentioned in the FIR initially and his name was subsequently included based on the statement of the victim girl. The Doctor, who had conducted the first medical test on the victim girl was not examined during trial. It was submitted by the learned Legal Aid Counsel that the accused was initially charged under Section 5(m) / 6 of the POCSO Act, 2012 and later on, it was altered to one under Section 3(a) / 5(p)(m) / 6 of the POCSO Act, 2012 along with Section 376(2)(j)(n) IPC by way of alteration report on the instruction of the Superintendent of Police, East Khasi Hills, Shillong, which was blindly accepted by the Magistrate. It was also submitted by the learned Legal Aid Counsel that there were several inconsistencies and contradictions amongst witnesses produced by the prosecution. It was reiterated by the learned Legal Aid Counsel that though

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the charges were framed against the appellant under Section 5(m)/6 of the Act of 2012, which describes about the aggravated penetrative sexual assault, there was no incriminating material adduced on the side of the prosecution to prove that the appellant had committed aggravated penetrative sexual assault on the victim girl and therefore, he sought for interference by this Court in the conviction and sentence awarded by the Trial Court.

5. Per contra, learned Additional Advocate General appearing for the State contended that by no stretch of imagination, it can be said that the evidence of P.Ws.1 & 2 are inconsistent, as the prosecution had, beyond reasonable doubt, established its case by means of both oral and documentary evidence that it was the accused, who had committed aggravated sexual penetration on the victim girl. In support of his contention, he referred to the 164 Statement of the victim girl, wherein she had clearly mentioned that the accused molested her two times along with the juvenile accused and her statement was duly fortified by the evidence of P.W.10, who is the friend of the victim girl and an eyewitness to the occurrence, stating that the accused had inserted his penis into the private part of the victim girl and she cried loudly due to severe pain. 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

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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 in a criminal jurisprudence, alteration of charges would be based on further investigation conducted by the Investigating Officer, which cannot be faulted with to propel the case of the prosecution through the air and prayed that the present Criminal Appeal is liable to be dismissed.

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

7. According to the prosecution, there were two accused, namely, Arup Baura, a Juvenile in conflict with law and the appellant, involved in the commission of the offence of molestation of the victim girl (P.W.2). Though the name of Arup Baura was specifically mentioned in the FIR, the appellant had been arrayed as an accused in this case subsequent thereto. The mother (P.W.l) of the victim girl (P.W.2) had clearly deposed in her chief examination that on

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several occasions, her daughter complained of pain in vagina and she had also noticed reddishness in her private part. She had also deposed that when her daughter struggled to sit properly, on enquiry, it was unearthed by the victim girl that because of the intolerable sexual abuse committed by the accused persons, she was unable to sit rightly on account of severe pain in the buttocks. P.W.1, being chipped on her shoulder, rushed to the Police Station for lodging a complaint and after receipt of the complaint, victim girl was subjected to medical examination at the Ganesh Das Hospital and at that time, the victim girl mentioned about the act committed by the appellant herein, who is well known to the family of the victim girl. She had stated that on enquiry with the appellant herein, he asked for apology in the local language (Map Ia Nga nga la bakla) and thereafter, his name was added in the original FIR lodged against the juvenile.

8. The prosecution, in order to establish the guilt of the accused, heavily relied upon the statements of P.Ws.1, 2 and 10 made under Section 164 Cr.P.C., which read as under:

P.W.1 (mother of the victim girl)	On 7.12.12 the boy whose name is titu called my daughter Shimti through the little boy Aibanjop to give Doremon cards to her. After sometime she came back from the house of Titu and got up to sit on the bed since I was preparing tea for her. As she was sitting in the bed she sat in wrong position and she told me that her buttock (put put) is paining. So I asked her what happened why was her buttock paining she told me that Titu made her sleep in his bed and took off her pants and his own pants and then he did something with his tom tom (meaning his penis) from her put put (meaning her buttock). Then I checked her buttock but I could not make anything out, so I went to Titu's house and asked him what have you done to Shimti, he said I did not do anything, After that I asked his sister to call up his mother since she was not at home. When his mother came I asked her to ask him about what he has done to Shimti. When his mother asked him he denied having

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	done anything to Shimti. So I called Shimti and asked Shimti again what Titu has done to her and I also asked her to show me the bed where he made her sleep. Shimti showed me the bed but still Titu denied to have done anything to Shimti. So I called the husband of my younger sister who is a traffif Police. He also came back home and when and asked Titu what he has done to Shimti but Titu denied to have done it; so my brother-in-law took him to Pasteur Beat House Polo Shillong. The Police of the Pasteur Beat House took Shimti to Ganesh Das Hospital Shillong for medical examination. Thereafter we went back to Pasteur Beat House and there when my sister-in-law asked Shimti whether she was in pain, Shimti said that she is in pain because one Andrew had also did something to her with his tom tom (meaning Penis) twice. When Andrew did Shimti said it was painful but when Titu did it did not pain. I have nothing more to say.
P.W.2 (victim girl)	Tutu took off my pants and he did hard and slowly to me from my buttock with his buttock. Tuti made me sleep in the bed and Andrew released me and Tutu took off my pants and he did with his buttock to me. Andrew also took off my pants and hid me in the corner. When people left Andrew did it again. Tutu did only one. After that Andrew release me and when I cried he said "I will buy food" but he did not buy.
P.W.10 (a friend of the victim girl, namely, Master Aibanjop Jarain)	Tutu did with his tom tom which is very big at tom tom of Shimti. Tom tom means where we urinate, he inserted into the tom tom of Shimti and jenish and Shimti went to play outside, what Andrew did was painful to Shimti.

9. The statement made by the victim girl appears to be very innocent in nature and she was actually not aware about what was the wrong done to her by the accused persons. She was playing as usual with the pain in her buttocks and when her mother asked her as to why she was unable sit in a correct position, out of unbearable pain and intolerability, she had disclosed the act of the accused to her mother, which, in our considered view, was not a tutored one and was of sterling quality, so as to inspire confidence in the minds of this Court. Though the Doctor, who had firstly conducted medical examination on the

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victim girl was neither examined nor the report filed before the Court, for the best reasons known to the prosecution, the Doctor, who had subjected the victim girl for examination secondly, was cross examined and she had deposed as under:

> "The statement which I have recorded in the medical report Ext.2 is the version of the child (victim) that the child had pain in the vaginal area where a certain person had assaulted her but the name of Andrew Rani was spoken by the complainant. I do not know the date and the time the child was examined as she was sent to me for reexamination. In my 15 years of service in Ganesh Das Hospital I could not ascertain whether from this case whether the complaint is genuine or not as the examination of the victim was done in the year 2013 whereas the incident had happened in the year 2012."

10. From the medical report (Ex.P2), we are not in a position to come to a definite finding, because the report does not hit the nail on the head, whether the accused played ducks and drakes and committed the offence of rape on the victim girl. Be that as it may, it was obvious from the innocent statement of the victim girl (P.W.2) that there was an act of penetration both in the private part and buttocks of the victim girl. As per the dictum laid down by the Supreme Court in the case of ***Ganesan vs. State***, reported in ***AIR 2020 SC 5019***, the statement of the prosecutrix, if found to be worthy of credence and reliable, requires no corroboration and the court may convict the Accused on the sole testimony of the prosecutrix.

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11. In yet another case, the Apex Court in ***Rai Sandeep alias Deepu v. State (NCT of Delhi)***, reported in ***(2012) 8 SCC 21*** elaborately dealt with the reliability of "sterling witness", by observing as follows:

> 22. In our considered opinion, the "sterling witness" should be of a very high quality and calibre whose version should, therefore, be unassailable. The court considering the version of such witness should be in a position to accept it for its face value without any hesitation. To test the quality of such a witness, the status of the witness would be immaterial and what would be relevant is the truthfulness of the statement made by such a witness. What would be more relevant would be the consistency of the statement right from the starting point till the end, namely, at the time when the witness makes the initial statement and ultimately before the court. It should be natural and consistent with the case of the prosecution qua the accused. There should not be any prevarication in the version of such a witness. The witness should be in a position to withstand the cross-examination of any length and howsoever strenuous it may be and under no circumstance should give room for any doubt as to the factum of the occurrence, the persons involved, as well as the sequence of it. Such a version should have co-relation with each and every one of other supporting material such as the recoveries made, the weapons used, the manner of offence committed, the scientific evidence and the expert opinion. The said version should consistently match with the version of every other witness. It can even be stated that it should be akin to the test applied in the case of circumstantial evidence where there should not be any missing link in the chain of circumstances to hold the accused guilty of the offence alleged against him. Only if the version of such a witness qualifies the above test as well as all 12 other such similar tests to be applied, can it be held that such a witness can be called as a "sterling witness" whose version can be accepted by the court without any corroboration and based on which the guilty can be punished. To be more precise, the version of the said witness on the core spectrum of the crime should remain intact while all

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other attendant materials, namely, oral, documentary and material objects should match the said version in material particulars in order to enable the court trying the offence to rely on the core version to sieve the other supporting materials for holding the offender guilty of the charge alleged."

12. On due assessment of the statement of the victim girl in consonance with the law laid down by the Apex Court (supra), we are of the opinion that the testimony of the PW2-victim is trustworthy and unblemished and her evidence is of sterling quality. In this case, in addition to the deposition of the victim girl (P.W.2), this Court does not find any prevarication in the versions of P.Ws.1 (mother of the victim girl) and P.W.10 (friend of the victim girl). 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 and the relevant paragraph is extracted hereunder:

> "8. It may here be noticed that Section 375 of the IPC defines rape and the Explanation to Section 375 reads as follows:
>
> > "Explanation. –Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape."
>
> 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 IPC 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***

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> ***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 Section 375 and 376 of IPC.*** 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. But in the present case before us as noticed above there is more than enough evidence positively showing that there was sexual activity on the victim and she was subjected to sexual assault without which she would not have sustained injuries of the nature found on her private part by the doctor who examined her."

13. The sexual abuse of the victim girl by the accused was duly established by the prosecution through various depositions and 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 no attempt was made by him to disprove the version of the prosecution and the victim girl as well.

14. At this juncture, learned Legal Aid Counsel brought to our attention that there was an amendment to Criminal Law in the year 2013 in the aftermath of the Nirbhaya case, wherein a female student was gang-raped in December 2012. The Act amended several provisions of the Indian Penal Code, including Section 376, Indian Evidence Act, and the Criminal Procedure Code. Though the alleged occurrence in this case had taken place way back in 2012, charges were altered with an intention to enhance the punishment for the offence by giving retrospective effect to the amended Act, which is impermissible

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under Criminal Law. The provisions of the POCSO Act, 2012 came into existence with effect from 2012 and therefore, the appellant was rightly tried under the relevant provisions of the POCSO Act, 2012 at the first instance and subsequently, the provisions of Indian Penal Code were included / altered in order to book the appellant for punishing him to the offence greater in degree, which is in violation of Article 20 of the Constitution of India.

15. We find a justifiable force in the submission of the learned Legal Aid Counsel for the appellant in respect of alteration of the offence with a view to enhance the punishment. In terms of the judgment of the Apex Court in the case of ***Soni Devrajbhai Babubhai vs. State of Gujarat and others***, reported in ***(1991) 4 SCC 298***, an act, which is legal at the time of commission cannot be made illegal by way of introduction of new enactment and more so, the penal statute will only be prospective on account of constitutional restriction stipulated under Article 20 of the Constitution of India, which reads as follows:

> "20. Protection in respect of conviction for offences. –(1) No person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence."

16. The Criminal Law (Amendment) Act, 2013 came into existence with effect from 03.02.2013 after receiving assent of the President on

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02.04.2013 by Act No.13 of 2013, vide which the punishment for rape under Section 376 IPC has been increased as under:

> "376. Punishment for rape –(1) Whoever, except in the cases provided for in sub-section (2), commits rape, shall be punished with rigorous imprisonment of either description for a term which [shall not be less than seven years, but which may extend to imprisonment for life, and shall also be liable to fine."

It is relevant to point out here that the Parliament, in its wisdom, amended Section 6 of the POCSO Act, 2012 vide Act 25 of 2019, which reads as follows:

> "6. (1) Whoever commits aggravated penetrative sexual assault shall be punished with rigorous 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, or with death.
>
> (2) The fine imposed under sub-section (1) shall be just and reasonable and paid to the victim to meet the medical expenses and rehabilitation of such victim."

17. In this case, as stated earlier, the incident had happened in the year 2012 and the punishment under Section 6 of the POCSO Act, 2012 before the amendment coming into effect, was only 10 years and therefore, the prosecution had altered the offence into Section 376 IPC as per the amended Act, which came into effect only on 03.02.2013. It is needless to mention here that any provision, which increases the penalty cannot be allowed to operate retrospectively, when the commission of offence had occurred as per the existing law and

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therefore, the provisions of the Criminal Law Amendment Act, 2013 cannot be invoked for the purpose of enhancement of the punishment. In our considered opinion, the punishment awarded under the amended Section 376 IPC is hit by Article 20 of the Constitution of India. The Trial Court miserably failed to look into the punishment that can be awarded before the Criminal Law (Amendment) Act, 2013, as Indian Penal Code is a substantive law, which cannot be given retrospective operation unless made retrospective either expressly or by necessary intendment.

18. The charge against the appellant was that he had committed the offence of aggravated penetrative assault, for which he could be tried under Section 6 of the POCSO Act, 2012 that prescribed the punishment of rigorous punishment not less than ten years, which may extend to imprisonment for life and fine as per Old Act. However, as per the Criminal Law (Amendment) Act, 2013, the minimum sentence shall be not less than seven years that may extend to imprisonment for life. The Trial Court, irrespective of the fact that the amendment came into effect after the incident, had proceeded to award rigorous imprisonment for twenty five years and to pay a fine of Rs.1,00,000/-, in default to undergo one year imprisonment, which is bad in the eye of law and cannot sustain, requiring modification in the award of

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punishment.

19. In the result, this Criminal Appeal is allowed in part and the judgment dated 27.04.2022 and the order of sentence dated 29.04.2022, passed by the Special Judge (POCSO), East Khasi Hills District, Shillong in Special (POCSO) Case No.10/2013 alone is modified to the extent that the Appellant shall undergo Rigorous Imprisonment for ten years instead of twenty five years as imposed by the Court below. Except the reduction in the quantum of punishment, the rest of the judgment of the Trial Court, including the fine amount, payment of compensation, etc., holds good in all other respects. 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.

Sd/-
(W.Diengdoh)
Judge

Sd/-
(S.Vaidyanathan)
Chief Justice

PRE-DELIVERY JUDGMENT IN Crl.A.No.13/2023

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