



Serial No. 01
Regular List

HIGH COURT OF MEGHALAYA
AT SHILLONG

Crl.A. No. 21 of 2022

Date of Decision: 14.10.2024

Shri. Ajaybirth Marak,
S/o Gopinath Sangma,
R/o Gurudubi Village, P.O & P.S.
Boko, Meghalaya.

::::: **Appellant**

-Vs-

1. The State of Meghalaya represented
by Secretary, Department of Home &
Police Affairs, Meghalaya, Shillong.
2. The Superintendent of Police,
East Garo Hills District,
Williamnagar, Meghalaya.
3. Investigating Officer,
Williamnagar, P.S, East Garo Hills
District, Meghalaya.
4. Officer-In-Charge,
Williamnagar, P.S, East Garo Hills
District, Meghalaya.

::::: **Respondents**

Coram:

Hon'ble Mr. Justice W. Diengdoh, Judge



Appearance:

For the Petitioner/Appellant(s) : Mr. P.T. Sangma, Adv.
 For the Respondent(s) : Mr. K. Khan, PP.
 Mr. S. Sengupta, Addl. PP.
 Mr. A.H. Kharwanlang, Addl. Sr. GA.

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

JUDGMENT AND ORDER

1. An undated FIR was filed by the mother of a minor girl, wherein was narrated an incident which allegedly took place on 24.01.2013 at about 8:00 pm or so accusing the appellant herein that he had molested the said minor girl at her residence.

2. The said FIR addressed to the Officer-In-Charge, Williamnagar Women Police Station was immediately registered on 24.01.2013 itself at about 9:20 pm as Women P.S Case No. 01(01) 2013 under Section 354 IPC and investigation was launched.

3. In due course, the Investigating Officer (I/O) after completion of the investigation, filed the final report under Section 173 Cr.P.C. and in the



charge sheet, the brief story of the prosecution's case was noted to say that on 24.01.2013, the appellant had molested the said minor girl at her residence and accordingly, in course of investigation, the minor girl was taken to the hospital for medical examination which revealed that there are some scratch marks on the right side of her breast. The appellant was apprehended and, on his being, arrested, the I/O then proceeded to examine relevant witnesses, including recording of the statement of the complainant and the survivor. Eventually, the I/O found that a prima facie case under Section 354 IPC r/w Section 10 of the POCSO Act, 2012 is found well established against the appellant/accused person and he was directed to stand trial.

4. The learned Special Judge (POCSO), Williamnagar, East Garo Hills District then proceeded with the trial in the case, the same being numbered as Special (POCSO) Case No. 3 of 2018. After charges were framed, the learned Trial Court then examined as many as 9(nine) prosecution's witnesses. On the conclusion of the recording of the deposition of the witnesses, the court then recorded the statement of the appellant under Section 313 Cr.P.C. Finally, after hearing the argument of the parties, the



learned Trial Court came to the conclusion that the charges have been made out against the accused person/appellant and vide judgment and order dated 31.05.2022, has accordingly convicted him under Section 10 POCSO Act, imposing a concurrent sentence of 5(five) years with fine of ₹ 10,000/- (Rupees ten thousand) in default thereof, to undergo a further simple imprisonment of two months.

5. This appeal filed under Section 374(2) Cr.P.C. is to challenge the legality of such impugned judgment and order dated 31.05.2022 preferred by the accused person, Shri Ajaybirth Marak.

6. Heard Mr. P.T. Sangma, learned counsel for the appellant, who has submitted that admittedly, the appellant is known to the family of the survivor being a frequent visitor of their home. On the day of the alleged incident, he was invited for a birthday party and accordingly, he went to the house for such purpose.

7. It is the further submission of the learned counsel that on that day, after having dinner, the appellant was sitting in the sitting room and the survivor was there, she did sit on his lap as he used to treat her as his



daughter, but he did not commit any offensive act. In fact, there is no malafide intention or mens rea as far as he is concerned.

8. As to the evidence of the prosecution's witnesses, the learned counsel has submitted that the first objection is to the deposition of the complainant, who as PW-1 has admitted that she did not remember what was written in the FIR as her neighbour was helping her write the same, but she had only signed in the said FIR. This according to the learned counsel is to be taken seriously as the filing of the FIR was not proper.

9. The learned counsel has also submitted that the version of the complainant's evidence as PW-1 has to be tested as to its truthfulness when she stated that when she came to the sitting room, she saw the appellant committing the crime, after which he stopped the act, however, in her cross-examination, she has stated that she peeped from her room and she saw the appellant keeping her daughter in his lap and touching her breast, the contradiction in such statement can only lead to a presumption that the PW-1 has not been able to state the actual facts.



10. Again, on the evidence of the Doctor who has examined the survivor soon after the incident has happened in which she has found that there was a small scratch mark on the breast of the survivor, the learned counsel has submitted that this Doctor who was examined as PW-8 has admitted in her cross-examination that she does not know who has made such scratch mark. Therefore, it may not have been made by the appellant, submits the learned counsel.

11. The learned counsel has referred to the statement of the appellant made under Section 313 Cr.P.C to say that the appellant has not made any statement to discriminate himself, rather he has denied any suggestion that he was guilty of the offences alleged.

12. It is the submission of the learned counsel that the learned Trial Judge have not appreciated the composite evidence to notice the contradiction and variation found in the testimonies of the witnesses and since no incriminating materials are found against the appellant, his guilt not having been proved beyond reasonable doubt, the learned Trial Court has



therefore come to a wrong conclusion by holding the appellant guilty of the alleged offence.

13. It is therefore prayed that the impugned judgment and order may be set aside and quashed and the appellant be acquitted and released from custody forthwith.

14. Per contra, Mr. K. Khan, learned PP appearing for the State respondents, while defending the impugned judgment and order, has submitted that the prosecution has been able to prove the charges beyond reasonable doubt, when in cases of these kind involving sexual assault, the testimony of the survivor is very material, but in this case, not only has the survivor been able to bring home the fact as regard the guilt of the appellant, even the complainant who is her mother has also confirmed the fact of the incident, since she was an eye witness to the same.

15. The learned PP has further submitted that the survivor herself has been consistent in her testimony as to what actually happened on the date of the incident, narrating the events as it happened, before the police with her statement recorded under Section 161 Cr.P.C and also her statement made



under Section 164 and finally, when she deposed as PW-2 before the Trial Court. The defence or rather the appellant have not been able to dislodge or shake the evidence of the survivor, who has also confirmed that her mother (PW-1) has also witnessed the appellant touching her breast inside her sweater. There could be no other clinching evidence than this to prove the guilt of the appellant, submits the learned PP, and as such, the impugned judgment and order cannot be faulted, the same deserves to be upheld.

16. This Court on perusal of the relevant records and the impugned judgment and order, would notice that the allegation against the appellant is that of aggravated sexual assault and outraging the modesty of a woman. However, since the learned Special Judge had considered it fit to proceed with the trial focussing mainly on the aspect of aggravated sexual assault on a minor girl, the relevant provision under the POCSO Act was taken into consideration in course of the trial, especially when the sentence was pronounced, wherein Section 42 of the POCSO Act was taken recourse to impose the much heavier punishment as far as the period of imprisonment is concerned.



17. However, this Court cannot, but notice that when the charges were framed, the same was under two heads, one under Section 354 IPC and the other under Section 10 of the POCSO Act. Section 10 of the POCSO Act is the prescribed punishment for aggravated sexual assault and therefore, cannot be the charged section. On an overall analysis of the facts and circumstances of this case, particularly considering the fact that the survivor involved is a child of 8(eight) years old, the appropriate section under which the accused person/appellant ought to have been charged should have been sub-Section (m) of Section 9 of the POCSO Act which reads as follows:

“9. Aggravated Sexual Assault. – (a)...

(m) whoever commits sexual assault on a child below twelve years; or ...”

18. Accordingly, this Court hereby alters the charge by replacing Section 10 in the original charge sheet with Section 9(m) POCSO Act. However, no additional or further evidence is required in this regard as the evidence on record is sufficient to prove a charge under Section 9(m) of the POCSO Act.



19. Coming back to the appreciation of evidence in this case, the fact that the appellant had committed the offence as alleged, has been proven by the testimony of the survivor herself when she has stated before the court that “2. *After sometime, accused person, Ajaybirth Ch. Marak took me in his lap and embraced me and put his hand inside my clothes from the top and touched my breast...*” This evidence was corroborated by the complainant who is her mother when as PW-1, in her evidence, she has stated that “1. *...I was in my bedroom, accused person Ajaybirth Ch. Marak was sitting in the sitting room and he took my minor daughter, then aged about 8 years, who was in the sitting room, in his lap and touched her breast inappropriately. Ajaybirth Ch. Marak pushed his hand inside the cloth while touching her breast. 2. When I came to the sitting room, I saw the accused person committing the said crime and he suddenly stopped and I scolded him...*”

20. The other aspect of the matter is the medical report of the survivor, wherein, on being sent for medical examination, the doctor who had examined her when she appeared at the witness box as PW-8 has deposed that on examination of the survivor, she found finger nails scratches on the left side of the breast of about 3 cm in length. In her cross-



examination, she has further admitted that “*the scratch mark which I found on the victim was a fresh scratch mark*”. Of course, this witness is not certain as to who had made the scratch mark on the victim. Even the survivor has not said anything about being scratched by the accused or any other person. Even if this piece of evidence is not given much credence, suffice it say that the overwhelming evidence to clinch the case of the prosecution is the testimony of the survivor herself.

21. It is well settled that the testimony of a child witnessed under the POCSO Act, if found to be worthy of credence and is reliable, would requires no corroboration for the court to convict the accused on such testimony. In the case of ***Ganesan v. State represented by its Inspector of Police reported in (2020) 10 SCC 573***, para 10.1, the Hon’ble Supreme Court has observed as follows:

“10.1. Whether, in the case involving sexual harassment, molestation, etc., can there be conviction on the sole evidence of the prosecutrix, in Vijay, (2010) 8 SCC 191, it is observed in paras 9 to 14 as under: (SCC pp. 195-98)

“9. In State of Maharashtra v. Chandraprakash Kewalchand Jain, (1990) 1 SCC 550, this Court held that



a woman, who is the victim of sexual assault, is not an accomplice to the crime but is a victim of another person's lust and, therefore, her evidence need not be tested with the same amount of suspicion as that of an accomplice. The Court observed as under: (SCC p. 559, para 16)

"16. A prosecutrix of a sex offence cannot be put on a par with an accomplice. She is in fact a victim of the crime. The Evidence Act nowhere says that her evidence cannot be accepted unless it is corroborated in material particulars. She is undoubtedly a competent witness under Section 118 and her evidence must receive the same weight as is attached to an injured in cases of physical violence. The same degree of care and caution must attach in the evaluation of her evidence as in the case of an injured complainant or witness and no more. What is necessary is that the court must be alive to and conscious of the fact that it is dealing with the evidence of a person who is interested in the outcome of the charge levelled by her. If the court keeps this in mind and feels satisfied that it can act on the evidence of the prosecutrix, there is no rule of law or practice incorporated in the Evidence Act similar to Illustration (b) to Section 114 which requires it to look for corroboration. If for some reason the court is hesitant to place implicit reliance on the testimony of the prosecutrix it may look for evidence which may lend assurance to her testimony short of corroboration required in the case of an accomplice. The nature of evidence required to lend assurance to the testimony of the prosecutrix must necessarily depend on the facts and circumstances of each case. But if a prosecutrix is an adult and of full understanding the court is entitled to base a conviction on her evidence unless the same is shown to be infirm and not trustworthy. If the totality of the circumstances



appearing on the record of the case disclose that the prosecutrix does not have a strong motive to falsely involve the person charged, the court should ordinarily have no hesitation in accepting her evidence."

10. In State of U.P. v. Pappu, (2005) 3 SCC 594, this Court held that even in a case where it is shown that the girl is a girl of easy virtue or a girl habituated to sexual intercourse, it may not be a ground to absolve the accused from the charge of rape. It has to be established that there was consent by her for that particular occasion. Absence of injury on the prosecutrix may not be a factor that leads the court to absolve the accused. This Court further held that there can be conviction on the sole testimony of the prosecutrix and in case, the court is not satisfied with the version of the prosecutrix, it can seek other evidence, direct or circumstantial, by which it may get assurance of her testimony. The Court held as under: (SCC p. 597, para 12)

"12. It is well settled that a prosecutrix complaining of having been a victim of the offence of rape is not an accomplice after the crime. There is no rule of law that her testimony cannot be acted upon without corroboration in material particulars. She stands at a higher pedestal than an injured witness. In the latter case, there is injury on the physical form, while in the former it is both physical as well as psychological and emotional. However, if the court of facts finds it difficult to accept the version of the prosecutrix on its face value, it may search for evidence, direct or circumstantial, which would lend assurance to her testimony. Assurance, short of corroboration as understood in the context of an accomplice, would do."



11. *In State of Punjab v. Gurmit Singh*, (1996) 2 SCC 384, this Court held that in cases involving sexual harassment, molestation, etc. the court is dutybound to deal with such cases with utmost sensitivity. Minor contradictions or insignificant discrepancies in the statement of a prosecutrix should not be a ground for throwing out an otherwise reliable prosecution case. Evidence of the victim of sexual assault is enough for conviction and it does not require any corroboration unless there are compelling reasons for seeking corroboration. The court may look for some assurances of her statement to satisfy judicial conscience. The statement of the prosecutrix is more reliable than that of an injured witness as she is not an accomplice. The Court further held that the delay in filing FIR for sexual offence may not be even properly explained, but if found natural, the accused cannot be given any benefit thereof. The Court observed as under: (SCC pp. 39496 & 403, paras 8 & 21)

"8. ... The court overlooked the situation in which a poor helpless minor girl had found herself in the company of three desperate young men who were threatening her and preventing her from raising any alarm. Again, if the investigating officer did not conduct the investigation properly or was negligent in not being able to trace out the driver or the car, how can that become a ground to discredit the testimony of the prosecutrix? The prosecutrix had no control over the investigating agency and the negligence of an investigating officer could not affect the credibility of the statement of the prosecutrix. ... The courts must, while evaluating evidence, remain alive to the fact that in a case of rape, no selfrespecting woman



would come forward in a court just to make a humiliating statement against her honour such as is involved in the commission of rape on her. In cases involving sexual molestation, supposed considerations which have no material effect on the veracity of the prosecution case or even discrepancies in the statement of the prosecutrix should not, unless the discrepancies are such which are of fatal nature, be allowed to throw out an otherwise reliable prosecution case. ... Seeking corroboration of her statement before relying upon the same, as a rule, in such cases amounts to adding insult to injury. ... 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. ...

* * *

21. ... The courts should examine the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the statement of the prosecutrix, which are not of a fatal nature, to throw out an otherwise reliable prosecution case. If evidence of the prosecutrix inspires confidence, it must be relied upon without seeking corroboration of her statement in material particulars. If for some reason the court finds it difficult to place implicit reliance on her testimony, it may look for evidence which may lend assurance to her testimony, short of corroboration required in the case of an accomplice. The testimony of the prosecutrix must be appreciated in the background of the entire case and the trial court must be alive to its



responsibility and be sensitive while dealing with cases involving sexual molestations."

(emphasis in original)

12. In *State of Orissa v. Thakara Besra*, (2002) 9 SCC 86, this Court held that rape is not mere physical assault, rather it often distracts (sic destroys) the whole personality of the victim. The rapist degrades the very soul of the helpless female and, therefore, the testimony of the prosecutrix must be appreciated in the background of the entire case and in such cases, nonexamination even of other witnesses may not be a serious infirmity in the prosecution case, particularly where the witnesses had not seen the commission of the offence.

13. In *State of H.P. v. Raghubir Singh*, (1993) 2 SCC 622, this Court held that there is no legal compulsion to look for any other evidence to corroborate the evidence of the prosecutrix before recording an order of conviction. Evidence has to be weighed and not counted. Conviction can be recorded on the sole testimony of the prosecutrix, if her evidence inspires confidence and there is absence of circumstances which militate against her veracity. A similar view has been reiterated by this Court in *Wahid Khan v. State of M.P.*, (2010) 2 SCC 9 placing reliance on an earlier judgment in *Rameshwar v. State of Rajasthan*, AIR 1952 SC 54.

14. Thus, the law that emerges on the issue is to the effect that the statement of the prosecutrix, if found to be worthy of credence and reliable, requires no corroboration. The court may convict the accused on the sole testimony of the prosecutrix."



22. In view of the above findings and observations, this Court is convinced that the appellant has indeed committed the offence as alleged and under the circumstances, the sentence imposed by the learned Trial Court cannot be upset.

23. This appeal is accordingly dismissed as devoid of merits.

24. Matter disposed of. No costs.

25. Registry is directed to send back the Trial Court records.

Judge