



Serial No.01
Supple List

HIGH COURT OF MEGHALAYA
AT SHILLONG

CrI. A. No. 20 of 2023

Date of Decision: 19.03.2024

Shri. Wallamhok Kshiar
S/o (L) Aibor Kshiar, Age about 22 years.
R/o Umtyrnnga Ri Bhoi District,
Meghalaya. :::: Appellant.

Vs.

1. State of Meghalaya
Represented by: The Secretary, Home Department,
Govt. of Meghalaya, Shillong.
2. The Superintendent of Police
Ri Bhoi District, Govt. of Meghalaya, Nongpoh.
3. The Officer-in-Charge,
Women P.S. Nongpoh, Govt. of Meghalaya,
Ri Bhoi District, Nongpoh. :::: Respondent.

Coram:

Hon'ble Mr. Justice B. Bhattacharjee, Judge

Appearance:

For the Petitioner(s) : Mr. C. H. Mawlong, Adv.
For the Respondent(s) : Mr. K. Khan, AAG with
Mr. S. Sengupta, Addl. Sr. GA.
Mr. J. N. Rynjah, GA.

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



JUDGMENT AND ORDER

The impugned judgment of conviction dated 27-07-2023 and order of sentence dated 31-07-2023 passed by the Special Judge (POCSO), Ri Bhoi District, Nongpoh in Special POCSO Case No. 13 of 2019 are under challenge in this appeal. By the said judgment of conviction and order of sentence, the appellant was convicted and sentenced to undergo imprisonment for 3 (three) years and 6 (six) months with fine of Rs. 2,00,000/- and in default of payment be imprisoned for further 6 (six) months under Section 7/8 of The Protection of Children from Sexual Offences Act, 2012 (POCSO Act). The appellant was also convicted and awarded a sentence of six months imprisonment with a fine of Rs. 20,000/- and in default of payment to undergo further one month imprisonment under Section 3(1)(w)(i)(ii) The Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1985 (SC/ST Act).

1. The fact of the case is that a written compliant was lodged by the PW2, the father of the survivor stating that on 04-03-2019 at about 1.00 PM his daughter, aged about 17 years, was molested by the appellant at Umtyrnga near Presbyterian Secondary School, Ri Bhoi District. On the basis of the FIR Women PS Case No. 11(3)2019



under Section 7/8 POCSO Act was registered at Nongpoh. Upon completion of the investigation, a charge-sheet bearing charge-sheet No. 11/19 dated 25-05-2019 was filed in the matter. Thereafter, charge under Section 8 of the POCSO Act was framed against the appellant on 13-08-2019 to which the appellant pleaded not guilty and claimed to be tried. In support of the allegation, the prosecution examined 10(ten) witnesses and exhibited 11(eleven) Exhibits. The statement of the appellant under Section 313 Cr.P.C. was recorded on 28-06-2023. The appellant declined to adduce any defence witness. The Trial Court thereafter heard the arguments of the rival parties and delivered the impugned judgment of conviction and the sentence which are under challenged in this appeal.

2. Mr. C. H. Mawlong, learned counsel appearing for the appellant submits that the survivor in her evidence did not say that she was inappropriately touched by the appellant. He contends that mere hugging or embracing would not amount to any crime as it is only an expression of love and friendship. He further submits that the evidence of PW3 and PW4, who claimed to be the eye-witnesses, did not support the evidence of the survivor and, in fact, contradicted the narrative of the survivor. He submits that the statement of the PW1 (survivor) recorded under Section 164 Cr.P.C. and her evidence



during the course of trial are different and do not support each other. The learned counsel submits that the appellant and the survivor are well-known to each other and the alleged incident is nothing but an expression of friendly relationship between them. He contends that the evidence PW2 do not project existence of any sexual intent on the part of the appellant, and in absence of that, it cannot be said that the prosecution has established foundational fact to attract provision of Section 7/8 of POCSO Act. He submits that the presumption under Section 29 of POCSO Act cannot be drawn on the basis of mere allegation and in support of his contention, the learned counsel places reliance on *(2010) 9 SCC 189, Babu Vs. State of Kerala*, the decisions of the Calcutta High Court rendered in *C.R.A. No. 736 of 2016 with C.R.A. N. No.1035 of 2015, Sahid Hossain Biswas Vs. State of West Bengal.* and of Bombay High Court, Nagpur Bench in *Criminal Appeal No. 600 of 2017, Amol s/o Dudhram Barsagade Vs. State of Maharashtra.* The learned counsel has also placed reliance on the decisions of the Apex Court reported in *(2010) 6 SCC 736, Baij Nath Sah Vs. State of Bihar* to impress upon the Court that the statement under Section 164 Cr.P.C. is not substantive evidence to base the conviction.



3. The learned counsel for the appellant further contends that the Trial Court grossly erred in convicting the appellant under Section 3(1)(w)(i)(ii) SC/ST Act. He submits that the appellant being a member of the Scheduled Tribe community could not have been punished under the aforesaid Act and the Trial Court convicted the appellant behind his back without affording any chance to defend himself against the conviction under the SC/ST Act. He submits that at no point of time the Trial Court added any charge against the appellant in the Trial, and the conviction, as such, has highly prejudiced the appellant. The learned counsel submits that there is no allegation against the appellant that he committed any wrong to the survivor in the name of her caste or community and he intentionally insulted or intimidated with intent to humiliate the survivor in a public place within public view. To buttress the argument the learned counsel relies upon the decisions of the Apex Court reported in *(2010) 18 SCC 763, Khuman Singh Vs. State of Madhya Pradesh* and *(2018) 12 SCC 531, Gorige Pentaiah Vs. State of Andhra Pradesh and Others* submits that the impugned judgement of conviction and order of sentence is liable to be set aside and quashed on this ground alone.
4. On the other hand, Mr. K. Khan, learned PP supports that conviction and sentence recorded by the Trial Court and submits that



the version of PW 1 (survivor) is totally supported by the evidence of eye-witnesses i.e. PW 3 & PW 4. He submits that the facts of the entire case leading to the arrest of the appellant undoubtedly projects a case of sexual assault as defined in Section 7 of the POCSO Act against the appellant. However, the learned PP has not offered any argument in support of the conviction and sentence of the appellant under Section 3(1)(w)(i)(ii) SC/ST Act and left the same to the discretion of the Court.

5. The appellant has not raised any dispute with regard to the determination of age of the survivor by the Trial Court.

6. The PW1, who is also the survivor, in her deposition before the Trial Court has stated that on the day of occurrence i.e. on 04-03-2019, while she was sitting with other school friends and eating chips during recess, the appellant came near her and held her hand and tried to kiss her forcibly and further held her body parts in and around and also forcibly tried to hug her. She screamed and tried to remove herself from his clutches and when her friends reached the spot upon hearing her screaming, the appellant left her. Thereafter, along with her friends her class teacher was contacted who upon being informed of the incident narrated the facts to the school Principal and police was called and the accused was arrested. The survivor was taken for



medical examination where she narrated the incident to the doctor. The Statement of the survivor was recorded under Section 164 Cr.P.C. and the same was exhibited before the Trial Court as Exhibit-4. In her cross-examination, the survivor admitted that the appellant was known to her. She denied to have made the complaint against the appellant due to misunderstanding. She also denied the suggestion that she was chatting with the appellant on Facebook.

7. The PW 2, the complainant and the father of the survivor, deposed that on 04-03-2019 his daughter was molested by the appellant. He stated that he visited the police station on 04-03-2019 and signed the complaint. The PW 3 in her deposition stated that she, along with the PW 4, was present with the survivor at the place of occurrence at the time of the incident. She deposed that one boy came and held the hand of the survivor and touched her body-parts and shoulder and was trying to kiss her. On this the survivor started crying and went inside her classroom. Thereafter the survivor reported the matter to Garo teacher and Principal. In her cross-examination she denied that the appellant was in jovial mood and she affirmed that the survivor was crying after the incident. She stated that she did not see the appellant touch the breast of the survivor. She also failed to recognize the appellant in the Court room.



8. The PW 4, who also happens to be an eye-witness, deposed that the survivor is her friend and classmate. On the day of the incident, she was going with one Alisha to a hotel near the school during the lunch break and she saw the survivor sitting with the PW 3 on a parked scooty which belonged to their school teacher. She called the survivor to have lunch but the survivor denied and preferred to remain there as it was a shady area. While returning back to school, she saw the survivor along with the appellant on the same scooty and the appellant was hugging the victim from behind. When she went ahead, she suddenly heard the survivor calling out her name and asked for help. She turned around and saw that the appellant was holding the survivor around her arms from behind and was not letting her go. She went to school and told the incident to one female teacher who is the wife of the principal. She stated that she did not go and help the survivor as she was scared. She identified the appellant in the Court. In her cross-examination she stated that she did not see the survivor crying as she was far but stated that the survivor cried a lot when she reached school. She stated that she did not see the appellant touching the breast of the survivor.

9. The PW 5, who is the headmaster of the school of the survivor, stated that the appellant is his own brother. On the day of incident, he



was in Guwahati and received a call from one staff of his school informing him that his brother, the appellant, had touched the survivor from her shoulder. He returned back from Guwahati and went to the school and had a meeting with his staffs and students who witnessed the incident. One of his students informed him that his brother had approached the survivor and started molesting her, the survivor tried to back away from the appellant who did not stop his act and the survivor thereafter started crying as the incident happen in a public place. He stated that his staff had also narrated the same incident as told by his student. He stated that his brother denied to have touched the survivor. He stated that his brother and the survivor knew each other although they belong to different villages. He also told his brother to apologize to the survivor but he did not listen to him. In his cross-examination he admitted that he is not the eye-witness and he did not know anything about the case.

10. The PW 6, the Investigating Officer, in her deposition stated that on 04-03-2019 the survivor was brought to the Byrnihat police outpost and where the appellant was also brought by police. Both the survivor and the appellant were taken for medical examination by separate vehicle after which the appellant was detained at the police station for interrogation where he admitted to have committed the



offence on the survivor. On the same day a written FIR was filed by the father of the survivor and thereafter the appellant was formally arrested on 05-03-2019 after registration of the case at Women PS, Nongpoh. During the course of investigation place of occurrence was visited and a rough sketch map was prepared. Photographs of the place of occurrence were also taken. The photo copy of the birth certificate of the survivor was also seized on the production by the elder brother of the appellant who was the headmaster of the school where the survivor was studying. The statement of the survivor as well as of the other relevant witnesses were also recorded and the statement of the survivor was also recorded under Section 164 Cr.P.C. during the course of investigation. She also identified the appellant in the Court room.

11. The PW 7, the medical expert, in his deposition stated that no biological sample from the survivor and the appellant was collected as it was a case of only sexual assault as per the requisition given by the police and the history of the incident given by the survivor. The PW 8 stated that on 04-03-2019 he received the written FIR from the PW 2 and forwarded the same to the Women PS, Nongpoh. The PW 9, who is a teacher of the survivor of the school and also the brother-in-law of the appellant, stated that on the day of incident on his return to school



after lunch, he saw some students sitting with one teacher (PW 10) in a class room. He entered the room and upon enquiry came to know that the appellant had inappropriately touched the survivor. He asked the survivor who was present there about the incident and she said that the appellant touched her inappropriately while she and her friends were sitting outside the school during lunch break. He immediately informed the matter to the headmaster (PW 5). The witness also stated that he accompanied the survivor to the Byrnihat Police Outpost and to Byrnihat PHC for medical examination. In cross-examination he stated that he is not the eye-witness in the case and admitted that he came to know about the incident from the PW 10.

12. The PW 10, who is a teacher in the same school, in his deposition stated that on the day of occurrence a friend of the survivor came to the staff room and informed him that the appellant was playing around/teasing the survivor. He stated that he knows the appellant and saw the police arresting him. He stated that along with the friend, the survivor also came and was crying. He went and told the headmaster who called the police. He stated that the birth certificate of the survivor was taken by police from school and he signed the seizure list. In his cross-examination, he stated that he is not the eye-witness in the case.



13. The appellant in his statement under Section 313 Cr.P.C. while responding to the various questions put to him stated that he knew the survivor and they used to talk to each other. They were cracking jokes and after that he left the place. He also stated that while they were joking, the survivor herself touched his shoulder and he removed her hand and did not allow her to touch him.

14. What can be gathered from the entire evidence of the prosecution witness is that the appellant at no point of time disputed his presence in the place of occurrence at the time of the incident by putting any question in that regard to the witnesses while cross-examining them. The appellant rather confirmed his presence in the place of occurrence and tried to justify the reason for touching the survivor by trying to project the entire incident as an exchange of pleasantries between two close friends.

15. A perusal of the statement of the survivor under Section 164 Cr.P.C., exhibited as Exhibit – 4, would show that the appellant came and started to touch the survivor's hand. He then touched survivor's shoulder and tried to feel her breast but was resisted and pushed by the survivor. Though the survivor in her deposition before the Trial Court as PW 1 did not repeat the same statement, but stated that the appellant came near her and held her hand and tried to kiss her



forcibly and further held her body parts in and around and also forcibly tried to hug her. The PW 3 while narrating the same incident in her deposition before the Trial Court stated that one boy came and held the hand of the survivor and touched her body parts and shoulder and was trying to kiss her. On this the survivor started crying and went inside her classroom. The PW 4, in her evidence while giving her version of the incident stated that she saw the appellant hugging the survivor from the behind. As she went ahead, she suddenly heard the victim girl calling out her name asking for help. She turned around and saw the appellant was holding the survivor around her arms from behind and was not letting her go. The above unwavering disclosure by the PW1, PW3 and PW4 makes it completely clear that the appellant touched the survivor in an improper and indecent manner without her consent which made the survivor scream, cry and move towards her classroom. Further, holding of hands of the survivor, trying to kiss her by applying force and further holding of body parts in and around and also forcibly trying to hug the survivor clearly establishes existence of sexual intent on the part of the appellant.

16. Moreover, the evidence of the eye-witnesses reveal that the victim was crying a lot immediately after the incident which fact has not been contradicted by the appellant. The fact that the survivor



screamed and called out the name of the PW 4 asking for help would unerringly show that the survivor was traumatized and felt helpless because of the action of the appellant. The contention of the appellant that the entire incident was an expression of sign of love and friendship between the survivor and the appellant is, thus, totally unsupported by evidence and cannot be accepted.

17. The appellant's contention that the PW 2, the father of the survivor, has not supported the case of the prosecution as he stated that the appellant had only held the hand of the survivor, also do not lend any discredit to the prosecution case in view of the fact that the PW 2 was not an eye-witness to the incident. The fact that the PW 2 went to the police station to sign the complaint after being informed of the incident by the survivor is good enough to hold that he was convinced about the commission of the offence by the appellant against his daughter.

18. The follow up action taken by the PWs 5, 9 & 10 upon being informed of the incident by the survivor and her friends, as can be gathered from their evidence recorded before the Trial Court, indicates that the matter was treated with utmost seriousness by them after discussion with the staffs and students concerned. It is clear from the evidence of the PW 5 and PW 9, the brother and brother-in-law of the



appellant, that after receiving the information of the incident, they realized the gravity of the occurrence and did not hesitate to report to the police after making initial enquiry from their end. In fact, the action of PWs 5, 9 & 10 negate the contention of the appellant that there was only exchange of pleasantries between the appellant and the survivor.

19. The decisions of *Babu Vs. State of Kerala (supra)*, *Sahid Hossain Biswas Vs. State of West Bengal (supra)* and *Amol s/o Dudhram Barsagade Vs. State of Maharashtra (supra)* laid down that the foundational fact of the prosecution case must be established by legally admissible evidence before statutory presumption can be invoked by a Court. The Courts must be careful to ensure that application of mere presumption may not lead to any injustice or mistaken conviction.

20. In *Baij Nath Sah Vs. State of Bihar (supra)* held 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-à-vis statement made in Court.

21. The present case is not a case where prosecution has failed to establish foundational fact. The prosecution version of the case is firmly established by the evidence of PW 1 (Survivor) and PWs 3 & 4



and well-supported by the evidence of all other witnesses including PWs 5, 9 & 10. It is also evident from the materials on record that the learned Trial Court did not pass the impugned judgment solely on the basis of the survivor's statement under Section 164 Cr.P.C. The Trial Court has taken into consideration testimonies of all the witnesses including that of the survivor and the eye-witnesses. Hence, it cannot be said that the Trial Court's judgment is in contradiction of the proposition of law laid down in the aforesaid decisions.

22. The appellant has not made any allegation of hostility or vindictiveness on the part of the survivor in making the accusation against him in order to render the statement of the survivor doubtful. The totality of the circumstances appearing in the case does not disclose that the survivor had a strong motive to falsely involve the appellant and, therefore, there should not be any hesitation on the part of the Court in accepting her evidence adduced during the course of trial. The appellant also has not raised any challenge to the age of the survivor in this appeal and the findings recorded by the learned Trial Court to that effect has not been disputed in this appeal.

23. Coming to the challenge made against the conviction of the appellant under Section 3(1)(w)(i)(ii) SC/ST Act, it is seen that the learned Trial Court has held that the appellant is a member of a



Scheduled Tribe, though not of the one to which the survivor belongs. The Trial Court further held that to attract an offence under Section 3(1)(w)(i)(ii) SC/ST Act, all that is required is that the accused is not a member of the Scheduled Caste or Scheduled Tribe of which survivor/victim is a member. It seems that the learned Trial Court arrived at the aforesaid conclusion by making a distinction between the meaning of the word 'a' used in Section 3(1) of the SC/ST Act with the word 'any' to give an interpretation that the SC/ST Act would be applicable in cases of violence/atrocities against members of a distinct Scheduled Caste/Scheduled Tribe by members of another distinct Scheduled Caste/Scheduled Tribe.

24. The above observation made by the Trial Court on the face of it appears to be wholly erroneous and against the basic object and purpose of the SC/ST Act. The SC/ST Act was enacted to prevent various offences, indignities, humiliation and harassment to the members of the Scheduled Caste/ Scheduled Tribe community committed by non-Scheduled Caste and non-Scheduled Tribe community. The last line of para 2 of the Statement of Object and Reasons attached to the preamble of the SC/ST Act reads as hereunder: -

“A special legislation to check and deter crimes against them (SC/ST) committed by non-Scheduled Caste



and non-Scheduled Tribe has, therefore, become necessary”.

25. Moreover, Section 3(1) SC/ST Act opens with the words, “Whoever, not being a member of a Scheduled Caste or a Scheduled Tribe,-.....” meaning thereby that the provision mandates that to punish a person for offenses of atrocities under Section 3(1)(a) to (zc) of the said Act, it is mandatory to establish that the offender is not a member of a Scheduled Caste or Scheduled Tribe community. In the impugned judgment the learned Trial Court has nowhere recorded a finding that the appellant is not a member of Scheduled Caste or Scheduled Tribe. On the contrary, it is recorded therein that the appellant is a member of a Scheduled Tribe community.

26. The Apex Court in *Gorige Pentaiah Vs. State of Andhra Pradesh & Ors. (supra)* at para 6 held as under: -

“6. In the instant case, the allegation of Respondent 3 in the entire complaint is that on 27-05-2004, the appellant abused them with the name of their caste. According to the basic ingredients of Section 3 (1) (x) of the Act, the complainant ought to have alleged that the appellant-accused was not a member of the Scheduled Caste or a Scheduled Tribe and he (Respondent 3) was intentionally insulted or intimidated by the accused with intent to humiliate in a place within public view. In the entire complaint, nowhere it is mentioned that the appellant-accused was not a member of the Scheduled Case or a Scheduled Tribe and he intentionally insulted or intimidated with intent to humiliate Respondent 3 in a place within public view. When the basic ingredients of the offence are missing in the complaint, then permitting



such a complaint to continue and to compel the appellant to face the rigmarole of the criminal trial would be totally unjustified leading to abuse of process of law.

27. Again, in *Khuman Singh Vs. State of Madhya Pradesh (supra)*

The Hon'ble Supreme Court in paras 13 and 14 held as under: -

“13. 15. Sine qua non for application of Section 3(2)(v) is that an offence must have been committed against a person on the ground that such person is a member of the Scheduled Castes or the Scheduled Tribes. In the instant case no evidence has been led to establish this requirement. It is not the case of the prosecution that the rape was committed on the victim since she was a member of Scheduled Caste. In the absence of evidence to that effect, Section 3(2)(v) has no application. Had Section 3(2)(v) of the Atrocities Act been applicable then by operation of law, the sentence would have been imprisonment for life and fine.

14. As held by the Supreme Court, the offence must be such so as to attract the offence under Section 3(2)(v) of the Act. The offence must have been committed against the person on the ground that such person is a member of Scheduled Caste and Scheduled Tribe. In the present case, the fact that the deceased was belonging to “Khangar” – Scheduled Caste is not disputed. There is no evidence to show that that offence was committed only on the ground that the victim was a member of the Scheduled Caste and therefore, the conviction of the appellant-accused under Section 3(2)(v) of the Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act is not sustainable.”

28. What emerges from the above is that to attract application of the penal provisions of the SC/ST Act, it is mandatory to establish that the accused is not a member of a Scheduled Caste/ Scheduled Tribe community. In addition, it is also required to establish that the offence



has been committed on the ground that the victim is a member of a Scheduled Caste/ Scheduled Tribe community. In the instant case, there is no allegation in the FIR that the appellant has committed the crime on the survivor on the ground of her belonging to a particular community or caste. The conviction of the appellant under Section 3(1)(w)(i)(ii) SC/ST Act appears to be *ex facie* illegal and unwarranted because the prosecution case in the entire charge-sheet did not mention that the offence alleged was committed by the appellant upon the survivor based on her caste or community. Therefore, the necessary ingredient for the offence under Section 3(1)(w)(i)(ii) SC/ST Act was not made out.

29. According to Section 2(1)(c) of the SC/ST Act, Scheduled Castes and Scheduled Tribes shall have the meanings assigned to them respectively under Clause (24) and Clause (25) of Article 366 of the Constitution. Clause (25) of Article 366 of the Constitution of India defines Scheduled Tribes as: -

Article 366 – “(25) “Scheduled Tribes” means such tribes or tribal communities or parts of or groups within such tribes or tribal communities as are deemed under article 342 to be Scheduled Tribes for the purposes of this Constitution;”

Thus Scheduled Tribes are designated tribes or tribal communities or parts of or groups within such tribes or tribal



communities as are deemed under Article 342 of the Constitution to be Scheduled Tribes. It is an admitted position of the parties herein that both the survivor/victim and the appellant are deemed to be Scheduled Tribes under Article 342 of the Constitution. Hence, the classification drawn by the Trial Court between the survivor/victim and the appellant basing on their distinct and different tribal identity is totally unwarranted and uncalled for.

30. The tribes or tribal communities or parts of or groups within tribes or tribal communities those who are recognised by the Constitution of India under Article 342 of the Constitution are known as Scheduled Tribes. For the purpose of the SC/ST Act, all the recognised tribes are referred to as Scheduled Tribes. The learned Trial Court instead of going by popular or commonsense meaning adopted a hyper-technical analysis of interpretation of provisions of SC/ST Act to come to a finding which is apparently against the very legislative policy as evident from the Statements of Objects and Reasons of the SC/ST Act. Hence, the conviction and sentence of the appellant under the SC/ST Act is not tenable in the eye of law.

31. In view of the discussions made above, the conviction and sentence of the appellant under Section 3(1)(w)(i)(ii) SC/ST Act cannot stand scrutiny of law and is hereby set aside and quashed.



However, the conviction of the appellant under Section 7/8 POCSO Act is upheld. Taking into consideration the fact that the appellant was only about 19 years old at the time of the incident and there is no other criminal record against him and also that he is a student, the period of sentence of imprisonment of 3 years 6 months shall stand reduced to 3 years. The amount of fine imposed shall also stand reduced from Rs. 2,00,000/- to Rs. 20,000/- and in default of payment, the appellant shall undergo further 1 month's imprisonment. Except for the above, the other stipulations made by the Trial Court in the order of sentence will remain unchanged.

32. The Appeal stands partly allowed in terms of the above.

33. Let a copy of this Judgment and Order be furnished to the respective parties forthwith.

JUDGE

Meghalaya
19.03.2024
"Biswarup-PS"