Serial No. 01
Supplementary List

HIGH COURT OF MEGHALAYA
AT SHILLONG

Crl.A. No. 29 of 2019

Date of order: 30.03.2022

Morningstar Nongsiej vs. State of Meghalaya

Coram:
Hon'ble Mr. Justice Sanjib Banerjee, Chief Justice
Hon'ble Mr. Justice W. Diengdoh, Judge

Appearance:

For the Appellant : Dr. N. Mozika, Legal Aid Counsel with Ms. L. Jana, Adv.

For the Respondent : Mr. S. Sengupta, Addl.PP

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

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

JUDGMENT: (per the Hon'ble, the Chief Justice) (Oral)

The appeal arises out of a judgment of conviction passed on September 28, 2018 and the consequential sentence under Section 4 of the Protection of Children from Sexual Offences Act, 2012 for the appellant to undergo imprisonment for a period of 10 years and to pay a fine of Rs. 10,000/-. In default of the payment of the fine, the appellant is to suffer a further term of imprisonment for a year.

2. According to the appellant, at the highest, the case may be one of sexual assault without there being any penetration, particularly in view of

the statement of the victim and how the victim described the incident to a relative. The appellant says that there was a delay of about a year in the matter being reported. As to the appellant's confessional statement recorded under Section 164 of the Code of Criminal Procedure, 1973, the appellant submits that the same should be read in the context of the actual complaint by the victim herself.

3. The first information report came to be lodged on July 29, 2014 upon the mother of the victim, who was eight years old at the time of the incident, being informed of the incident by a cousin of the victim in whom the victim confided. The relevant cousin informed the victim's mother of the incident on July 27, 2014. It is not clear as to when the incident happened, except that, according to the victim, it was on a Sunday, several months before she reported the matter to her cousin and it happened at Nongstoin market.

4. According to the victim's statement made under Section 164 of the Code, on that particular Sunday, she was asked by her mother to buy *kwai* (betel nut), whereupon she went to the market and bought *kwai* and, while returning home, a man who was sitting on the road called out to her. The victim claimed that she recognised the face of the man and answered his call as she perceived that he also wanted betel nut. The

victim recounted that when she went near the man, he asked her to enter a shop where he made her lie down on a bed, removed her panties while the man also took off his trousers and underpants. In the exact words of the victim, what happened thereafter, was that "He then took out his penis & inserted *(it)* inside my private parts." The girl said that she was in pain and, even after substantial passage of time, she still felt some pain. The victim narrated that she felt scared as the offender had threatened to kill her if she reported the matter to anyone. She recalled that after some time she told Lari, her aunt's daughter, about the incident.

5. The appellant submits that the above version of the victim was not maintained by her in course of her oral evidence at the trial. The victim was examined as PW3 and the material part of her statement in her examination-in-chief was as follows:

> "…on the date of incidence *(sic, incident)* the date, month and year I could not recollect as of now but I remember it was a Sunday, my mother sent me to buy betel nut, when I returned from buying the betel nut, the accused person called me inside one shop. The accused was alone in the said shop, I went as I thought that the accused want me to buy betel nut for him, but instead he asked me to take out my underwear but I did not obliged to his demand. Then he took it off by himself. He asked me to opened my mouth I did not open, he then pulled down his trouser and underwear and he came on top of me after some times he let me go and threatened to kill me if I dare to disclosed about the incidence to anyone. After that I went back home I did not dare to informed my mother as I was scared of the accused person. After a lapse of few months I told my cousin sister whom we use

to call Lari that one person came on top of me and Lari disclosed the same to my mother…"

6. The appellant next refers to the deposition of the relevant cousin as PW4. According to such cousin, the victim told her that a man once called her into a shop and then asked her to open her underwear. According to the witness, the victim informed her that upon the victim not doing so, the offender opened her underwear by himself and he also took off his trousers and underwear "and then went on top of her." The appellant suggests that in the light of both the victim and the person in whom the victim first confided indicating that the appellant only came on top of the victim and no more, it may be a case of sexual assault under Section 7 of the Act and attracting a punishment of not more than five years, together with fine, under Section 8 of the Act.

7. The appellant also asserts that the medical examiner, who examined the victim shortly after the complaint was lodged, reported that he found the victim's hymen torn and perceived that the victim could have had sexual intercourse; but the doctor did not find any sign of injury and, in course of his cross-examination, he accepted that it was possible for the hymen to be torn other than as a result of sexual intercourse. The appellant is critical of the manner in which the questions were put to the appellant in course of the court summarising the oral evidence adduced

under Section 313 of the Code. The appellant submits that the appellant's response to the second and sixth questions at such stage must be seen in the backdrop of the questions put to him and not as any independent admission on the appellant's part of having committed rape or indulged in penetrative sexual assault on the victim. It is in such vein that the appellant seeks to explain away as clear a statement as attributed to him and recorded under Section 164 of the Code that "I raped her."

8. By the judgment and order impugned dated September 28, 2018, the trial court referred to the entire evidence, including the deposition of the victim in court and her statement recorded under Section 164 of the Code, and perceived that a case of rape had been made out and that the appellant herein had unequivocally admitted to having committed the offence.

9. At the time that the appellant rendered his statement under Section 164 of the Code, he was more than 25 years old. Though it must be accepted that a lot is lost in course of translation, when no objection as to such recording was taken in course of the trial and it was accepted by the appellant that his statement amounted to the appellant having said that he had raped the victim, the connotation of "rape" would be seen to be understood by the appellant at the time of making the admission. In

any event, the minor victim, then aged about nine years, clearly and categorically described the incident in course of her statement recorded under Section 164 of the Code; and, there could not have been a more lucid description of penetrative sexual assault than as narrated by her. The later statement of the victim recorded in course of her deposition at the trial must be seen in the milieu of how a woman in this country, particularly a girl child, would be intimidated in the foreign and suffocating atmosphere of a court and in the presence of rank strangers to describe how she had been violated. The expression, "came on top of me" must be seen to be an euphemism for the offender having violated her in the sense of having committed penetrative sexual assault.

10. The situation may be better understood in the context of how a girl child in this country grows up by being made ashamed of her body and being accused of not keeping her body to herself even if she is subjected to an undesirably aggressive touch by a man. In the strange atmosphere of a court room, the girl child may have been inhibited in being more explicit than she was in course of her one-on-one with the lady magistrate before whom she recorded her statement under Section 164 of the Code. It is in the same sense that the statement of the cousin, who was called as PW4, must also be read.

11. In view of the unambiguous admission of the appellant that he had raped the victim and, in particular, his answers to the second and sixth questions at the stage of being examined under Section 313 of the Code, there is little room for doubt as to the nature of the offence committed by the appellant. It may do well, at this stage to notice the second and sixth questions put to the appellant by the trial court and the identical answers thereto:

> "Q2. It transpires from the evidence of P.w – 1 that her minor victim daughter was rape at Nongstoin market inside one shop by you. What do you have to say?
>
> Ans. It is fact"
>
> "Q6. It transpires from the evidence of Pw-3 (victim) that inside the shop you asked her to take out her under wear but she did not obliged to yoyur demand and you took if off by yourself and also pulled down your trousers and unde wear and came on top of her after sometime you let her go and threatened to kill her if she disclose the incident to anyone. What do you have to say?
>
> Ans. It is a fact"

12. The trial court referred to the oral evidence in great detail and dwelt on the principal plank of the defence argument that it was a case of mere sexual assault without any penetration. The trial court noticed how the victim described the incident in her statement recorded under Section 164 of the Code and the simple and categorical admission of the appellant herein in his statement voluntarily made under Section 164 of the Code.

The trial court appropriately inferred that there was an assertion of penetrative sexual assault by the victim and an independent admission of the commission of the offence of rape by the accused before the trial court and duly arrived at the reasoned finding that the case of penetrative sexual assault had been made out and proved beyond reasonable doubt against the appellant herein.

13. The evidence that panned out was appreciated in the right perspective by the trial court and neither the judgment of conviction nor the sentence pronounced thereupon calls for any interference. Accordingly Crl. A No. 29 of 2019 is dismissed.

14. Let a copy of this judgment be immediately made over to the appellant free of cost.

(W. Diengdoh)
Judge

(Sanjib Banerjee)
Chief Justice

Meghalaya
30.03.2022
"Sylvana PS"