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Serial No.01
Supplementary List

HIGH COURT OF MEGHALAYA
AT SHILLONG

Crl.A.No.12/2021

Date of Order: 05.04.2023

Julius Kitbok Dorphang Vs. State of Meghalaya & ors

Coram:

Hon'ble Mr. Justice Sanjib Banerjee, Chief Justice
Hon'ble Mr. Justice W. Diengdoh, Judge

Appearance:

For the Appellant : Mr. K. Ch. Gautam, Adv with
Ms. C.B. Sawian, Adv

For the Respondents : Mr. N.D. Chullai, AAG with
Mr. S. Sengupta, Addl.PP
Mr. A.H. Kharwanlang, GA

i) Whether approved for reporting in Law journals etc.: Yes

ii) Whether approved for publication in press: Yes

JUDGMENT: (per the Hon'ble, the Chief Justice) (Oral)

Amid the legal nuances involved in this criminal appeal arising out of an order of conviction, there is also the story here of a young girl losing her way and her life being destroyed.

2. Upon a meaningful reading of the several statements that the survivor made, it is clear that at the age of about 14 years or so when the survivor was distressed with the parlous state of her somewhat uncaring family and when she had already been pulled out from school, she was

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lured by an elderly lady acquaintance to leave home. She then imagined the city lights and bustling life in Shillong that she was promised to be a distant dream and a welcome contrast to the daily drudgery that she faced in her small village in Ichamati bordering Bangladesh. The survivor recounted that she was brought by an elderly Nepali lady to Shillong and deposited with a Muslim family that lived in Demthring. The survivor even began calling the lady of the family "mummy" and the lady's husband "papa". The couple had two sons. The survivor spent an uneventful initial two months with her foster family but it does not appear that she experienced a vastly better life during such time and, in one of her statements, it appears that she expressed a desire to return home. She was persuaded by her new-found "mummy" to stay back.

3. She recounted that after staying for about two months with the family at Demthring, she had her first menstrual periods and, shortly thereafter, she was taken one evening by her foster parents and another acquaintance of theirs to a guesthouse at Motinagar in the city. She consistently narrated in course of her two initial statements recorded before the members of the State Child Welfare Committee, her third statement recorded under Section 164 of the Code of Criminal Procedure, 1973 and, finally, both in her examination-in-chief and cross-examination at her deposition at the trial, that she was given some drink to have before her first

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forced sexual encounter and she was intoxicated and not in her senses. She recounted the helpless feeling of her clothes being removed from her body and the pain and hurt that she experienced when she was violated but she remembered the face of the man. She went on to say that she was taken to the same man, the appellant herein, sometime later at a hotel in Nongpoh. It transpires that the hotel she referred to was the Umiam Lake Resort run by the tourism department of the State.

4. Upon the CWC officials discovering that the survivor referred to two incidents when she was raped by the appellant herein, a second first information report came to be lodged at Nongpoh Police Station after the first had been filed in Madanryting.

5. The survivor described both her encounters with the appellant herein in gory detail. There was little chance, on the basis of her statements, that there was any case of mistaken identity despite the fact that she had been heavily intoxicated the first time. In course of her statement recorded under Section 164 of the Code in connection with the Umiam case, she confined her narration to the Umiam incident and left out the details pertaining to the several other times that she was forced to have sexual intercourse with other men by her so-called foster parents. As to the Umiam incident, the survivor recounted that after her foster parents left the hotel room and she was left alone with the appellant herein, the appellant asked

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her to take off her clothes and made her "sleep with him on one of the beds." The survivor remembered that she bled, but the appellant made her "sleep with him on the carpet and again made me sleep with him on another bed" and all the antics while she was bleeding profusely. In the morning, the appellant apparently asked the survivor to wash and clean herself and when she returned from the toilet, the appellant told her that she did not "satisfy him and caught hold of my neck and threw me on the bed." The survivor was, quite naturally, scared as a gun was in open view and she knew that the appellant was a powerful minister. She recounted that "I politely asked water from him but he threw the bottle on me and scolded me that he had spent a lot of money and would not *(let)* me go free of cost."

6. In course of her testimony in court, the survivor narrated her entire ordeal, right from the time that she was lured by the Nepali lady to come to Shillong and through several of the incidents pertaining to other men, apart from the appellant herein. Indeed, in her description of the incident at Umiam, at paragraph 2 of her continuing examination-in-chief conducted on September 14, 2017, she repeated most of the details that she had indicated in her statement under Section 164 of the Code.

7. It appears from the survivor's account that her so-called mummy and papa were given to using her almost as a cash card and so when they

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were unable to pay rent, the survivor was sent to the landlord in lieu of the defaulted rent.

8. According to the survivor, she was fed up and disgusted with the life that she was given in Shillong and when her foster mother was away from home one day, she took some money from a neighbouring Manipuri lady, boarded a bus and disembarked near the Civil Hospital in the centre of town. Though it is submitted on behalf of the appellant that the circumstances in which she was brought to the police station in Laban or how she narrated her suffering to two ladies appear to be doubtful, the essence of the survivor's statement is that she confided in two persons who she called as aunts and who may have been no more than acquaintances; and such persons brought her to the Laban Police Station or put her in touch with the State Child Welfare Committee officials.

9. In course of the present proceedings and before the merits of the appeal were taken up for consideration, this Court enquired into the well-being of the survivor. It appears that she is still under the care of the State and her day-to-day needs and expenses are being borne by the State. She will, doubtless, be entitled to the entire fine, if the appeal is dismissed, and further compensation from the State for the unimaginable misery that she has suffered.

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10. On behalf of the appellant, five major grounds are addressed. The appellant claims that the minority of the survivor was not established in course of the trial, which prompted the trial court to even examine a radiologist who had conducted a test on the survivor in connection with the Madanryting FIR, after the arguments had been concluded in course of the Nongpoh trial.

11. The second ground urged on behalf of the appellant is that since both the FIRs lodged at Madanryting and Nongpoh were directed against the same person, the appellant herein, the two complaints should have been really seen as parts of a solitary case and dealt with accordingly on the basis of the FIR that was lodged first in point of time.

12. The third contention raised on behalf of the appellant is that the conviction is based on material dating to a period prior to the lodging of the FIR in this case. The fourth ground taken is that the trial court, in its wisdom, consulted the records pertaining to the investigation relating to the first FIR, even to the extent of the identification of the appellant herein; but failed to give a fresh opportunity under Section 313 of the Code to the appellant herein.

13. The fifth and final ground canvassed pertains to the apparent inconsistencies in the various statements of the survivor. Three main aspects have been harped on in furtherance of such ground. The first is that

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even though in the various statements made by the survivor, she claimed that she was raped for the first time by the appellant herein, there is a stray sentence in course of her cross-examination at the trial that the first time she was raped was by a person called Appu. The next apparent inconsistency in the survivor's statement pertains to what she did after escaping from her adopted home in Shillong at Demthring and the persons that she met thereafter who ultimately led her to the police. The third count of perceived inconsistency is regarding the elderly Nepali lady who, according to the survivor, lured her to come to Shillong. The appellant suggests that the real charge of trafficking ought to have been brought against this Nepali lady and, considering that the survivor claimed that the lady lived in her village, such lady should have been arrested and otherwise produced before the court to substantiate the entire story made out by the survivor.

14. The trial court dealt with the matter in great detail and, by a judgment of August 13, 2021, convicted the appellant under Section 376(2)(i) and (n) of the Penal Code, 1860 along with Section 5 of the Protection of Children from Sexual Offences Act, 2012. The sentence was pronounced against the appellant on August 24, 2021 under Section 376(2) of the Penal Code since such provision provides for the more severe punishment. Three other persons, Mamoni Parveen, Darisha Mary

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Kharbamon and Sandeep Biswas, were also arrayed as accused. They were found guilty and convicted, inter alia, under the provisions of the Act of 2012, the Penal Code and the Immoral Traffic Prevention Act, 1986.

15. In this appeal, the focus is on the sole appellant. He has been sentenced to 25 years of rigorous imprisonment and fined Rs.15 lakh. The entire amount of fine has been required to be made over as compensation to the survivor. In default of the fine being paid, the appellant is to undergo another five years of rigorous imprisonment.

16. Despite the attempt on the part of the appellant to bring out seemingly contradictory or inconsistent strains from the survivor's testimony in course of her cross-examination at the trial, it does not appear that any serious attempt was made to question her age at the time of the Umiam incident. The incident was of the year 2016 and the FIR came to be lodged on January 5, 2017 by members of the State Committee for Protection of Child Rights.

17. It, however, appears that an application was filed by the appellant herein long after the recording of the evidence of several of the prosecution witnesses was over, to question the age of the survivor. In course of such challenge, the appellant herein relied on a certificate issued by the Ramakrishna Mission Lower Primary School at Khamlai to the effect that the year of birth of the survivor was recorded as 1997. The relevant

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certificate indicated that the survivor had studied in the school till December 23, 2005 and her recorded date of birth in such school was May 12, 1997.

18. A mini-trial of sorts, within the main proceedings, was conducted by the Sessions Court to ascertain the age of the survivor and the veracity of the certificate produced on behalf of the appellant herein. To cut a long story short, the trial court discovered that the survivor had studied in Ramakrishna Mission School in Umphloh (Ichamati) and never at the Ramakrishna Mission at Khamlai. Accordingly, the trial court completely disbelieved the certificate, particularly since the two persons examined from the relevant school in Khamlai in connection with the making of that certificate could not indicate the records from which the date of birth was recorded or even the school-leaving date that was indicated.

19. Instead, the father of the survivor was examined and he claimed that in 2018 his daughter, the survivor, was aged about 15 years. Though the appellant here seeks to point out the anomalies in the father's deposition, even if the best arguable case of the appellant were to be accepted, the age of the survivor in 2016 would still have been 16 years or below and no more.

20. It also appears that the father of the survivor produced a certificate from the midwife who was involved in delivering the survivor,

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but such certificate is not found in the records though it is referred to in course of his examination-in-chief on the issue of the age of the survivor.

21. The father of the survivor claimed that the survivor's mother, his first wife, died when the survivor was two years old. He narrated that he remarried two years after the death of his first wife. He also claimed that within a year of his second marriage, he had a son. The father of the survivor indicated that the age of his son at the time of his deposition in July, 2018 was 14.

22. Though, a little later in the same deposition, the father of the survivor asserted that the survivor was then aged 15 years at the time of his deposition, the appellant claims that if the step-brother was aged 14 in 2018, the survivor would have been at least 19 years of age at such point of time. Thus, the appellant seeks to demonstrate that the father's assertion to the effect that the survivor was 15 years of age in 2018 was incorrect. Without seeking to justify the father's assertion, even if it is accepted that the survivor was 19 years of age in the year 2018, it is clear that she would have been 17 years of age in the year 2016 when the Umiam incident happened. Thus, since the best arguable case of the appellant makes out the survivor's age to be 16 or 17 years at the time of the Umiam incident, there can be no doubt that she was a 'child', within the meaning of such word as used in the Act of 2012 which defines a 'child' in Section 2(1)(d) thereof

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to mean any person below the age of 18 years. And, as discussed hereafter, cogent material and scientific examination revealed that the survivor was below 16 years of age at the time of the Umiam incident.

23. Incidentally, the relevant order of the trial court of September 4, 2018 repelling the appellant's challenge to the minority of the survivor as on the date of the Umiam incident was carried to this Court by the present appellant by way of Criminal Revision Petition No.12 of 2018. The revision was dismissed by a speaking order of this Court of August 27, 2020.

24. There is no doubt that despite the dismissal of the criminal revision petition, in course of the present appeal, the age of the survivor could have been made an issue. Yet, there is no material to doubt the age of the survivor at the time of the incident in the absence of any meaningful attempt by the appellant to disprove the general assertion that she was a minor at the relevant point of time. In such context, the appellant refers to Section 29 of the Act of 2012 that places a reverse burden on the accused to disprove any allegation of committing or attempting to commit an offence under, inter alia, Section 5 of the said Act. The appellant submits that such provision and the burden that the accused has to discharge is subject to the minority of the survivor being established. There is no presumption as to the minority of the survivor upon a charge under the Act of 2012 being brought against an accused.

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25. There is no doubt that Section 29 of the Act of 2012 provides for a presumption as to the commission of the offence or the attempt at commission. It is such allegation which is seen on a more exalted footing, but there is no presumption as to the age or the minority of the victim, which has to be otherwise established without there being any burden in such regard on the part of the accused. It only remains to be seen if the minority of the girl in this case was established with cogent evidence.

26. In the present matter, it was the consistent assertion of the survivor in her statements and the case run by the prosecution that the girl was below 15 years at the time of the Umiam incident. Despite such position, no meaningful question was put to the survivor in course of her elaborate cross-examination, to cast any doubt as to her minority at the time of the incident. Though a belated application was filed, as noticed above, it was based on a false certificate issued by a school which the survivor never attended. Further, the survivor's age was established by her father and the trial court, in the judgment on such aspect rendered on September 4, 2018, referred to high authorities of the Supreme Court instructing that the parents of a survivor were the best witnesses to indicate the age of the survivor. Accordingly, there does not appear to be much merit in the appellant's assertion at this stage that the survivor may not have been a minor at the time of the Umiam incident.

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27. It must be remembered that the father of the survivor is not well-educated and his answers were, at the highest, in approximate terms. What the father may have meant was that the survivor was about two years old when her mother died and it was about two years later that he remarried and it was about a year later that his son from the second marriage was born. The approximation in all three cases may have been on the higher side, since he firmly maintained that at the time of his deposition his relevant daughter was aged 15 years.

28. From the statements of the survivor recorded before the members of the Child Welfare Committee and her statement recorded under Section 164 of the Code, it is evident that she was 15 years of age in end-December, 2016 and January, 2017. She also clearly indicated that she was 14 years old when she left home and accompanied the Nepali woman to Shillong. When she narrated the various sexual encounters that she was forced to undergo, the first of them was at least two months after she came to Shillong. The several incidents that she referred to between her first sexual encounter and the last, sometime around December, 2016, before she ran away from her Demthring home would indicate a period of several months, possibly in excess of a year.

29. More importantly, there is no doubt that the appellant had access to the statements rendered by the survivor before the CWC members and

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the further statement recorded by her under Section 164 of the Code. Indeed, there are references to such statements in the cross-examination of the survivor on behalf of the appellant. In all the three statements preceding the survivor's testimony at the trial, she maintained that she was 15 years old; yet not a solitary serious question was put to the survivor on behalf of the appellant regarding her age. Only a perfunctory suggestion was made that she had indicated an incorrect age, which she firmly denied. In course of her deposition in Court recorded in August or September, 2017, she indicated her age to be 15 years. Again, the defence, limited to the extent of the appellant herein, let it pass and did not effectively question the same till long after the survivor's examination was over. Subsequently, when the appellant questioned the age of the survivor, it was on the basis of a fabricated document obtained for the purpose of misleading the court. The relevant document that the appellant relied upon to assert that the survivor was born in the year 1997 emanated from a school which the survivor did not attend.

30. In course of the appellant's application challenging the minority of the survivor, the headmistress of the Ramakrishna Mission L.P. School, Umphloh was examined. Such headmistress testified that she knew the survivor and that the survivor was admitted in the school in the year 2008. She asserted that she had submitted the original admission register

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pertaining to the survivor before the court in Shillong. Such headmistress went on to add that in the year 2008, the relevant school did not maintain any register with regard to the dates of birth of the students and at the time of the admission of the survivor, her father did not produce any proof of her age but he "verbally told me that she was 7 years old and the same I have entered in the students' Admission Register." She further volunteered that she had seen the survivor at the time of her admission to the school "and she was quite small around the same age i.e., 7 years."

31. Long after the evidence on behalf of the prosecution and defence at the trial had been closed, the court had certain doubts that it wanted to dispel and called several witnesses for such purpose. Such additional witnesses included a dental surgeon who had examined the survivor to ascertain her age and a radiologist who had also issued a certificate regarding the age of the survivor. The dental surgeon maintained that as per her dental chronology examination, the survivor's dental eruption was fully completed for normal teeth; but "as for her molars i.e., her last molars or the wisdom teeth in a layman's terms, in a more scientific way as dentists we call it the 'third molars', there was no space yet for the eruption of the third molars." On such examination, the dental surgeon assessed the age of the survivor to be below 16 years when she conducted the test on the survivor on December 19, 2016.

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32. The dental surgeon was grilled to the hilt on behalf of the appellant herein. The object of the exercise in the cross-examination was to get the dental surgeon to indicate that her suggestion as to the age of the survivor was an approximation with a large bandwidth of variation. Indeed, direct questions were put to the dental surgeon on behalf of the appellant that the survivor could have been more than 18 years of age at the time of her examination. However, the dental surgeon was steadfast in her assertion that the girl-child could not have been more than 16 years of age when she examined her.

33. In response to the suggestion put to the dental surgeon on behalf of the appellant that the survivor may have been over 18 years at the time of her examination, the expert witness responded thus:

> "It cannot be, because I have based my examination on the 8. As per the dental chronology there should be a space if the survivor or any patient for that matter is above 16 years. There should be a space for the eruption of the 8. As for this particular survivor or patient, there is no space so based on that she will be less than 16 years of age. I based my finding on the dental chronology of the 8. The space which was not available. She is approximately below 16 years as per the dental chronology of the erupting of teeth. If she is above 16 years then the space should be there for the eruption of the 8/the last molars/the third molars."

34. To a further question in cross-examination, the dental surgeon was adamant that the survivor was below 16 years of age at the time of her examination. In the surgeon's words, "... she is approximately below 16.

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Not above 16. Below 16 but I cannot give the exact age. She can be 13 or 12."

35. Finally, upon the suggestion being repeated on behalf of the appellant herein that the survivor could have been above 18 years of age at the time of her examination by the dental surgeon, the witness signed off by saying:

> "Based on the dental chronology she could not have been above 16 on the day that I examined her."

36. The radiologist at the Civil Hospital, Shillong was also summoned by the court. He had conducted the ossification test on the survivor on December 19, 2016 and was of the opinion that "the approximate age of the victim is between 15 to 16 years." Though, in cross-examination, the radiologist indicated a range of two to three years upon an ossification test being conducted, he also clarified, when asked why he indicated the approximate age to be 15 to 16 years and not 18 or 12, as follows:

> "Based on the appearance and fusion of the ends of the long bones, because there is a certain age at which the bones fuse. For example, I have mentioned very clearly that in the x-ray of the right elbow the middle and the lateral humeral epicondyles have fused. That means the victim has attained the age of 14 years. She is not less than 14 years. And then in the report I have mention the x-ray of the right wrist the epiphyseal centre of the distal end of the ulna has fused. That means she is not less than 15 years. Then, the epiphyseal centre of the distal end of the radius has not yet fused completely. That means she has not attained the age of above 17 years."

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37. Right from the repeated assertions of the survivor as to her age to the indication of her age as given by her father and the recollection by the headmistress of the relevant school that the survivor was seven years old when she took admission in the school in 2008, the fact that the survivor was below 16 years of age even in 2017 is clearly established. The scientific evidence based on the examination by the dental surgeon and the ossification test conducted by the radiologist with their clear enunciation of the principles they followed in arriving at their independent conclusions, leave no manner of doubt that the survivor did not attain the age of 16 years till well after December, 2016.

38. Though the exact date of the Umiam incident has not come out in course of the evidence, the guest registration papers collected from the Umiam Lake Resort indicate the range of time to be between July and October, 2016. There is cogent evidence in such regard upon examination of several employees at the resort who confirmed both the fact that the appellant was a regular visitor there and that he would entertain guests at such place. Even the driver of the appellant maintained that he had taken the appellant to the relevant resort on several occasions. To boot, several employees posted at the resort identified the appellant in court.

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39. As to the second ground raised by the appellant, it must be said that it is possible, as the appellant suggests, that when two similar acts are complained of against the same person, they may be taken up for consideration in the same trial. However, when two separate offences are shown to have been committed in different points of time and at different places, there is no law to prevent different complaints in such regard being filed and such complaints being pursued separately in accordance with law, however similar the nature of the offences alleged may have been. It is true that right at the end of the trial, the trial court looked into the some of the records pertaining to the investigation following the original FIR lodged at Madanryting Police Station, but it is evident that the conviction in this case qua the action of the appellant herein is confined to only the Umiam incident. Nothing that the survivor claimed that the appellant inflicted on her at the guesthouse in Motinagar in Shillong was taken into consideration by the trial court in convicting the appellant for the entirely independent incident at Umiam.

40. What the trial court was interested in conclusively ascertaining at the fag end of the proceedings pertained to the identification of the appellant herein. Since it appears that the survivor was not called upon to identify the appellant in court during her deposition, the trial court deemed it necessary to ascertain whether the survivor had identified the appellant

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at all in course of the investigation. This was a reasonable doubt that engaged the trial court, particularly since the survivor's description of how she was taken to her "customers" indicated that she would be forced to consume alcohol and almost be in an inebriated state by the time she reached the place of occurrence.

41. The officer in whose presence the test identification parade was conducted was called as a witness. She indicated, without blemish, as to how the survivor identified the appellant herein despite the appellant being included in three different sets of line-up. Again, the appellant here suggests that the presence of a member of the staff of the investigating officer, who signed as a witness to the TI parade report, would vitiate the report. Apart from the fact that it was only a member of the staff and not any police personnel who signed as a witness, there is the unerring testimony of the person who organised the TI parade that no other witness was available to sign the report. In any event, both the person conducting the TI parade and the relevant member of the staff testified to the effect that at the time of conducting the parade, the member of the staff was neither in the vicinity nor in the room and it was only upon a document being made over to the member of the staff at a subsequent stage for him to sign, that he signed it at the request of the person who conducted the parade. The veracity of the identification or the recording thereof is not vitiated merely

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by reason of a second witness to the report being a member of the staff of the investigating officer, particularly when such second witness did not participate in the process of identification at all and was not within the room from where the young survivor identified the appellant herein. It is not as if the law requires, unlike in the case of, say, a Will, for two witnesses to verify the signature of the person executing the document or preparing the identification report. In such circumstances, the veracity of the identification exercise cannot be questioned. More importantly, the trial court allowed the defence to cross-examine all the witnesses called at the late stage. In several cases, the defence declined to cross-examine the relevant witness.

42. There is no doubt that the trial court had adequate authority under Section 311 of the Code to seek further evidence on any aspect that the trial court deemed necessary to arrive at a just decision. As long as such exercise was conducted upon notice to the accused and the witnesses called were presented to the accused for cross-examination, the accused cannot complain of having suffered any prejudice thereby.

43. The final point which is emphasised in such regard is that whatever may have impressed the trial court from the evidence adduced at the belated stage, the same ought to have been put to the appellant herein

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in course of a fresh statement being recorded under Section 313 of the Code.

44. Ideally, the trial court ought to have followed such course of action as suggested by the appellant. At the same time, it must not be missed that the additional evidence, so to say, that was gathered at the belated stage did not pertain to any act or action on the part of the appellant herein. The trial court was only attempting to ensure that the survivor had, at some stage, identified the appellant as the person who had abused her in Umiam and the trial court was also trying to further ascertain the approximate age of the survivor by questioning the dental surgeon and the radiologist who had examined her to assess her age, despite having already held that the survivor was a minor and below 16 years of age at the time of the Umiam incident.

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45. Ordinarily, when certain acts which amount to the commission of an offence are alleged by witnesses against a particular accused, it is the duty of the trial court to make the accused understand the implication of the factual statements made against him by the witnesses. In this case, since the object of the further exercise to adduce evidence was to merely ascertain whether the appellant had been identified at any stage by the survivor and to also satisfy the court that the survivor was a minor and

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below 16 years of age at the time of the Umiam incident, such exercise did not pertain to any act or action of the appellant herein.

46. Considering that a thorough examination under Section 313 of the Code had been previously concluded, the fact that the appellant was afforded a chance to cross-examine the further witnesses called but was not presented a second opportunity under Section 313 of the Code would not vitiate the conviction or the course of action adopted by the trial court.

47. As to the perceived inconsistent statements of the survivor, there is a lot to be said. Here was a girl who was about 16 or 17 at the most, when she was recounting the trauma that she had to live through when she was barely 15. Indeed, there is a remarkable untutored consistency in how she detailed what had happened in course of the relevant night in Umiam, how she was dragged from the bed to the carpet to another bed and even ill-treated the morning after.

48. The three aspects of inconsistency that the appellant focuses on pertain to the Nepali woman not being found, the nature of the survivor's relationship with the persons that she discovered near the Civil Hospital after she ran away from her foster home at Demthring and a stray sentence in her cross-examination that she was first raped by a person called Appu though she had elsewhere maintained that she was initially violated by the appellant herein.

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49. As to the Nepali woman not being brought to book or even discovered, it is a matter for the investigating agency to answer and the survivor cannot be accused of any inconsistency in such regard. What comes through from the survivor's statement is that she met the lady on a particular day when the lady invited the survivor to live a life in Shillong, whereupon she disclosed the same to her father and, though the father may not have agreed with her, she fled home, nonetheless; and much to her chagrin as she would discover later. It is also clear that she spent a night at the Nepali's woman house before ultimately coming to Shillong.

50. As to the circumstances immediately after she ran away from her new home at Demthring, it matters very little as to who she contacted since it is evident from her statements that the persons she described as aunts may not have been her real aunts but may have been regarded as aunts as Indian children tend to call adult lady acquaintances. It cannot be doubted that she was taken to the Laban Police Station within a short while of her running away from her Demthring home and she made two statements before the Child Welfare Committee officials. Such statements made on different dates are consistent with the detailed recollection of her trauma that she rendered in course of her testimony at the trial and it would not do to pick a stray sentence somewhere or an apparent aberration elsewhere to discredit her extremely believable account.

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51. Even if it be assumed for argument's sake that some other may have violated the survivor before the appellant herein ravished her, it would not make any difference. The conviction of the appellant is, inter alia, for committing aggravated penetrative sexual assault on a child and having sexual intercourse with a woman below 16 years of age and not because he was the first to violate her. Once the Umiam incident was proved – which it has been – whether the appellant was the first or the twentieth man to rape the survivor would make little difference. It would not even be a mitigating factor that could be taken into account at the time of sentencing.

52. The only other aspect that remains to be considered is the third contention raised on behalf of the appellant to the effect that the conviction is based on material dating to a period prior to the lodging of the FIR in this case. Frankly speaking, the argument is unintelligible and exceptionable. If the conviction in this case was required to be based on, first, the age of the survivor and, secondly, on the act or acts committed by the appellant on the survivor, the business of ascertaining the age of the survivor would, obviously, be on the basis of her birth certificate or other records dating to a period prior to the complaint being brought. As such, in principle, the third ground asserted by the appellant holds no water.

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53. In addition to the grounds put forth by the appellant to question the propriety of his conviction, the quantum of sentence imposed is also seriously challenged.

54. The appellant refers to Section 6 of the Act of 2012 which mandates that a person found to have committed aggravated penetrative sexual assault "shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may extend to imprisonment for life and shall also be liable to fine." The appellant asserts in view of the clear wording of Section 6 of the Act of 2012, the appellant could not have been sentenced to 25 years in prison under such provision.

55. The appellant next refers to the punishment provision under Section 376(2) of the Penal Code. At the relevant point of time, Section 376(2) of such Code provided for a common punishment in several special cases, including under clause (i) for committing rape on a woman under 16 years of age; and under clause (n) for committing rape repeatedly on the same woman. The statutory command for the extent of punishment in the special cases covered under Section 376(2) of the Penal Code is that it would be "rigorous imprisonment for a term which shall not be less than ten years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and shall also be liable to fine."

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56. The underlying submission of the appellant in such regard appears to be that a punishment that is not expressly provided for in a statute cannot be conjured up by a court of law. In essence, the appellant seeks to rely on the Latin maxim *nulla poena sine lege*, which literally means "no punishment without a law authorising it", as per *Black's Law Dictionary (11th Ed)*.

57. It is elementary that an act may be regarded to be an offence only when it is prescribed as such by a statute as on the date of the commission thereof. Indeed, the definition of the word "offence" in Section 40 of the Penal Code indicates, in its larger sense, "a thing made punishable by this Code ... or under any special or local law ..."

58. The expression *nulla poena sine lege* is a part of the larger maxim, *nullum crimen sine lege, nulla poena sine lege*. In rudimentary English, the complete maxim implies that there cannot be any crime, nor can there be any punishment, without a specific law in such regard. Thus, for a punishment to be meted out to an offender, such offender must have violated a penal law by committing an act which is recognised in the statute as an offence as at the time of the commission thereof. As a corollary, and possibly so that a would-be offender is warned of the consequences of his action, the extent of the punishment is also clearly spelt out in a statute.

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59. There is no doubt that the court is given a bandwidth within which to operate; in the sense that a minimum punishment for an offence is indicated in a particular provision together with the maximum punishment that can be awarded for the same offence. Judicially accepted principles then guide a court to take into account the aggravating circumstances and mitigating circumstances to indicate whether the punishment in a particular case ought to be the lowest or the highest or somewhere in between. It is not an arbitrary sentence that may be pronounced by a court. Reasons must be given to justify the quantum of the punishment awarded, but the punishment can neither be lower than what is the minimum prescribed nor higher what is indicated as the maximum permissible in the relevant statutory provision. Indeed, no discretion is available to be exercised in such regard to lower the quantum of punishment than the minimum prescribed on the basis of any perceived special circumstances; nor can the maximum extent of punishment be exceeded by any quirk of legal or rational reasoning.

60. It is in such light that the "rarest of rare" principle applied in cases involving the death penalty must be seen. The dictum in the judgment reported at (1980) 2 SCC 684 *(Bachan Singh v. State of Punjab)*, has been fine-tuned in several later judgments by indicating the non-exhaustive myriad circumstances which would lead to a conclusion that the crime

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committed in the particular case would be of a kind that is described as the rarest of rare, before a death penalty may be handed down.

61. Section 53 of the Penal Code describes the five kinds of punishment which offenders are liable to suffer: death, imprisonment for life, rigorous or simple imprisonment, forfeiture of property and fine.

62. Even in the rarest of rare cases if a sentence of death is passed, by virtue of Section 54 of the Penal Code, the appropriate government may, without the consent of the offender, commute the punishment for any other punishment provided by the Penal Code. Similarly, in every case in which a sentence of imprisonment for life is passed, the appropriate government may, without the consent of the offender, commute the punishment for imprisonment of either description for a term not exceeding 14 years.

63. Thus, for all practical purposes, even though the extent of punishment awarded as, say, under Section 302 of the Penal Code, for murder, may be imprisonment for life, the maximum tenure that may be served by the offender is 14 years.

64. In recent times, a new species of punishment has been prescribed, particularly in the Penal Code in respect of gender crimes and trafficking. In several amended provisions of the Penal Code, like Sections 370, 376(2), 376(3), 376A, 376AB, 376DA, 376DB and 376E, the punishment prescribed or the maximum punishment prescribed is

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"imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life and shall also be liable to fine."

65. For those given to nitpicking, it may appear that such new species of punishment would have required an amendment to Section 53 of the Penal Code. That is because, in Section 53 of the Penal Code, the description of the second form of punishment – imprisonment for life – would imply all forms of imprisonment for life and, as a corollary, it may be argued that Section 55 of the Penal Code would permit any punishment of imprisonment for life to be commuted for a term not exceeding 14 years. However, on a plain reading of some of the relevant provisions which have incorporated such new species of punishment as in sub-sections (5), (6) and (7) of Section 370 of the Penal Code and in Section 376(2) thereof, it would be illogical on the face of it to suggest that when the punishment or the maximum punishment prescribed uses the word "shall" and postulates that such imprisonment for life "*shall* mean imprisonment for the remainder of that person's natural life", there is any possibility of remission or any form of reduction of such sentence. In cases where the imprisonment for life, meaning imprisonment for the remainder of that person's natural life, is awarded, it does not appear that the quantum of the sentence can be tinkered with under Section 55 of the Penal Code. Maybe, a Parliamentary

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clarification in such regard would be in order, if only to avoid useless waste of time; but that is a different matter altogether.

66. As far as the present case is concerned, the appellant has been found to have been appropriately convicted under Section 5 of the Act of 2012 to be found liable to be punished under Section 6 thereof; and, again, justly convicted and punished under Section 376(2) of the Penal Code, both for committing rape on a woman below 16 years of age and for committing rape repeatedly on the same woman. However, the punishment that has been awarded is under Section 376(2) of the Penal Code while keeping in mind the principle embodied in Section 71 of the Penal Code.

67. As for the appellant's conviction under Section 5 of the Act of 2012, there can be no question raised. Indeed, two independent limbs of Section 5 of the Act of 2012 fastened to the appellant: the first for the position that he occupied at the time of the commission of the offence; and, the second for his conduct which was established beyond reasonable doubt at the trial. Since the appellant was a minister in the State at the relevant point of time, the trial court quite rightly found that Section 5(c) of the Act of 2012 would be attracted and the appellant's commission of penetrative sexual assault on the survivor would amount to aggravated penetrative sexual assault. Further, since the evidence conclusively revealed that the appellant had committed penetrative sexual assault on the survivor more

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than once or repeatedly on that night in Umiam, Section 5(l) of the Act of 2012 would come into play for his offence to be regarded as aggravated penetrative sexual assault on an additional count.

68. In fact, in the context of the offence committed by the appellant having been found to be covered by Section 376(2)(n) of the Penal Code, the entire contention of the appellant as to the age of the survivor is rendered nugatory. Even if the survivor had attained the age of majority or was over the age of 16 at the time of the Umiam incident, the appellant herein could still have been found guilty, as he has been, under clause (n) of Section 376(2) of the Penal Code for committing rape repeatedly on the same woman.

69. The relevant clause does not imply that the repeated commission of rape has to be on different dates. The provision is clear: rape has to be committed repeatedly on the same woman. Oftentimes, a complaint of rape involves a single act. In this case, the survivor's account is clear that she was raped on one bed, then dragged down on the carpet and raped on the floor and, again, taken to other bed and raped there. It is also possible that the survivor was again raped the morning after when the appellant claimed that he had paid good money for her and had not derived his money's worth.

70. When the twin conditions indicated in Section 376(n) of the Penal Code are "repeatedly" and "the same woman", the provision cannot

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be distorted or read down to imply that the several offences have to be committed in different points of time where the points of time would be counted in days or weeks or months and not in minutes or hours. There is no doubt that the several acts have to be discrete acts and not a part of the same motion, so to say.

71. Once the second condition – as to the woman being the same – is satisfied, it has to be rationally assessed as to what would amount to repeated acts of rape on the same woman. Strictly speaking, in terms of the definition of rape in Section 375 of the Penal Code, a man is said to commit rape if he penetrates his penis, to the slightest extent or even for a fleeting moment, into the vagina, mouth, urethra or anus of a woman or makes her do so with him under any of the seven circumstances described in the provision. However, if a person in course of the same action penetrates his penis into the woman several times, it would not amount to repeatedly raping her. But if the man completes a solitary action, even by multiple penetrations, and then commences another round, whether or not after a gap, and finishes such further action and repeats the process even in course of several minutes or hours, it would amount to an aggravated offence under Section 376(2)(n) of the Penal Code and attract the punishment thereunder.

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72. Of course, the word "repeatedly" implies multiple times and the commission of rape on the same woman has, at least, to be more than twice for it to seen as having been committed repeatedly. Indeed, in a similar context, Section 5(l) of the Act of 2012 uses the expression, "more than once or repeatedly" whereas Section 376(2)(n) uses only "repeatedly". But as long as there are separate acts of rape, even within a short span of time, the unambiguous wording of Section 376(2)(n) of the Penal Code would attract such provision.

73. Hence, to the final discussion on the quantum of the sentence awarded. Such discussion must be prefaced with a caveat that at the time that the offence in this case was committed, the 2018 amendment to the Penal Code was not in place. Thus, the special provision now carved out under Section 376(3) of the Penal Code pertaining to rape on woman below 16 years of age would not be applicable. In such a scenario, the trial court had to choose the punishment from within the spectrum which, at its lowest end was 10 years' rigorous imprisonment and at its highest end was "imprisonment for life which shall mean imprisonment for the remainder of *(the appellant's)* natural life." Sufficient reasons have been indicated in the trial court's judgment and order as to the aggravating circumstances and the brutality with which the appellant treated the survivor, for the highest end of the spectrum to be considered appropriate.

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74. But that still begs the question that when the minimum prescribed prison term is indicated in the relevant provision to be 10 years and the maximum as life imprisonment, implying imprisonment for the remainder of the convict's life, whether a term of 15 years or 20 years or 25 years, which is not specifically prescribed, may be awarded.

75. Logically, if the highest end of the prescribed punishment is till the end of the natural life of the convict, it stands to reason that any shorter period may be awarded since the highest punishment prescribed is tempered by the expression "may extend to". There is an element of discretion at large which, naturally, has to be exercised in consonance with established judicial principles upon aggravating and mitigating circumstances being taken into account.

76. The provision for punishment under Section 376(2) of the Penal Code gives the court a discretion to award imprisonment for life; but when the punishment meted out is imprisonment for life, it would automatically imply imprisonment for the remainder of the convict's life. Indeed, the word "shall" in the expression "may extend to imprisonment for life, which *shall* amount imprisonment for the remainder of that person's natural life" will not permit any other interpretation. However, the court also has the discretion to not award a punishment of imprisonment for life but indicate a tenure which is more than 10 years yet would not be imprisonment for

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life. Considering the age of the convict, such a tenure could be 15 years or 20 years or 30 years or any number of years in between. The discretion that is exercised is for the benefit of the convict by not awarding the maximum sentence permissible. In such a scenario, even though there is no specific prescription in the provision for awarding a sentence of 15 years or 20 years or 22 years of imprisonment, if such tenure is indicated, it will be deemed to fall within the bandwidth of discretion made available to the court by the relevant provision. Accordingly, the term of imprisonment of 25 years as awarded by the trial court by indicating cogent reasons therefor, does not call for any interference.

77. At any rate, notwithstanding the limitations in the Penal Code, in view of the dictum in *V. Sriharan* reported at (2016) 7 SCC 1, when a death sentence is commuted by a Constitutional Court to a term for life imprisonment, such Constitutional Court is empowered to provide a tenure of life imprisonment to extend to the remainder of the convict's natural life, even if such form of punishment is not prescribed in the applicable provision. Indeed, at paragraph 104 of the report in *V. Sriharan*, the Constitution Bench observed as follows:

> "104. ... By way of abundant caution and as per the prescribed law of the Code and the criminal jurisprudence, we can assert that after the initial finding of guilt of such specified grave offences and the imposition of penalty either death or life imprisonment, when comes under the scrutiny of the Division Bench of the High Court, it is only the High Court which derives

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> the power under the Penal Code, which prescribes the capital and alternate punishment, to alter the said punishment with one either for the entirety of the convict's life or for any specific period of more than 14 years, say 20, 30 or so on depending upon the gravity of the crime committed and the exercise of judicial conscience befitting such offence found proved to have been committed."

78. On a parity of reasoning, when the highest prescribed period for punishment is imprisonment for life for the remainder of the convict's natural life, an alternate tenure of imprisonment for any specific period of more than 14 years may be awarded, depending on the gravity of the crime committed and the exercise of judicial conscience befitting such offence found proved to have been committed.

79. At the time of commission of the repeated acts of rape on the same woman in Umiam, the appellant was about 52 years old. By imposing a sentence of 25 years of imprisonment, the trial court has ensured that by the time the appellant is let loose again in society his libido would have been sufficiently lessened by age and adequately chastened by the punishment. He will then no longer be able to unleash his lust or indulge in any further virile bravado.

80. A word may be said on the quantum of fine which has been imposed. Section 63 of the Penal Code mandates that when no sum is expressed to which a fine may extend, the amount of fine to which the offender is liable is unlimited but shall not be excessive. As to what may

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be excessive would be relative. It would depend on the nature of the offence, the ability of the convict to pay and even the compensation that ought to be awarded to the survivor under Section 357 of the Code of 1973. Considering the status and stature of the appellant in this case, a fine of Rs.15 lakh in this day and age and, that too, by way of compensation to a young survivor who has been brutalised, does not shock the conscience of the court as being excessive.

81. There is also an alternative available to the appellant in lieu of the fine: to suffer a further five years of rigorous imprisonment. Even such punishment in default is within the limit prescribed by Section 55 of the Penal Code as the default imprisonment in this case does not exceed one-fourth of the term of imprisonment which is the maximum fixed for the offence.

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82. This brings to an end the ghastly saga of the rather heinous and dastardly conduct of a person who held high public office. Nothing brought out by the defence in course of the trial could detract from the survivor's credible account of how she suffered at the hands of the appellant herein. Indeed, one does not find any redeeming feature in the defence and the manner in which the survivor described to have been treated by the appellant herein has appropriately resulted in the tenure of imprisonment and the fine of Rs.15 lakh being slapped on the appellant by the trial court.

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There does not appear to be any glaring infirmity in the judgment of conviction or the consequent sentence pronounced against the appellant on the basis thereof. The trial court dealt with the material before it at great length and justly arrived at the right conclusion by using the appropriate tools of assessment.

83. There is a minor matter which the trial court appears to have overlooked. The charges framed against the appellant included his act of having repeated sexual intercourse with the survivor in Umiam. Indeed, the trial court found against the appellant under Section 376(2)(n) of the Penal Code. But the trial court failed to record that the appellant was also guilty of aggravated penetrative sexual assault under Section 5(l) of the Act of 2012 for having repeatedly had sexual intercourse with the survivor on the same night in Umiam. But such minor mistake does not detract one bit from the reasoning indicated in the judgment of conviction or the punishment ultimately awarded since such punishment was under Section 376(2) of the Penal Code which provided for the more severe sentence than under Section 6 of the Act of 2012 for the similar offence.

84. As a consequence, Criminal Appeal No.12 of 2021 fails and the same is dismissed.

85. The State will ensure the continued well-being of the survivor, at least till she reaches the age of 25. The fine, if paid, and a total amount of

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compensation not less than Rs.20 lakh, should be provided by the State to the survivor by way of investments that would mature on a periodic basis for her to receive the same. In other words, the State will pay a further Rs.5 lakh to the survivor by way of compensation, in addition to the sum of Rs.15 lakh that she receives from the fine. If the appellant does not pay the fine and serves a further five years of rigorous imprisonment, the State will make over the equivalent amount of Rs.15 lakh to the survivor. The total amount of Rs.20 lakh must be invested in the name of the survivor within three months from date with the State taking adequate measures to ensure that the entire amount is not squandered in a hurry or the survivor is cheated of any part of it by any other person. The State will also be responsible for taking care of all the medical needs of the survivor free of cost and befitting a Grade-II officer of the State for at least the next 20 years.

86. In addition, if there is any special programme or working opportunity that is available or for which the survivor qualifies or if there is any late education programme for women where the survivor may be accommodated, the State should provide all assistance to the survivor to lead a remaining normal and healthy life.

87. The society at large owes a huge apology to the brave young survivor for having failed one of its most precious and tender.

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88. Nothing said herein and nothing done pursuant to this judgment and order will stand in the way of the proceedings arising out of the FIR filed on behalf of the survivor at Madanryting being brought to a logical conclusion in accordance with law.

89. Let an authenticated copy of this judgment and order be immediately made available to the appellant free of cost.

(W. Diengdoh)
Judge

(Sanjib Banerjee)
Chief Justice

Meghalaya
05.04.2023
"Lam DR-PS