

Serial No. 03
Regular List

HIGH COURT OF MEGHALAYA
AT SHILLONG

Crl. Petn. No. 45 of 2022

Date of Decision: 27.10.2022

Shri Silvestar Khonglah & 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. S. Sengupta, Addl. PP and Mr. H. Kharmih, Addl. PP.

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

J U D G M E N T & O R D E R (O R A L)

1. This is an application filed under Section 482 Cr.PC seeking to invoke the inherent powers of this Court to quash the FIR dated 18.12.2020 and the resultant criminal proceedings in Spl. POCSO Case No. 10 of 2021 under Section 5(1)/6 of the POCSO Act pending trial before the court of the learned Special Judge (POCSO), Shillong.

2. Heard learned counsel for the petitioners Mr. K.Ch. Gautam who has submitted that the petitioner No.2 herein had lodged an FIR before the Officer-In-Charge Pynursla PS, East Khasi Hills on 18.12.2020, complaining that her minor daughter was sexually assaulted by the petitioner No.1 on two occasions that is, on 11.12.2020 and 16.12.2020 as was narrated by her minor daughter who was found absent from her room by the teacher of the school where she was studying and who had accordingly reported the matter to the petitioner No.2. Hence the FIR.

3. A detailed narration of the whole episode as is evident from the materials on record including the findings of the investigation is that, the minor daughter of the petitioner No.2 was having an affair with petitioner No.1 and on 11.12.2020 he came to her place of residence as the minor girl was a student of Sr. Anthony's Higher Secondary School, Pynursla and was staying with the teacher of the said school. The petitioner No.1 on the first occasion had picked up the minor girl and had gone to a place near Bri War Resort, where he had physical relationship with her inside his vehicle. In the same manner on 16.12.2020, the minor girl was found absent from her room, but was eventually dropped by petitioner No.1 at 3:00AM where the said teacher discovered her absence and reported the

matter to the parents. On this occasion too, the petitioner No.1 and the girl had sexual relationship in his vehicle.

4. The police then registered a case being Pynursla PS Case No. 70(12)2020 under Section 5(1)/6 of the POCSO Act and the petitioner No.1 was accordingly arrested and was in custody for about 10(ten) months before he was released on bail.

5. The learned counsel for the petitioners has also submitted that the minor girl in her statement under Section 161 Cr.PC made before the police as well as in her statement made before the Magistrate under Section 164 Cr.PC had stated that it is a fact that she went with petitioner No.1 on 11.12.2020 and that she also had physical relationship with him inside his vehicle on the said date and also on 16.12.2020 when they met once again and were also involved in a physical relationship inside his vehicle. The minor girl has however stated that the petitioner No.1 is her boyfriend and her relationship with him was consensual and of her own free will.

6. The Investigating Officer (I/O) has however filed the charge sheet and has come to a finding that there is prima facie evidence against the petitioner No.1 to booked him under the provisions of the POCSO Act particularly, under Section 5(1)/6 of the POCSO Act and he was made to

stand trial before the court of the learned Special Judge (POCSO), Shillong. The case is now at the stage of evidence. However, before the evidence could be recorded the petitioner No.1 as well as petitioner No.2 as complainant has made a prayer before the learned trial court to be allowed to move the High Court with an appropriate application. Hence this application.

7. It is further submitted that in this instant application, the petitioner No.1 as accused and the petitioner No.2 who is the mother of the minor girl and who has also lodged the FIR as complainant on mutual understanding has jointly filed this petition which reflected the bonafide of the petitioners.

8. The learned counsel for the petitioners has also submitted that this is a case where two teenagers are involved in a romantic relationship and being unaware of the legal restrictions, had indulged in a physical relationship out of their own free will and consent. This is therefore not a case of sexual assault as could be understood from the provisions of the POCSO Act since, this is not a case in which extreme depravity, perversity or cruelty was found present and as such the petitioner No.1/accused may not be subjected to face the rigors of law and to be penalised for the same

for no fault of his taking into account that there is no ill-motive or mens rea on his part.

9. The learned counsel has also submitted that this High Court as well as many High Courts while considering this issue has taken a lenient view of the situation. The case of *Vijayalakshmi v. State rep. by the Inspector of Police, All Women Police Station, Erode*, CrI.O.P. No. 232 of 2021, order dated 27.01.2021, para 11 and 18, and the case of *Ranjit Rajbanshi v. State of Bengal & Ors*; 2021 SCC Online Cal 2470, para 47 was cited by the learned counsel for the petitioners in support of his case.

10. Mr. S. Sengupta, learned Addl. PP appearing for the respondents has submitted that this Court on going through the petition and the materials on record, may apply its discretion to pass necessary orders.

11. In a case of rape or sexual assault, the act not only affects the physical well being of the victim but would also leave a very deep emotional scar which would require prolonged counselling for the experience and the image to be erased from the mind of the victim. Such an act would have a more profound effect on a child. Therefore, the makers of the law have thought it fit to bring out very stringent provisions in the Protection of Children from Sexual Offences (POCSO) Act to arrest and to deter any inclination in this regard by a perpetrator. What is even

prevalent now is, what is known as ‘good touch’ and ‘bad touch’ where even a semblance of sexual overtone in the way an alleged perpetrator touches a child victim will make him liable for prosecution under the relevant provisions of the law.

12. The pitfall to the above proposition is that in a case where there is mutual love and affection between a child and a person which might even lead to a physical relationship, though the consent of the child under the law is immaterial as far as prosecution for an alleged offence of sexual assault is concerned, but considering the peculiar facts and circumstances of a particular case, such as in a case of a boyfriend and girlfriend particularly, if both of them are still very young, the term ‘sexual assault’ as could be understood under the POCSO Act cannot be attributed to an act where, there is, as pointed above, mutual love and affection between them.

13. The observation of the Hon’ble Madras High Court in the case of Vijayalakshmi (supra) at para 11 is worth noting in this regard, the same reads as follows:-

“11. There can be no second thought as to the seriousness of offences under the POCSO Act and the object it seeks to achieve. However, it is also imperative for this Court to draw the thin line that demarcates the nature of acts that should not be made to fall within the scope of the Act, for such is the severity of the

sentences provided under the Act. Justifiably so, that if acted upon hastily or irresponsibly, it could lead to irreparable damage to the reputation and livelihood of youth whose actions would have been only innocuous. What came to be a law to protect and render justice to victims and survivors of child abuse, can, become a tool in the hands of certain sections of the society to abuse the process of law”

14. Again, the case of Ranjit Rajbanshi (supra), cited by the petitioner is also relevant in the context of this case. Para 47 and 48 of the same reads as follows:-

“ 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.”

15. In view of the above findings and observations, this Court is of the considered opinion that it would be for ends of justice that the FIR dated 18.12.2020 and the proceedings in Spl. POCSO Case No. 10 of 2021 under Section 5(1)/6 of the POCSO Act pending trial before the court of the learned Special Judge (POCSO), Shillong be quashed, which is accordingly done so here.

16. Resultantly, this petition succeeds and the petitioner No.1 is set at liberty from any liability in the aforementioned criminal case. Bail bond executed if any, hereby stands discharged.

17. Send back the Lower Court case records.

18. Petition disposed of. No costs.

Judge

Meghalaya

27.10.2022

“N. Swer, Stenographer”