GAHC030000172024

THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : CRL.A(J)/2/2024

Sh. Laldingluaia
Hmar Veng, Thingdawl, Mizoram

VERSUS

State of Mizoram and Anr.
Aizawl2:Smt. Irene Lalengzuali
w/o K.Lalrinliana
Hmar Veng
Thingdaw

Advocate for the Petitioner :

Advocate for the Respondent : P.P./Addl.PP, Mizoram for R1

BEFORE
HONOURABLE MR. JUSTICE MICHAEL ZOTHANKHUMA
HONOURABLE MRS. JUSTICE MARLI VANKUNG

Date of hearing & Judgment : 20.11.2024

J U D G M E N T & O R D E R (O R A L)

(Michael Zothankhuma, J)

Heard Mrs. Emily L. Chhangte, learned Amicus Curiae. Also heard Ms. Vanneihsiami, learned Addl. Public Prosecutor and Mr. C. Tlanthianghlima, learned Legal Aid Counsel for the respondent No. 2.

2. The challenge made in this appeal is to the impugned Judgment & Order dated 25.07.2023 passed by the Court of Addl. District & Sessions Judge-cum-Judge Fast Track Court, Kolasib in Crl.Trl. No. 209/2022 (SR No. 13/2022), by which the appellant has been convicted under Section 4 of the POCSO Act, 2012 and vide Order dated 07.09.2023 sentenced to undergo Rigorous Imprisonment for 20 years and to pay a fine of Rs. 10,000/-, in default (i/d) of fine, to further undergo Rigorous Imprisonment for 1 month.

3. The prosecution case in brief is that an FIR dated 23.12.2021 was submitted by the informant (PW-1), the mother of the victim, who stated that on the evening of 23.12.2021 at around 3:30 p.m, her 6 year old daughter visited the house of the appellant and came home with a frightened look on her face. On questioning her, her daughter told her that the appellant had inserted his private parts into her private parts and told her not to tell her mother about it or else she would be scolded badly.

4. Pursuant to the FIR, KLB P.S Case No. 71/2021 dated 23.12.2021 under Section 4 of the POCSO Act was registered. In pursuance to the said Police case, the victim was examined and the place of occurrence was visited and a sketch map was drawn. The victim was produced before the Kolasib District Hospital for medical examination and the appellant was apprehended from Hmar Veng, Thingdawl. The victim's statement was also recorded under Section 164 Cr.PC. After examining the witnesses, the Investigating Officer submitted a Charge-sheet, having found a prima facie case under Section 4 of the POCSO Act against the appellant. The case was then committed before the Court of the Addl. Sessions Judge, Kolasib for disposal.

5. Charge under Section 4 of the POCSO Act was framed against the appellant, to which the appellant pleaded not guilty and claimed to be tried.

6. In the trial proceedings, 7 (seven) Prosecution Witnesses were examined alongwith 1 (one) Defence Witness. Thereafter, the appellant was examined under Section 313 Cr.PC, during which he pleaded that he was innocent of the crime. The learned Trial Court however came to a finding that the appellant was guilty of having committed the offence under Section 4 of the POCSO Act. The appellant was thereafter sentenced under Section 4 of the POCSO Act, to undergo Rigorous Imprisonment for 20 years and to pay a fine of Rs. 10,000/-, in default to undergo Rigorous Imprisonment for 1 month.

7. Being aggrieved, the appellant has put the impugned judgment & order to challenge, on the ground that the learned Trial Court did not satisfy itself as to whether the victim child was tutored or not, prior to recording her evidence. The learned Amicus Curiae submits that unless the satisfaction of the Trial Judge is recorded, with regard to the capability of the victim child to understand questions put to her and that the victim child was capable of giving rational answers, the conviction of the appellant, solely on the basis of the evidence of the child witness was not sustainable.

8. She further submits that the corroborative evidence relied upon by the learned Trial Court is misplaced, inasmuch as, the medical report and the evidence given by the Medical Officer (PW-3) has not clarified as to whether the hymen of the victim had been ruptured or not. Further, no specific finding has been made by the Medical Officer with regard to whether there was any bruise/laceration/swelling etc. of the external genitalia of the victim girl.

9. The learned Amicus Curiae submits that when the charge framed against the appellant has been made only under Section 4 of the POCSO Act, without specifying whether it should be under Section 4 (1) or 4 (2), which carries different minimum sentences, the sentence imposed upon the appellant under Section 4 (2), without convicting the appellant under Section 4 (2) was not justified. Further, as the learned Trial Court has mentioned only Section 4 in the impugned Judgment & Order, the learned Trial Court could not have passed the sentence provided under Section 4 (2) of the POCSO Act. She accordingly prays that the impugned Judgment & Order should be set aside.

10. The learned Addl. Public Prosecutor and learned Legal Aid Counsel for the respondent No. 2, both admit that there has been a mistake committed by the learned Trial Court in not framing a specific charge under Section 4 (2) of the POCSO Act. They accordingly submit that the conviction of the appellant under Section 4, without specifying whether it is relatable to Section 4 (1) or 4 (2) was not proper. They also submit that the sentence imposed upon the appellant under Section 4 (2), in the absence of any framing of charge under Section 4 (2) and in the absence of conviction under Section 4 (2), was not sustainable.

11. We have heard the learned counsels for the parties.

12. Section 4 of the POCSO Act, 2012 states as follows:-

> "***4. Punishment for penetrative sexual assault***.
>
> *[(1)] Whoever commits penetrative sexual assault shall be punished with imprisonment of either description for a term which shall not be less than 10 [ten years] but which may extend to imprisonment for life, and shall also be liable to fine.*

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

(3) 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.]"

13. As can be seen from Section 4 (1), the minimum sentence that can be imposed is imprisonment for a term which shall not be less than 10 (ten) years, but which may extend to imprisonment for life and shall also be liable to fine. The minimum period of imprisonment under Section 4 (2), on the other hand, is for a term which shall not be less than twenty years, but which may extend to imprisonment for life, and shall also be liable to fine.

14. In the present case, charge has been framed only under Section 4 of the POCSO Act, without specifying the charge to be under 4 (1) or 4 (2) of the POCSO Act.

15. The impugned judgment & order convicting the appellant, also does not specifically state that the appellant has been convicted under Section 4 (1) or 4 (2) of the POCSO Act, although, it can be implied that the appellant was convicted under Section 4 of the POCSO Act by the learned Trial Court, as per paragraph No. 25 of the impugned Judgment & Order, which is as follows:-

"25. The accused, Laldingluaia (59) S/o Thangkunga (L) of Hmar Veng, Thingdawl is accordingly convicted for committing penetrative sexual assault for which he will be liable to receive sentence Under Section 4 of Protection of Children from Sexual Offences Act, 2012."

16. The sentence of the appellant has been made under Section 4, vide Order dated 07.09.2022, for a minimum period of 20 years, though the same can be done only in terms of Section 4 (2) of the POCSO Act. As the charge was framed only under Section 4 of the POCSO Act, we are of the view that the appellant could not have been sentenced for a term of 20 years under Section 4 of the POCSO Act, as the same can be done only in terms of Section 4 (2). Due to the above reasons, it appears that the appellant was not given a proper opportunity to defend himself, with regard to the charge and sentence apparently given under Section 4 (2) of the POCSO Act.

17. Section 211 (1) Cr.PC provides that every charge under the Cr.PC shall state the offence with which the accused is charged. Section 211 (2) states that if the law which creates the offence gives it any specific name, the offence may be described in the charge by that name only. Section 211 (4) Cr.PC provides that the law and Section of law against which the offence is said to have been committed shall be mentioned in the charge.

18. However, in the present case, the charge framed by the learned Trial Court only speaks of Section 4 and has not specifically mentioned Section 4 (2) of the POCSO Act, 2012 in the charge.

19. In the case of ***Nanak Chand Vs. State of Punjab,*** reported in ***1955 SCC Online SC 52***, the Supreme Court has held that the omission to frame a charge is a grave defect and it may be so serious that by itself it would vitiate a trial and render it illegal, prejudice to the accused being taken for granted. It further held that the real question is not whether a matter is expressed positively or is stated in negative terms but whether disregard of a

particular provision amounts to 'substantial' denial of a trial as contemplated by the Code and understood by the comprehensive expression 'natural justice'. It further held that in adjudging the question of whether the accused was prejudiced, the fact that the absence of a charge, or a substantial mistake in it, is a serious lacuna will naturally operate to the benefit of the accused and if there is any reasonable and substantial doubt about whether he was, or was reasonably likely to have been, misled in the circumstances of any particular case, he is as much entitled to the benefit of it here as elsewhere; but if, on a careful consideration of all the facts, prejudice, or a reasonable and substantial likelihood of it, does not misle the accused, the conviction must stand. In the present case, due to the absence of a specific charge, i.e., Section 4 (1) or 4 (2) of the POCSO Act, at the time of framing of charge stage and thereafter, there is a likelihood of the appellant being misled into believing that the charge has been framed under Section 4 (1) also. Further, when there is a serious lacuna which could cause prejudice to the appellant, the benefit of doubt should be given to the accused, as he could have been sentenced for a minimum of 10 years under Section 4 (1) of the POCSO Act.

20. The above being said, before recording the evidence of the 6 year old victim, the learned Trial Court did not put any preliminary questions to the child, to satisfy itself as to whether the victim child had the capacity/capability to understand the questions put to her and as to whether she could give rational answers to the same. This was a necessity, so as to take away any doubt, with regard to the understanding capacity of the victim child and to do away with any doubt regarding the child having being tutored, inasmuch as, the evidence of the Medical Officer does not inspire confidence. The medical report findings in respect of the genital examination of the victim girl, in relation to findings Nos.

5 (c) & 5 (d) are as follows:-

"*5. GENITAL EXAMINATION:*

(c). Brusing/Laceration of external genitalin: Labia looks congested.

(d). Hymen: Does not seem to be intact."

21. In the case of **Pradeep vs. State of *Haryana*** reported in ***AIR* 2023 SC 3245,** the Supreme Court has held that the proviso to Section 4(1) of the Oaths Act provides that unless satisfaction as required by the proviso is recorded, an oath cannot be administered to a child witness below 12 years. However, in view of Section 118 of the Evidence Act, the Trial Judge was under a duty to record his opinion that the child was able to understand the questions put to her. The Trial Judge must also record his opinion that the child witness understands the duty of speaking the truth and state why he is of the opinion that the child understands the duty of speaking the truth. The Supreme Court further held that before recording the evidence of a minor, it is the duty of a Judicial Officer to ask preliminary questions to him/her, with a view to ascertain whether the minor can understand the questions put to him/her and is in a position to give rational answers.

Para 9 of the judgment in ***Pradeep (Supra)*** is reproduced below as follows:-

"*9. Before recording evidence of a minor, it is the duty of a Judicial Officer to ask preliminary questions to him with a view to ascertain whether*

the minor can understand the questions put to him and is in a position to give rational answers. The Judge must be satisfied that the minor is able to understand the questions and respond to them and understands the importance of speaking the truth. Therefore, the role of the Judge who records the evidence is very crucial. He has to make a proper preliminary examination of the minor by putting appropriate questions to ascertain whether the minor is capable of understanding the questions put to him and is able to give rational answers. It is advisable to record the preliminary questions and answers so that the Appellate Court can go into the correctness of the opinion of the Trial Court."

22. In view of the above reasons, we are of the view that in this particular case, the evidence of the victim child cannot be the sole basis for convicting the appellant, unless the safeguards mentioned above are undertaken. We are of the view that the matter should be re-considered by the learned Trial Court, after following all the requirements/procedures required to be followed in law.

23. Accordingly, the impugned Judgment & Order dated 25.07.2023 passed by the learned Trial Court in Crl.Trl. No. 209/2022 and the Sentence Order dated 07.09.2023 are accordingly set aside.

24. The case is remanded back to the learned Trial Court for taking up the proceedings from the state of framing of charge, considering the seriousness of the case.

25. Send back the LCR.

26. In appreciation of the assistance provided by the learned Amicus Curiae,

her fee of Rs. 8,500/- is to be provided by the Mizoram State Legal Services Authority. The fee of the learned Legal Aid Counsel should be given to him as per the prescribed norms.

JUDGE **JUDGE**

Comparing Assistant