

Serial No. 01
Supplementary
List

HIGH COURT OF MEGHALAYA
AT SHILLONG

Crl.Rev.P. No. 1 of 2022

Date of Decision: 26.05.2022

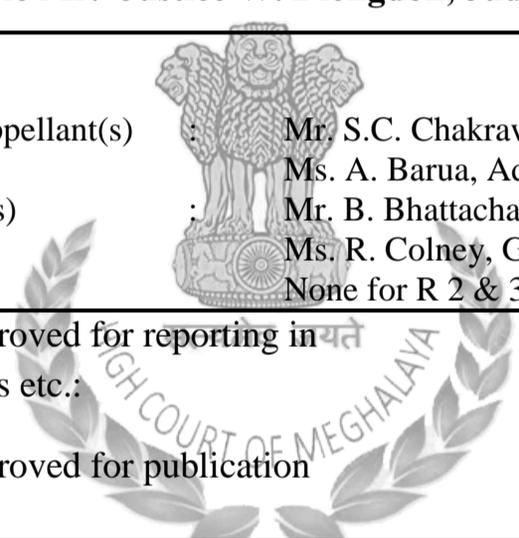
Mohammad Saimullah Vs. State of Meghalaya & 2 Ors.

Coram:

Hon'ble Mr. Justice W. Diengdoh, Judge

Appearance:

For the Petitioner/Appellant(s) : Mr. S.C. Chakrawarthy. Sr. Adv. with
Ms. A. Barua, Adv.
For the Respondent(s) : Mr. B. Bhattacharjee, AAG with
Ms. R. Colney, GA. for R 1.
None for R 2 & 3.

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

JUDGMENT AND ORDER

1. This is an application under Section 482 Cr.P.C, with a prayer to set aside and quash the criminal proceedings against the petitioner and the portion of the impugned order dated 18.11.2021 whereby, charges were framed against the petitioner in Special (POCSO) Case No. 58 of 2020.

2. Heard Mr. S.C. Chakrawarty, learned Sr. counsel along with Ms. A. Barua, learned counsel for the petitioner who has submitted that an FIR

dated 23.04.2020 was lodged before the Officer-In-Charge Madanrting P.S by the respondents No. 2 & 3 herein as complainants. In the said FIR, it was alleged that on 15.04.2020, their minor daughter of nine years old, while she was playing near her house, some persons were playing cards and one of them asked her for a glass of water and at that time, he grabbed her hand, but the said minor daughter managed to run away. Another incident which happened on 19.04.2020 involving the said minor daughter and another person was also noted down in the said FIR, however, the petitioner herein is concerned only with the first incident as he is the named accused in that said FIR.

3. It is further submitted that on the FIR being acknowledged, Madanrting P.S Case No. 32(4)2020 under Section 9(m)/10 POCSO Act was registered. On investigation launched, the Investigating Officer has followed due procedure and after examination of witnesses and recording of relevant statements, has filed the final report under Section 173 Cr.P.C indicating a finding of a prima facie case under Section 9(m)/10 POCSO Act against the petitioner herein and also against the other accused person. The charge sheet No. 52/2020 dated 08.08.2020 was accordingly brought to the knowledge of the Special Court (POCSO) for consideration. The learned Special Judge (POCSO) on consideration of the charges after hearing the parties has found it fit to frame charges against the petitioner herein under Section 354/354A IPC and under Section 7/9(m)/10 of the POCSO Act and has also directed that trial shall proceed against the

petitioner herein and also against all the other accused persons. This relates to order dated 18.11.2021, the matter is now fixed for evidence of the prosecution.

4. Being highly aggrieved for being subjected to undergo trial in the said criminal proceedings, the petitioner has approached this Court with this application with the prayer as aforesaid.

5. Mr. Chakrawarty has further submitted that the alleged victim in her statement under Section 164 has stated that “...*At that time one Muslim uncle who has a shop nearby asked me to bring him a glass of water. I brought a glass of water from my house and gave it to that uncle, that time he held my hand and stroked my hand and then said my hand is very beautiful, but he did not take the glass of water...*”. However, the petitioner in his statement has denied that he knew the minor girl or her parents and it was only he was picked up by the police that he came to know about the minor girl.

6. Mr. Chakrawarty has pointed out that the learned Special Judge had frame charges against the petitioner firstly under Section 354/354A of the Indian Penal Code which speaks about assault or criminal force to woman with intent to outrage her modesty and Section 354A speaks of sexual harassment. However, the principal provision of law on which the court has relied upon is Sections 7 and 9 of the POCSO Act which speaks of sexual assault and aggravated sexual assault respectively. Contending that the alleged act of the petitioner against the alleged victim cannot come

within the compass of the abovementioned provisions, in support thereof, the case of *Nurai Sk. @ Nurul Sk. v. State of West Bengal* wherein, vide judgment dated 15.11.2021 in “IA No.:CRAN/1/2019”, the Hon’ble Calcutta High Court while dealing with an appeal against conviction of the accused under Sections 354/354A(2)/506 IPC and Sections 8 and 12 of the POCSO Act. The High Court has held that “... *Even assuming that the appellant has committed the alleged act of dragging ‘orna’ and pulling hand of the victim and proposed her to marry, such act does not come within the definition of sexual assault or sexual harassment...*”.

7. Similarly, Mr. Chakrawarty has submitted that in the case of *Bandu Vitthalrao Borwar v. State of Maharashtra* the Hon’ble Bombay High Court in Crl. Appeal No. 50/2016 dealing with an appeal against conviction of the appellant therein under Section 12 of the POCSO Act and Section 354-D IPC, the brief facts being that the victim girl was accosted by the appellant by stalking her and putting a question to her as to why she did not love the appellant, on the victim girl giving a negative reply, the appellant in anger slapped the victim in her face. Hence the case. Elaborating on the issue of sexual intent, the court under the facts and circumstances of the case has found that no case has been made out against the appellant therein under Section 12 of the POCSO Act.

8. It is reiterated that the petitioner has been accused of holding or touching the hands of the alleged victim. The fact that a fifty-five year old man appreciating the hands of a young girl saying that your hands are

beautiful cannot by any stretch of the imagination be considered an offence under any law and as such, the petitioner has been unnecessarily implicated in a case in which he is completely innocent. Therefore, the impugned order whereby charges were framed against him is liable to be set aside and quashed and the proceedings against him be dropped.

9. Per contra, Mr. B. Bhattacharjee, learned AAG along with Ms. R. Colney, learned GA appearing for the State respondent No. 1 has submitted that the facts and circumstances of a case may not be reiterated as the same has been stated by the learned Sr. counsel for the petitioner, however, what is required to be taken into consideration as far as the case is concerned, is the impact of the incident on the victim who is a minor. The date of the incident as well as the date when the Test Identification Parade (TIP) was conducted has to be borne in mind, inasmuch as, from the date of the incident to the date when the TIP was conducted, considerable time has elapsed, but the fact that the victim could identify the appellant only goes to prove that the incident has a traumatic effect on the victim which is not a happy recollection.

10. Another aspect of the matter stressed upon by the learned AAG is that, the incident involves an allegation that the appellant after asking for a glass of water from the victim, and on the victim bringing the water to him, he instead held her hand and remarked that she has beautiful hands and did not take the glass of water which was dropped by the victim only goes to indicate the ulterior intention of the appellant and as such, for the

prosecution to make out a case under Sections 9(m) and 7 of the POCSO Act which speaks of sexual assault and sexual intent, the same can only be brought out after elaborate evidence is recorded.

11. On the question of sexual intent and sexual assault, the learned AAG has submitted that in the context of the facts and circumstances of the case, the decision of the Hon'ble Supreme Court in the case of *Attorney General of India v. Satish & Anr* and other related criminal appeals, reported in 2021 SCC Online SC 1076 at paragraphs 31, 32, 33 & 36 has touched on the issue '*sexual intent*' as could be found in Section 7 of the POCSO Act. It is therefore submitted that this is not a fit case for this Court to interfere with the impugned order.

12. Having heard the submissions of the learned counsels for the rival parties and on due consideration of the same, this Court looking into the entirety of the matter, the facts and circumstances having been stated as above, the main consideration would be as to whether the alleged act of the petitioner against the alleged victim girl would attract the provision of Section 7 of the POCSO Act.

13. Section 7 of the POCSO Act reads as follows: -

“7. Sexual Assault.- Whoever, with sexual intent touches the vagina, penis, anus or breast of the child or makes the child touch the vagina, penis, anus or breast of such person or any other person, or does any other act with sexual intent which involves physical contact without penetration is said to commit sexual assault.”

14. To better understand how this section has been viewed by the courts, in the case of *Attorney General of India v. Satish & Anr* (supra) the

Hon'ble Supreme Court has dwell at length to elaborate on the meaning and purpose of the term 'sexual assault' vis-à-vis 'sexual intent'. At paragraph 72 an analysis of Section 7 has been given as:

“72. A close analysis of Section 7 reveals that it is broadly divided into two limbs. Sexual assault, under the first limb is defined as the touching by a person - with sexual intent - of four specific body parts (vagina, penis, anus or breast) of a child, or making a child touch any of those body parts of “such person” (i.e. a clear reference to the offender) or of “any other person” (i.e. other than the child, or the offender). In the second limb, sexual assault is the doing of “any other act with sexual intent which involves physical contact without penetration”.

15. Touching the four specific body parts of a child (contained in Section 7) by a person with sexual intent would amount to sexual assault. However, even any act which involves physical contact of a child without penetration if it is done with sexual intent would also amount to sexual assault. Therefore, the key word here is 'sexual intent'.

16. At paragraph 77 of the said Attorney General's case, the Hon'ble Supreme Court has observed that the circumstances in which touch or physical contact occurs would be determinative of whether it is motivated by 'sexual intent'. There could be a good explanation for such physical contact which include the nature of the relationship between the child and the offender, the length of the contact, its purposefulness; also, if there was a legitimate non-sexual purpose for the contact. Also relevant is where it takes place and the conduct of the offender before and after such contact.

17. Coming to the case in hand, the prosecution's case that because of the fact that the petitioner/accused had held the hands of the alleged

victim girl and commented that she has beautiful hands, therefore he is said to have committed an act of sexual assault on a girl who is below 12 years old and as such has committed an offence under Section 9(m) of the POCSO Act.

18. In the light of the view expressed at paragraph 77 (supra), this Court has to determine as to whether the act of the petitioner has a connotation of sexual intent. In this regard, it is to be noted that the place of occurrence is located near the residence of the alleged victim girl. Near the place, a group of persons were playing cards and while she was playing the petitioner asked her for a glass of water to which she complied by bringing the said water to him. It is apparent that the place of occurrence is a public place with a number of people present and the alleged incident happened in broad daylight. The fact that the petitioner had held and commented on the hands of the alleged victim girl which contact is probably of a few seconds, the same cannot be read to imply that there is sexual intent on the part of the petitioner. At best, a non-sexual purpose of the contact can be presumed.

19. In the case of **Bandu Vitthalrao Borwar** (supra) cited by the learned Sr. counsel for the petitioner, the facts therein is that an incident occurred on 30.08.2013 at 10:30 am when the victim was proceeding to her school, she was accosted by the appellant therein who stopped her and put a question to her as to why she did not love him and on getting a negative reply, he slapped the victim in her face. An FIR was registered on a

complaint and the trial proceeded accordingly. The appellant was thereafter convicted for the offences punishable under Section 354D IPC and Section 12 of the POCSO Act. In the said case, the Hon'ble Judge while dealing with the expression '*sexual intent*' has opined that "*It is obvious that the intent, which is nothing but the state of mind, must be to establish some sort of physical contact or must be related to or associated with sex or indicative of involvement of sex in the relationship, if it is to be considered as sexual, I have already stated that the utterance indicating an expectation of a person that the other person should love him would not by itself amount to sexual intent as contemplated by the legislature*". The appellant therein was acquitted of all charges against him.

20. In the facts and circumstances of the case of the petitioner, this Court is inclined to agree with the opinion of the Hon'ble Bombay High Court and is also of the opinion that the action of the petitioner in holding the hands of the alleged victim girl and saying that her hands are beautiful would not in any way amount to sexual intent and thereby, would not be considered an act of sexual assault.

21. Since prima facie it appears that the petitioner has not committed the offence as alleged, it is unlikely that evidence if led would lead to a contrary result. Infact, continuation of the proceeding would only be a wastage of judicial time and ends of justice would not be met.

22. Viewed thus, this Court finds that the petitioner has been able to make out a case as prayed for. Apart from the judgments referred to above

which was taken note of by this Court, the other judgments cited which would only lead to the same conclusion has not been discussed. Consequently, this petition is hereby allowed.

23. The proceedings in Special (POCSO) Case No. 58 of 2020 as against the petitioner herein is hereby quashed. The bail bond executed also stands discharged.

24. Petition disposed of. No costs.

Judge

Meghalaya
26.05.2022
"N.Swer, Stenographer"

