

Serial No. 03
Supplementary
List

HIGH COURT OF MEGHALAYA
AT SHILLONG

Crl.Petn. No. 63 of 2021

Date of Decision: 23.03.2022

Shri. Skhemborlang Suting & Anr. Vs. State of Meghalaya & Anr.

Coram:

Hon'ble Mr. Justice W. Diengdoh, Judge

Appearance:

For the Petitioner/Appellant(s) :

Mr. K. Ch. Gautam, Adv.

For the Respondent(s) :

Mr. K. Khan, Sr. PP. with

Mr. S. Sengupta, Addl. Sr. GA.

Mr. H. Kharmih, Addl. Sr. GA.

Mr. A. H. Kharwanlang, 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. This is an application under Section 482 Cr.P.C with a prayer to set aside and quash the criminal proceedings pending in the Court of the learned Special Judge (POCSO), East Khasi Hills, Shillong being Special POCSO Case No. 70 of 2020 u/s 5(j)(ii)/6 POCSO Act, 2012.
2. Heard Mr. K.Ch. Gautam, learned counsel for the petitioners herein who has submitted that the petitioner No. 1 and petitioner No. 2 are husband and wife and in course of their relationship, the petitioner No. 2 got pregnant and accordingly, the petitioner No. 1 took her to Nazareth Hospital, Shillong for medical checkup. However, the hospital authorities on confirming that the petitioner No. 2 is pregnant and that her age was about 17 years at the relevant

time had accordingly informed the police of the matter.

3. The police on receipt of the telephonic information from Nazareth Hospital, had lodged an FIR through Inspector P. Burman of Madanrtting P.S, Shillong who had stated that on 12.05.2018 at about 11:40 PM, the petitioner No. 2, wife of petitioner No. 1 had gone to Nazareth Hospital for checkup and was found to be pregnant. Therefore, prayer for suo moto case was registered and investigation was made by the said informant. Accordingly, Madanrtting P.S Case No. 37(5)2018 u/s 5(j)(ii)/6 POCSO Act, 2012 was registered.

4. On investigation being conducted, the statement of the victim/petitioner No. 2 and other witnesses was duly recorded u/s 161 as well as u/s 164 Cr.P.C respectively and on completion of the investigation, the charge sheet was filed finding a well-established prima facie case against the petitioner No.1 and he was accordingly made to stand trial before the Court of the learned Special Judge (POCSO), Shillong. The case is at the stage of framing of charge.

5. Mr. Gautam has also submitted that the petitioner No. 1 and petitioner No. 2 are husband and wife as is evident from the statement of the petitioner No. 2 recorded u/s 161 as well as u/s 164 Cr.P.C where she has clearly stated that the petitioners are living together as husband and wife with the knowledge of the family members from both sides. The mother of petitioner No. 2 in her statement also recorded u/s 161 as well as u/s 164 Cr.P.C has confirmed the said fact and has also said that out of the cohabitation between the couple, a male child was born to them. Neither the petitioner No. 2 nor the family members wished to proceed with the case against the petitioner No. 1.

6. Mr. Gautam has further submitted that this is a case where the petitioners who hails from a rural background and who are oblivious to the provisions of law, particularly the Prevention of Children from Sexual Offences Act (POCSO) had willingly cohabited together as husband and wife as per the customary law of the land and it is, but natural, that a child be conceived out of such union. This is not a case where a heinous crime of rape has been committed and thereafter, a subsequent compromise has been arrived

at between the parties, but as stated above is a consequence of a relationship between two young persons who are in love.

7. Though, the POCSO Act has been rightly enacted to safeguard children from sexual exploitation, but in the peculiar facts and circumstances of the case of the petitioners herein, the rigors of the said Act may not be applied to their case and the converse would only result in the breakdown of a happy family relationship and the possible consequence of the wife having to take care of a baby with no support, physically or financially from her husband who may be languishing in jail.

8. In support of his contention, the learned counsel for the petitioner has relied on the following cases cited below: -

- (i) ***Ranjit Rajbanshi v. State of West Bengal & Ors: C.R.A. No. 458 of 2018, para 47, 48 & 49.***
- (ii) ***Vijayalakshmi & Anr. v. State Rep. By. Inspector of Police, All Women Police Station, Erode: Crl. O.P No. 232 of 2021 para 12 & 18.***

9. Mr. Gautam has submitted that quashing of the proceedings will not affect any overriding public interest in this instant case, rather it will allow the petitioner No. 2 to continue with her life with dignity and respect by living together with her husband (petitioner No. 1) along with the minor son. It is therefore prayed that this petition may be allowed and the conviction to be set aside and quashed.

10. Mr. K. Khan, learned Sr. Public Prosecutor in his response has submitted that the main ground where the petitioners herein has relied upon is that they are living together as per customary law. However, there is no evidence to prove what is customary law and even then, it would be the subject matter of a civil proceedings which this court may not venture to accept the statement of the petitioners at face value that such a marriage has taken place between them. Considering the fact that the victim girl is less than 18 years

old, consent would also not be a determining factor in favour of the petitioner No. 1 under the provisions of the POCSO Act, although it is fairly submitted that in evidence, if it is proved that the girl is almost 18 years, maybe 17 ½ or so, then due consideration may be given by the Trial Court. But at this stage, to quash the FIR as prayed for may not be in the interest of justice, it is finally submitted.

11. In reply, Mr. Gautam has submitted that the case of the petitioners is not only on the issue of customary law, but on the application of the concept of the POCSO Act, which has been enacted to primarily ensure that a child is not subjected to sexual assault or sexual harassment. In this case, facts will show that there has not been any occasion where sexual assault has taken place. It is a case of two young persons who are happily living together and following the prevalent practice of the society are considered to be husband and wife. The fact that a child was conceived and being concern about the health of the mother, the petitioner No. 1 took her to the hospital for medical check-up, the same could hardly be considered an act of sexual assault having been committed. The continuance of the proceedings would only be an abuse of the process of the court and ends of justice would be met only if further proceedings are altogether set aside and quashed, it is further submitted.

12. On consideration of the submission made, for its importance, the statement of objects and reasons of the POCSO Act may be reiterated herein. At the outset, since sexual offences against children are not adequately addressed by the existing laws, a special law was enacted to address this issue. The provisions of Article 15 and 39 of the Constitution of India was referred, inasmuch as, the need to ensure that the tender age of children are not abused, but rather protected against exploitation, sexual assault, sexual harassment and pornography which are cited as some of the causes for exploitation for which protection ought to be given to the children. Hence the Act.

13. In Section 2 under the heading definitions at sub-Section 1 clause (d), “child” means any person below the age of 18 years. This is only with regard

to the biological aspect of the matter, however the mental and psychological aspect has not been indicated, inasmuch as, a child born and brought up in a rural set-up may have a different mental faculty as compared to a child brought up in an urban setting. In the context of consensual or voluntary sexual intercourse, and more so if the girl is underage while the boy would be above the age of 18 and also if it is confirmed that they are living as husband and wife and the wife perhaps having given birth to a child, the issue becomes more complex.

14. In the case before this Court, the admitted fact is that there has been sexual physical contact and relationship between the petitioners herein which has resulted in the petitioner No. 2 giving birth to a child. It is also admitted that the petitioner No. 2 at the relevant period was below the age of 18 years and therefore, is a 'child' as per Section 2(1)(d) of the POCSO Act. Being a child and not capable of giving consent, the sexual contact by the petitioner No. 1 is accordingly termed as "penetrative sexual assault" u/s 3 of the said POCSO Act and u/s 5(j)(ii) where as a consequence of sexual assault, the female child became pregnant, the offence becomes "aggravated penetrative sexual assault" for which offence the punishment u/s 6 would be very severe to the extent that there could be an imprisonment for a period of not less than 10(ten) years or even life imprisonment.

15. According to Webster's dictionary, 'assault' means a threat or attempt to inflict offensive physical contact or bodily harm on a person (as by lifting a fist in a threatening manner) that puts the person in immediate danger of or in apprehension of such harm or contact.

16. Again, a look at the scenario of what happened between the petitioner No. 1 and petitioner No. 2, granted, there has been a physical sexual contact and intercourse between an adult and a child, although the alleged victim girl was about 17 years or so at that time. However, as is evident, the act committed under the circumstances cannot be called or termed in any logical or rational sense as a case of assault since no threat or attempt to inflict

offensive physical contact or bodily harm on the petitioner No. 2 has been made out. As stated by the petitioner No. 2, the act was voluntary and with consent premises on the fact that the two are in love and are living together as husband and wife.

17. The decisions cited by the learned counsel for the petitioners in this regard appears to be relevant, in the case of **Ranjit Rajbanshi** (supra) at paragraphs 47, 48 & 49, the Hon'ble Calcutta High Court has held as under:

“47. In the present case, the victim girl was admittedly 16 ½ years old and studied in Class XII at the relevant point of time. She was not naïve enough not to know the implication of sexual intercourse; rather, the victim admittedly had a physical relationship with the accused, who was also of a very young age, on several occasions prior to the incident. Although the consent of a minor is not a good consent in law, and cannot be taken into account as 'consent' as such, the expression 'penetration' as envisaged in the POCSO Act has to be taken to mean a positive, unilateral act on the part of the accused. Consensual participatory intercourse, in view of the passion involved, need not always make penetration, by itself, an unilateral positive act of the accused but might also be a union between two persons out of their own volition. In the latter case, the expression 'penetrates', in Section 3(a) of the POCSO Act might not always connote mere voluntary juxtaposition of the sexual organs of two persons of different genders. If the union is participatory in nature, there is no reason to indict only the male just because of the peculiar nature of anatomy of the sexual organs of different genders. The psyche of the parties and the maturity level of the victim are also relevant factors to be taken into consideration to decide whether the penetration was a unilateral and positive act on the part of the male. Hence, seen in proper perspective, the act alleged, even if proved, could not tantamount to penetration sufficient to attract Section 3 of the POCSO Act, keeping in view the admitted several prior occasions of physical union between the accused and the victim and the maturity of the victim.

48. *As such, it cannot be said that the accused was guilty of penetrative sexual assault, as such, since here the act of penetration, even if true, would have to be taken not as an unilateral act of the accused but a participatory moment of passion involving the participation of both the victim and the accused.*

49. *Although the question of consent does not arise in case of a minor, in order to attract Section 376(1) of the IPC, it had to be established that the alleged offence was committed against the will of the victim. Read in conjunction, the provisions of Section 376 of the IPC*

and Section 3 of the POCSO Act ought to be construed on a similar footing and cannot incriminate the accused for a voluntary joint act of sexual union.”

18. Echoing the same sentiment, the Hon’ble Madras High Court in the case of *Vijayalakshmi* (supra) at paragraphs 12 & 18 has held as follows:

*“12. As rightly recognized by the Learned Single Judge of this Court in *Sabari’s Case* (cited supra), incidences where teenagers and young adults fall victim to offences under the POCSO Act being slapped against them without understanding the implication of the severity of the enactment is an issue that brings much concern to the conscience of this Court. A reading of the Statement of Objects and Reasons of the POCSO Act would show that the Act was brought into force to protect children from offences of sexual assault, sexual harassment and pornography, pursuant to Article 15 of the Constitution of India, 1950 and the Convention on the Rights of the Child. However, a large array of cases filed under the POCSO Act seems to be those arising on the basis of complaints registered by the families of adolescents and teenagers who are involved in romantic relationships with each other. The scheme of the Act clearly shows that it did not intend to bring within its scope or ambit, cases of the nature where adolescents or teenagers involved in romantic relationships are concerned.*

18. In the present case, the 2nd Petitioner who was in a relationship with the 2nd Respondent who is also in his early twenties, has clearly stated that she was the one who insisted that the 2nd Respondent take her away from her home and marry her, due to the pressure exerted by her parents. The 2nd Respondent, who was placed in a very precarious situation decided to concede to the demand of the 2nd Petitioner. Thereafter, they eloped from their respective homes, got married and consummated the marriage. Incidents of this nature keep occurring regularly even now in villages and towns and occasionally in cities. After the parents or family lodge a complaint, the police register FIRs for offences of kidnapping and various offences under the POCSO Act. Several criminal cases booked under the POCSO Act fall under this category. As a consequence of such a FIR being registered, invariably the boy gets arrested and thereafter, his youthful life comes to a grinding halt. The provisions of the POCSO Act, as it stands today, will surely make the acts of the boy an offence due to its stringent nature. An adolescent boy caught in a situation like this will surely have no defense if the criminal case is taken to its logical end. Punishing an adolescent boy who enters into a relationship with a minor girl by treating him as an offender, was never the objective of the POCSO Act. An adolescent boy and girl who are in the grips of their hormones and biological changes and whose decision-making ability is yet to fully develop, should essentially receive the support and guidance of their

parents and the society at large. These incidents should never be perceived from an adult's point of view and such an understanding will in fact lead to lack of empathy. An adolescent boy who is sent to prison in a case of this nature will be persecuted throughout his life. It is high time that the legislature takes into consideration cases of this nature involving adolescents involved in relationships and swiftly bring in necessary amendments under the Act. The legislature has to keep pace with the changing societal needs and bring about necessary changes in law and more particularly in a stringent law such as the POCSO Act."

19. The Hon'ble High Court of Delhi in the case of **Kundan & Anr. v. State & Ors**, vide order dated 21.02.2022 in CRL.M.C. 27/2022 dealing with a similar case in which the alleged victim girl who had gone missing and was found in the company of the accused therein, had stated that she has married the said accused and a child out of the said wedlock was born to them with the parents of both the parties having accepted the marriage, an application u/s 482 Cr.P.C for quashing of the related FIR, on being preferred was allowed. Elaborating on the power of the High Court u/s 482 Cr.P.C, the court has quoted the decision in the case of **Gian Singh v. State of Punjab: (2012) 10 SCC 303** at paragraphs 55 & 56 therein which are also reproduced herein for better elucidation:

"55. In the very nature of its constitution, it is the judicial obligation of the High Court to undo a wrong in course of administration of justice or to prevent continuation of unnecessary judicial process. This is founded on the legal maxim quando lex aliquid alicui concedit, conceditur et id sine qua res ipsa esse non potest. The full import of which is whenever anything is authorised, and especially if, as a matter of duty, required to be done by law, it is found impossible to do that thing unless something else not authorised in express terms be also done, may also be done, then that something else will be supplied by necessary intendment. Ex debito justitiae is inbuilt in such exercise; the whole idea is to do real, complete and substantial justice for which it exists. The power possessed by the High Court under Section 482 of the Code is of wide amplitude but requires exercise with great caution and circumspection.

56. It needs no emphasis that exercise of inherent power by the High Court would entirely depend on the facts and circumstances of each case. It is neither permissible nor proper for the court to provide a straitjacket formula regulating the exercise of inherent powers under Section 482. No precise and inflexible guidelines can also be provided."

20. The case of ***Ramgopal & Anr. v. State of Madhya Pradesh: 2021 SCC Online, SC 834***, would be relevant, inasmuch as, the Hon'ble Supreme Court at paragraph 13 has held that “...Handing out punishment is not the sole form of delivering justice. Societal method of applying laws evenly is always subject to lawful exceptions...” and again, it was said that “...the touchstone for exercising the extra-ordinary power under section 482 Cr.P.C. would be to secure the ends of justice...”.

This has been precisely the endeavor of this court in this matter.

21. This Court is in respectful agreement with the cases cited above favouring the petitioner and accordingly, this petition is found to be meritorious and the same is hereby allowed.

22. Accordingly, the FIR and proceedings in Special POCSO Case No. 70 of 2020 before the Court of the learned Special Judge, POCSO, Shillong and the FIR dated 12.05.2018 in Madantring P.S Case No. 37(5)2018 are hereby set aside and quashed. Bail bond executed if any, stands discharged.

23. Petition is disposed of. No cost.

Judge

Meghalaya
23.03.2022
“D. Nary, PS”