

Serial No. 03
Supplementary List

HIGH COURT OF MEGHALAYA
AT SHILLONG

Crl. Petn. No. 34 of 2022

Date of Decision: 10.08.2022

Shri. Kwantar Khongsit & 2 Ors. Vs. State of Meghalaya & 4 Ors.

Coram:

Hon'ble Mr. Justice W. Diengdoh, Judge

Appearance:

For the Appellants

:

Ms. A. Syiem, Adv.

For the Respondents

:

Mr. H. Kharmih, Addl. P.P.

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

JUDGMENT AND ORDER (ORAL)

1. Heard Ms. A. Syiem, learned counsel for the petitioners who has submitted that the petitioner No. 1 and the petitioner No. 2 herein are husband and wife, presently residing at Mawryngkang village, Pynursla. The two were in a love relationship since the year 2018 and in the year 2019 started living together as husband and wife with the knowledge and consent of the family members of petitioner No. 2. This cohabitation is according to

the local custom and culture prevailing in this part of the country. It was also submitted that the petitioner No. 2 at the relevant point of time was about 16 years old.

2. Sometime in the month of October 2019, the petitioner No. 2 started complaining of weakness with bouts of vomiting following which she was taken to the Pynursla CHC for medical check-up and was thereafter referred to Ganesh Das Hospital. At the Ganesh Das Hospital, after conducting the required examination on 22.10.2019 it was confirmed that the petitioner No. 2 was pregnant for 16 weeks 4 days. As is duty bound, the Medical Officer of the said hospital informed the petitioner No. 1, the petitioner No. 3 and the uncle of the petitioner No. 2 that they need to report the matter to the police station as the petitioner No. 2 is still a minor.

3. After going to the Sadar Police Station the petitioner No. 3 who is the mother of the petitioner No. 2 was advised to lodge an FIR which she accordingly did so before the Pynursla Police Station on 29.11.2019 where upon Pynursla P.S Case No. 72(11) of 2019 under Section 5(j) (ii) of the Protection of Children from Sexual Offences (POCSO) Act, 2012 was registered.

4. Following due process of law, investigation was launched and on 06.06.2020 the petitioner No. 1 was arrested by the police and was incarcerated in custody for a period of 90 days. Thereafter, the I/O filed the

chargesheet *inter alia*, finding that there is a *prima facie* case made out against the accused/petitioner No. 1 under Section 5(j) (ii) (1)/6 of the POCSO Act and a case was registered as Special (POCSO) Case No. 49 of 2020 which is now pending at the stage of evidence before the Court of the learned Special Judge (POCSO) Shillong. So far, only the evidence of the petitioner No. 2 was recorded.

5. Ms. Syiem has led this Court to the statement of the petitioner No. 2 made under Section 161 CrPC and has submitted that the petitioner No. 2 has confirmed that she was in a relationship with the petitioner No. 1 since 2018 and has had physical relationship with him on several occasions and that too, with her consent, coupled with the fact that they are now staying together as husband and wife.

6. The petitioner No. 2 had reiterated whatever she had stated before the police under Section 161 in her statement under Section 164 CrPC and even in her evidence as PW-1 before the Special Court she has not diverted her stand but has maintained that the petitioner No. 1 is now her husband and they are living together in a happy married life with a child born to them. It is also further submitted that in the meantime the petitioner No. 1 and 2 have solemnized their marriage on 30.05.2022 at the Calvary Church, Meghalaya on the petitioner No. 2 having attained the age of majority.

7. Ms. Syiem has also submitted that the petitioner No. 1 and 2 respectively are now living a happy married life and as such continuation of the proceedings before the Special Court (POCSO) would only cause great hardship and inconvenience to the parties involved including the family members, for which even the mother of the petitioner No. 2 who is the petitioner No. 3 herein have jointly filed this petition seeking the reliefs as prayed for.

8. The case of Skhemborlang Suting & Anr. V. State of Meghalaya & Anr. in CrI. Petn. No. 63 of 2021 was cited by the learned counsel to show that under similar facts and circumstances this Court has quashed the FIR and chargesheet under Section 5(j) (ii)/6 POSCO Act. It is prayed that this petition may be allowed and the related proceedings before the Special Court (POCSO) be set aside and quashed.

9. Mr. H. Kharmih, learned Addl. P.P has submitted that though there is no strong opposition to the prayer of the petitioners herein, however considering the fact that the case is at the evidence stage and that this Court in a related matter has declined to entertain a similar petition on the ground that the recording of the evidence has already started, therefore the petitioners herein may also be directed to face the trial and to await the conclusion thereof.

10. Due consideration has been given to the submissions of the parties, the factum of the case as stated above may not be repeated, suffice it to say that the issue to be decided by this Court is whether the prayer of the petitioners can be allowed at this juncture.

11. One of the cardinal principles which emerged from an understanding and reading of the provision of Section 482 CrPC is that the inherent power of the High Court can be invoked irrespective of the provisions under the Code of Criminal Procedure only to the extent that necessary orders may be passed to give effect to any order under the said code or to prevent the abuse of any code or to secure the ends of justice.

12. Admittedly, the procedure for trial under the POCSO Act is in accordance with the Code of Criminal Procedure, 1973 and as such, the High Court, if it chooses to interfere with any proceeding under the POCSO Act can do so by exercising its inherent power under Section 482 of the code.

13. Coming to the case in hand, this Court dealing with cases under similar or even identical facts and circumstances has maintained that in the event it is apparent that a young couple are in a relationship where love is the deciding factor even to the extent that it has culminated into a marriage relationship, it may be the case that in such a relationship even if the girl involved is legally a minor, if she has the capacity to procreate and her age is perhaps ranging from about 16 to 17 years and more but below 18 years,

it would not shock the conscience of this Court if hypothetically speaking such a girl enters into a marriage relationship on her own free will, as oppose to a child of about 12 or 13 years voluntarily entering into a marriage relationship.

14. This Court in the case of Skhemborlang Suting (supra) at para 7 of the same has observed as follows:-

“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.”

15. At para 17 of the same has cited with approval the case of Ranjit Rajbanshi v. State of West Bengal & Ors. C.R.A. No. 458 of 2018 wherein the Hon'ble Calcutta High Court at para 47, 48 and 49 has observed 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 7 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.”

16. Notwithstanding the fact that the case in question is at the evidence stage, this Court can exercise its inherent power to ensure ends of justice is met and, in this case, it would be an injustice to separate or to divide a well knitted family unit.

17. Accordingly, on an overall consideration, this Court is convinced that the petitioners have made out a case for quashing of the said proceedings in Special (POCSO) Case No. 49 of 2020 which is hereby done so.

18. This petition is allowed. The proceedings in Special (POCSO) Case No. 49 of 2020 pending before the Court of the learned Special Judge (POCSO) is hereby set aside and quashed.

19. Petition disposed of. No costs.

Meghalaya
10.08.2022
"Tiprilynti-PS"



Judge