Serial No.01
Supple List

HIGH COURT OF MEGHALAYA
AT SHILLONG

Crl. A. No. 21 of 2023 Date of Decision: 08.03.2024

Shri. Arjun Boro
son of Late Krishna Boro,
resident of Village Qurduli,
P.S. Nogoan, District Marigoan,
Assam. :::: Appellant.

Vs.

State of Meghalaya
represented by the Commissioner & Secretary
to the Department of Home (Police)
Government of Meghalaya,
Shillong – 793001. :::: Respondent.

Coram:

Hon'ble Mr. Justice B. Bhattacharjee, Judge

Appearance:

For the Petitioner(s) : Mr. M. Sharma, Legal Aid Counsel.

For the Respondent(s) : Ms. S. Ain, GA.

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

JUDGMENT AND ORDER

This Criminal appeal under Section 374 (2) Cr.P.C is filed against the Judgment and order of conviction dated 18-05-2022 and sentence of even date passed by the learned Special Judge (POCSO)/ Addl D.C(J), East Jaintia Hills District, Khliehriat in POCSO Case No. 8/2020 (new), [Spl Session No.18/19 (old)] whereby the accused/appellant was convicted under Section 3(a)/4 of the Protection of Children from Sexual Offences Act, 2012 (POCSO Act) and awarded a sentence of 7 (seven) years of rigorous imprisonment and a fine of Rs.10,000/- (Ten thousand rupees) only and in default to undergo one month's simple imprisonment.

1. The fact of the case is that on 19-08-2018 a written FIR was lodged by the complainant to the effect that on the midnight of 17-08-2018, her son, aged about 10 years, was sexually assaulted by the accused/appellant who came to stay in her house as he was well known to her husband. The FIR was received vide GDE No. 24 dated 19-08-2018 at Ladrymbai Police Outpost. Thereafter the FIR was received at Khliehriat PS vide GDE No. 05 dated 19-08-2018 and a cognizable case was registered vide Khliehriat PS Case No. 153(8)2018 under Section 377 IPC read with Section 9(m)/10 POCSO Act. After completion of the investigation, a charge-sheet bearing

No.62/19 dated 01-06-2019 under Section 5(m)/6 POCSO Act was submitted against the appellant. On production of the appellant before the Trial Court, he was provided with a State defence Counsel and after hearing both the parties, the charge under Section 5(m)/6 POCSO Act was framed against the appellant on 16-08-2019. The prosecution examined 8(eight) witnesses, exhibited 6(six) documents and 2(two) material exhibits before the Trial Court in support of its case. The appellant was examined under 313 Cr.P.C. after completion of the prosecution witness. The appellant declined to adduce any defence witness. The matter was finally heard thereafter by the Trial Court and the impugned judgment and order of conviction and order of sentence was passed.

2. Mr. M. Sharma, learned Legal Aid Counsel for the appellant submits that the identity of the accused was not established before the Trail Court. The learned counsel refers to the Arrest Memo dated 19-08-2018 and submits that while reflecting the details of the appellant therein, the name was recorded as Shri. Arjun Boro alias Amit (First Alias), whereas the PW1 in her evidence before the Trail Court referred the accused person's name as 'Bhutt' and the survivor in his statement under Section 164 Cr.P.C. referred the accused person as 'Ksuid'. He submits that in absence of establishment of proper

identity of the accused person before the Trail Court, the conviction of the appellant cannot be sustained in law. The learned counsel contends that the Trail Court has placed reliance on the statement of the survivor recorded under Section 161 Cr.P.C. to support the conviction in utter disregard to the settled provision of law. He further contends that the statement of the survivor recorded under Section 164 Cr.P.C. also could not have been taken into consideration by the Trial Court as the same stood contradicted by the evidence of PW2, medical report (Exhibit P–2) and the FSL report dated 29-11-2018 indicating no visible injury or sign of bleeding on the body of the survivor. The learned counsel submits that the survivor has not been examined by the prosecution and as a result, the appellant was deprived of an opportunity to counter the allegation made against him. The statement of PW1 as to the occurrence of the incident is a hearsay statement not admissible in law. He further submits that PW1 in her cross-examination stated that on the night of the incident she, her husband, her children including the survivor and the appellant were sleeping in the same room, but she did not see anything or hear any unusual sound. Hence, the evidence of PW1 is sufficient to negate the entire prosecution version of the case. He submits that the father of the survivor was also not cited as a witness by the prosecution which

makes the allegation against the appellant doubtful. Drawing attention to the deposition of PW2 and the Exhibit P-2 which reflected that the survivor informed about the incident to his family members in the daytime of the following morning, the learned counsel submits that there is a delay in lodging the FIR as the same was not filed immediately thereafter and came to be filed on the next day.

3. The learned counsel for the appellant also places reliance on a judgment dated 16-05-2023 of a Division Bench of this High Court rendered in *Crl.A.No.36 of 2022, Binod Tamang Vs. State of Meghalaya*, and contends that in a similar situation of the present case, the conviction recorded by the Trial Court was set aside by the High Court on the ground of non-examination of survivor during the course of the trial. The learned counsel further contends that in the said case, there was a Test Identification Parade (TIP) conducted wherein the accused was identified by the survivor, but despite the identification, the High Court interfered on the ground of non-examination of the survivor by holding that the opportunity that an accused gets to cross-examine the survivor at the time that really has to be regarded as the primary evidence. The learned counsel submits that by following the proposition laid down in the aforementioned case, the appellant herein also deserves to be acquitted and the

impugned judgment of conviction and order of sentence of the Trial Court be set aside and quashed.

4. Countering the submission made on behalf of the appellant, Ms. S. Ain, learned Government Advocate, submits that there is no confusion with regard to the identity of the appellant as the arrest memo in question mentioned the name of the appellant as Arjun Boro and the meaning of both the terms 'Bhutt' and 'Ksuid' in the local dialect is 'Ghost'. The appellant in his statement under Section 313 Cr.P.C. before the Trial Court stated that he is also known as 'Bhutt'. In addition, the PW1 has identified the appellant before the Trial Court living behind no confusion in the matter. The learned GA submits that the statement of the survivor recorded under Section 164 Cr.P.C. is totally consistent with the medical report Exhibit P-2 and the deposition of PW2 wherein it is clearly projected that there was tenderness over the anus of the survivor and the clinical opinion is consistent with recent sexual anal intercourse. She further submits that there is no delay in lodging the FIR as the incident took place at the midnight of 17-08-2018 and the FIR was received at the Ladrymbai Police Outpost at 1.30 AM of 19-08-2018, within a period of 24 hours. By placing reliance on a decision of the Apex Court reported in *(2018) 11 SCC 163, State of Maharashtra Vs. Bandu Alias*

Daulat, the learned counsel submits that non-examination of the survivor cannot be a ground for rejecting the prosecution case. She submits that the evidence of the PW1, the mother of the survivor, clearly proved the guilt of the appellant and non-availability of the survivor cannot be a reason for interfering with the finding of the Trial Court. The learned GA further contends that the decision of this High Court relied upon by the learned counsel for the appellant is distinguishable and not applicable in the facts and circumstances of the present case. She submits that there is no merit in the present appeal and the judgment of conviction and sentence passed by the Trial Court needs no interference by this High Court.

5. The submissions advanced by the rival parties are duly noted by this court and sought to be addressed by referring to the materials available on record.

6. With regard to the question of establishment of identity of the appellant, it transpires that the arrest memo besides recording Amit (First Alias) also recorded Arjun Boro as the name of the appellant. The PW1 in her deposition before the Trail Court though referred the appellant as 'Bhutt', but has identified the appellant and stated that he was present in the court via V/C. There is no dispute to the fact that term 'Bhutt' and 'Ksuid' refer to one and the same meaning i.e.

'Ghost'. The identification of the appellant by the PW1 before the Trial Court was not challenged by the defence in her cross-examination. Thus, there remains no confusion with regard to the identity of the appellant.

7. As to the contention of the appellant that there was a delay in lodging of the FIR, the materials on record reveal that the incident took place on 17-08-2018 at midnight and the FIR was received at the Ladrymbai Police Outpost at 1.30 AM on 19-08-2018. The date and time of occurrence and the date and time of lodging of FIR has not been disputed by the appellant. It is only because of the mention of the date of occurrence as on 17-08-2018 and the date of FIR on 19-08-2018, the appellant raised the question of delay without referring to the time of the occurrence of the incident and time of lodging of FIR. A close scrutiny of the date and time of incident and the date and time of lodging of FIR would reveal that there is barely a gap of 24 hours in between and hence, there is no unreasonable delay in lodging the FIR.

8. The decision of the Division Bench of this High Court rendered in *Crl. A. No. 36 of 2022, Binod Tamang Vs. State of Meghalaya (supra)* relied on by the learned counsel for the appellant is distinguishable in a sense that in the said case neither the survivor nor

the complainant could be traced and produced before the trial Court for recording their evidence. In the present case, the complainant was present and her deposition was recorded as PW1.

9. The case law cited by the learned GA reported in *(2018) 11 SCC 163, State of Maharashtra Vs. Bandu Alias Daulat (supra)* was rendered in a case where the victim being deaf and dumb and mentally challenged to some extent was not examined and the High Court reversed the conviction on ground of non-examination of victim by holding that the factum of rape and involvement of the accused could not be held to have been proved. The Apex Court disagreeing with the finding of the High Court interfered with the reversal and restored the conviction by holding that the evidence of the mother of the victim clearly supported the prosecution case. What follows is that non-examination of survivor cannot be sole ground for rejecting the prosecution case.

10. A perusal of the material on record reveals that the survivor was not produced before the Trial Court for recording his evidence. The learned Trial Court based its order of conviction mainly on the deposition of PW1 i.e., mother of the survivor, statement of the survivor recorded under Section 164 Cr.P.C., the evidence of PW 2 i.e., the medical expert, statement of the survivor made under Section

161 Cr.P.C, the statement of the appellant under Section 313 Cr.P.C. and by drawing the assistance of presumption under Section 29 of POCSO Act.

11. The deposition of PW 1 revealed that on the day of the incident the appellant, who was known to her husband, came to her house and on that night after watching TV the appellant slept with her minor son (survivor). She came to know about the incident on the next day in the evening time when the survivor told her that while he was sleeping, the appellant took off his pant and committed rape on him from his anus. She also stated that she informed about the incident to her husband and her mother and on the instruction of her mother she went to the police station and thereafter the FIR was filed. She exhibited the FIR as Exhibit P–1. In her cross-examination she stated that on the night of occurrence she, her husband, her children including the survivor and the appellant were sleeping together in the same room. She further stated that she did not see the incident and also did not hear unusual sound from the survivor.

12. The survivor in his statement under Section 164 Cr.P.C. stated that on the day of occurrence after finishing dinner, he went to sleep. At around midnight the appellant, who was his father's friend, came to their house and stayed with them. The appellant was sleeping with the

survivor and took off the survivor's pant and inserted his penis into the backside of the survivor. The survivor felt pain and woke up and straight away went to the kitchen to drink water. When he returned back to his room, he saw that the appellant was sleeping on his bed right next to him. The survivor went back to sleep that night. The next morning the appellant left the house. The survivor did not go to school two weeks after the incident as there was bleeding and pain on his backside. The next day, during the night time he informed his mother about the incident.

13. The PW2, the medical expert, in his deposition stated that history of bleeding per anus was complained by the survivor. On local examination no visible injury or bleeding was seen in the anus. However, there was tenderness over the anus. The PW2 gave his opinion that after performing the above-mentioned clinical exams the findings are consistent with recent sexual intercourse. The witness further deposed that as per the version of the grandmother of the survivor, one unknown person, a friend of survivor's father slept with the survivor on the night of 17-08-2018 and then the said person took off his pant and apply some fluid in his buttock (anus) and then forced himself into his buttock several times and then the survivor told his

father in the day time on the following morning. The PW2 also exhibited the medical report as Exhibit P–2.

14. The facts which are apparent from the material on record of the Trial Court is that though the father of the survivor (husband of the PW 1) was present at the time of incidents, he was neither examined under Section 161 Cr.P.C. by the investigating authority nor was cited as a prosecution witness. The investigation also did not disclose how many other children were present at the place of occurrence along with the PW1 and the father of the survivor and how old the other children were. The reason for non-production of the survivor before the Trial Court as recorded by the Trial Court is that the PW1 appeared in Court again and reported that her ex-husband had taken the survivor with him to his native place to Nepal to which particular location she did not know and that there was no hope that her pervious husband would bring back the survivor especially after she is married to somebody else.

15. As per the record the alleged incident took place on 17-08-2018 and the FIR was lodged on 19-08-2018. The statement of the survivor under Section 164 Cr.P.C. was recorded on 04-10-2018. The evidence of PW1 was recorded on 12-04-2021 by the Trial Court. Till such time, there was no disclosure of missing of either the survivor or the

father of the survivor (husband of PW1). The fact of disappearance of the survivor and his father was reflected only in the impugned judgment and order of conviction of the Trial Court. The action of the investigating authority in keeping the father of the survivor (husband of PW1) away from the entire investigation and the proceeding before the Trial Court inspite of the fact of his presence in the scene of occurrence and his disappearance with the survivor during the pendency of the matter creates a serious doubt in the prosecution case. No effort was made by the prosecution to unfold the truth behind the disappearance of the survivor along with his father at the stage of the trial of the case.

16. The learned Trial Court in its judgment and order of conviction has referred to the statement made by the survivor under Section 161 Cr.P.C. before the investigating authority to record reasons for its findings. Section 162 Cr.P.C. puts a clear embargo on the admissibility of statement made by any person to a police office in the course of investigation. For ready reference, the provision of Section 162 Cr.P.C. is reproduced below: -

"162. Statements to police not to be signed: Use of statements in evidence. -

(1) *No statement made by any person to a police officer in the course of an investigation under this Chapter, shall, if reduced to writing, be signed by the person making it; nor shall any such statement or any record*

thereof, whether in a police diary or otherwise, or any part of such statement or record, be used for any purpose, save as hereinafter provided, at any inquiry or trial in respect of any offence under investigation at the time when such statement was made:

Provided that when any witness is called for the prosecution in such inquiry or trial whose statement has been reduced into writing as aforesaid, any part of his statement, if duly proved, may be used by the accused, and with the permission of the Court, by the prosecution, to contradict such witness in the manner provided by section 145 of the Indian Evidence Act, 1872 (1 of 1872); and when any part of such statement is so used, any part thereof may also be used in the re-examination of such witness, but for the purpose only of explaining any matter referred to in his cross-examination.

(2) *Nothing in this section shall be deemed to apply to any statement falling within the provisions of clause (1) of section 32 of the Indian Evidence Act, 1872 (1 of 1872), or to affect the provisions of section 27 of that Act.*

Explanation. - An omission to state a fact or circumstances in the statement referred to in sub-section (1) may amount to contradiction if the same appears to be significant and otherwise relevant having regard to the context in which such omission occurs and whether any omission amounts to a contradiction in the particular context shall be a question of fact."

17. The Apex Court in *Parvat Singh v. State of M.P., (2020) 4 SCC 33* has held that as per the settled proposition of law a statement recorded under Section 161 Cr.P.C. is inadmissible in evidence and cannot be relied upon or used to convict the accused. As per the settled proposition of law, the statement recorded under Section 161 Cr.P.C. can be used only to prove the contradictions and/or omissions. It follows that statement under Section 161 Cr.P.C. cannot be used by a Court to justify the reasons while recording its finding in a criminal trial. The statement under Section 161 Cr.P.C may be used only at the stage of recording evidence in a trial in accordance with the proviso

attached to Section 162 (1) Cr.P.C. In the instant case, none of the prosecution witnesses was ever confronted with their statement recorded under Section 161 Cr.P.C. at the time of recording of evidence by the Trial Court and hence, the use of the statement of the survivor made before the investigating officer by the Trial Court is against the settled proposition of law.

18. From the judgment and order of the Trial Court, it transpires that the learned Trial Court placed reliance on the statement of the survivor recorded under Section 164 Cr.P.C. by drawing corroboration from medical evidence. The Apex Court in *RamKishan Singh vs. Harmit Kaur and another (1972) 3 SCC 280* and later in *BaijNath Sah vs. State of Bihar (2010) 6 SCC 736* has laid down that a statement under Section 164 Cr.P.C is not substantive evidence and can be utilized only to corroborate or contradict the witness vis-`a-vis statement made in Court.

19. The evidence of medical expert is relevant under Section 45 of the Indian Evidence Act, 1872 but it cannot take place of substantive evidence. The opinion of a medical expert is not direct evidence, but it has corroborative value. It can only support the grounds of an eye-witness and prove the direct evidence. Since the statement under Section 164 Cr.P.C. is not substantive evidence, the learned Trial

Court was misled in placing reliance on it by drawing corroboration from the medical evidence. The medical evidence adduced before the Trial Court reveals that the narrative of the incident was disclosed to the medical officer by the grandmother of the survivor. However, the grandmother of the survivor has also not been cited as witness by the prosecution in the case. The entry in the injury report does not necessarily amount to a statement. At the stage of medical examination, the duty of the doctor is not to enquire about the actual offender from the injured person.

20. To raise presumption under Section 29 of the POCSO Act, it is essential on the part of the prosecution to establish foundational facts on the basis of admissible and substantial evidence. The provision of Section 29 of the Act cannot be interpreted to say that just because a charge-sheet is filed, the onus shifts on the accused to prove his innocence against the accusation. The Court cannot mechanically accept whatever the prosecution version of the case is and give an approval to it without even analyzing the admissibility and acceptability of the evidence relied on by the prosecution. The presumption under Section 29 POCSO Act will become operational only when the necessary foundational facts are established by the prosecution by leading legally tenable evidence. In the present case

there is no direct evidence of survivor's suffering from bleeding and pain. The PW1 in her deposition before the Trial Court did not say anything about the injury or bleeding of the survivor. There is nothing in her evidence to show that she herself noticed any discomfort in the physical appearance/movement of the survivor. In such a situation, it was grossly improper for the Trial Court to convict the appellant on the basis of corroborating evidence drawn from the statement of the survivor under Section 161 Cr.P.C. and 164 Cr.P.C. and the medical evidence.

21. The appellant in his statement under Section 313 Cr.P.C stated that he was present in the place of occurrence and also that he slept with the survivor on that night. The appellant also stated that he was known as 'Bhutt'. However, he denied to have committed the alleged offence. A perusal of the statement of the appellant under Section 313 Cr.P.C. shows that as many as 18 questions, running into 4 (four) pages, were put to the appellant and the statement was recorded on 12-04-2022. The relevant order sheet of the said date shows that the learned Trial Court after recording the statement passed the following order: -

> "**12-04-2022**, CR put up.
> Accused Shri. Arjun Boro is produced before me from Jowai prison and on being asked he said he is fine and healthy.

Ld. State Defence Counsel Shri. B. Dkhar is present.

Ld. Spl. PP Smti. S Dkhar is present.

The statement of accused U/S 313 CrPC recorded today in which he denied to all allegations and refused to adduce evidence for his defence.

Both sides submitted to proceed for final argument.

Furnish to both sides the copy of evidence and 313 CrPC.

Accused is remanded back to custody.

Fix **27/04/2022** for production & final argument.

Sd/-
Special Judge
(POCSO)
Khliehriat."

The aforesaid order dated 12-04-2022 indicates that the appellant was physically present before the Court at the time of recording of his statement under Section 313 Cr.P.C and it was completed on the same date. However, a perusal of the statement of the appellant under 313 Cr.P.C. would show that the appellant put his thumb impression on all the 4(four) pages of the statement in presence of the Assistant Superintendent, District Prison and Correctional Services, Jowai, who also signed all the pages on 20-04-2022 by making a note, "LTI taken in presence of" on the top of his signature appearing on the last page of the statement of the appellant. If the statement was recorded on 12-04-2022 by the Trial Court on the physical presence of the appellant

before it, there was no justification for taking of thumb impression of the appellant on the statement in presence of the Assistant Superintendent on 20-04-2022. The date of signature and note made by the Assistant Superintendent on the last page would mean that the appellant also put his thumb impression on 20-04-2022 and not on 12-04-2022 i.e. the day on which he made his statement under Section 313 Cr.P.C. Moreover, Section 281 (5) Cr.P.C. mandates that the memorandum of statement of the accused shall be signed only by the accused and by the magistrate or presiding Judge.

22. In addition, the order sheet dated 12-04-2022 of the Trial Court further reveals that the copies of the evidence including the statement under Section 313 Cr.P.C. were received by the learned Counsels appearing for the rival parties by putting their respective signatures on the aforementioned order sheet on 19-04-2022 and 22-04-2022. It is difficult to comprehend as to how a copy of the statement under Section 313 which was signed on 20-04-2022 by the Assistant Superintendent, District Prison and Correctional Services, Jowai, came to be received on 19-04-2022.

23. The above fact raises a serious question as to how and when the statement of the appellant was recorded under Section 313 Cr.P.C. There is no doubt that the appellant is an illiterate person and required

a careful and attentive approach of the Trial Court at the time of recording of his statement. The object of Section 313 Cr.P.C. is to afford the accused a fair and proper opportunity of explaining circumstances appearing against him and the procedure adopted by trial court in discharging its duty towards the object of Section 313 Cr.P.C. must be couched in a form which an ignorant or illiterate person may be able to appreciate and understand. The facts and situation in the present case projects lack of proper application of procedure of law rendering the entire statement of the appellant defective and perfunctory. Resultantly, considerations of answers of the appellant given in his statement under 313 Cr.P.C. by the learned Trial Court while passing the impugned judgment and order of conviction was not valid.

24. Under our system of justice, no person can be punished unless legal proof is adduced in a Court of law to establish that he has committed the crime for which he has been charged. Suspicion, however strong does not amount to legal proof. In the absence of legal proof that the appellant had committed the offence, the Court has no option but to give benefit of doubt to the appellant.

25. Viewed from above, the impugned judgment and order of conviction passed by the Special Judge (POCSO)/ Addl D.C(J), East

Jaintia Hills District, Khliehriat in POCSO Case No. 8/2020 (new), [Spl Session No.18/19 (old)] cannot stand scrutiny of law and is hereby set aside and quashed. Consequently, the Order of Sentence is also set aside. The appellant is set at liberty forthwith if he is not wanted in connection with any other case.

26. This criminal appeal stands allowed.

27. Let authenticated copies of this judgment and order be furnished to the respective parties forthwith.

JUDGE

Meghalaya
08.03.2024
"Biswarup-PS"