Serial No.02
Regular List

HIGH COURT OF MEGHALAYA
AT SHILLONG

Crl.A.No.14/2022

Date of order: 10.08.2022

Mehun Lamurong Vs. State of Meghalaya

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

Appearance:

For the Appellant : Mr. S.D. Upadhaya, Legal Aid Counsel

For the Respondent : Mr. R. Gurung, GA

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

ii) Whether approved for publication in press: Yes/No

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

The appeal arises out of a judgment of conviction of April 15, 2021 and the resultant sentence under which the appellant herein has been condemned to rigorous imprisonment for a period of 10 years under Section 5(m) and (n) of the Protection of Children from Sexual Offences Act, 2012 read with Section 6 thereof. The appellant has also been fined Rs.10,000/- and, in default, to undergo simple imprisonment for a further year. At the time that the appellant was sentenced, he had already undergone nearly three years and three months of detention.

2. The appellant claims that there is no evidence of penetrative sexual assault and even the survivor asserted that the appellant did not insert his penis into her vagina. The appellant refers to the inconclusive forensic science laboratory report and the absence of any firm opinion in the report of the medical expert who conducted an examination on the survivor immediately upon the first information report being lodged. The appellant also contends that at least two key witnesses were not examined by the prosecution and, as such, the real truth did not come out. These two persons who were not examined were the mother of the appellant and a sister of the appellant.

3. The appellant seeks to suggest that the survivor contradicted herself in the two statements that she rendered, first under Section 164 of the Code of Criminal Procedure, 1973 and, next, in her deposition at the trial. The appellant points out that while the survivor initially said that the appellant invited the survivor to join a dance programme in the village, in her testimony at the trial she did not refer to such invitation and made out a case that the appellant followed the survivor when the survivor was going from her cousin's place to her aunt's.

4. The appellant next refers to the apparent confusion as to the place of occurrence. In the FIR lodged by the mother of the survivor, the

complainant claimed that the incident took place in a forest near the complainant's sister's house. In the statement rendered by the survivor under Section 164 of the Code, she referred to the incident taking place in a garden of a relative. Finally, in her deposition at the trial, the survivor maintained that the incident took place in a forest near her aunt's house. According to the appellant, if the place of occurrence could not be appropriately indicated, the rest of the statement of the survivor had to be seen in such light and not accepted as a gospel truth. The appellant also indicates that in her initial statement, the survivor had referred to the appellant noticing the appellant's mother being in the vicinity and stopping the assault, but there was no reference to such aspect in the deposition at the time of the trial.

5. The appellant places the categorical statement of the survivor that was recorded under Section 164 of the Code to the effect that the appellant merely rubbed his penis on her vagina but did not insert the same in her vagina. In the survivor's testimony at the trial, she referred to the appellant coming on top of her and doing "bad things" to her. The appellant contends that since penetration was not even alleged in either statement by the survivor, no case of penetrative sexual assault could have been found to have been made out.

6. As to the place of occurrence, there is no doubt that the incident took place in rustic surroundings and whether the same was a wood or a forest or a garden or someone's backyard makes little difference. The investigating officer, who was presented as PW7, was cross-examined on this aspect on behalf of the appellant. The officer maintained that the place of occurrence was at an area surrounded by pine trees. Since it was a specific answer to a direct question put in such regard, such description of the place of occurrence has to be seen in the light of how it was referred to by the complainant in the FIR and by the survivor in her two statements. Considering that the survivor was of the tender age of about 9 at the time of the incident and further taking into account that the place of occurrence was close to the survivor's relative's house, there does not appear to be the kind of contradiction in the survivor's description of the place of occurrence, as a garden once and as a forest next, to doubt the veracity of the substance of her allegation.

7. As for the appellant's assertion that there was no penetrative sexual assault, it is evident from the FIR that the allegation was of rape. Further, it is clear from the statement of the FIR-maker that her daughter complained of pain in her private parts and difficulty in passing urine. In course of the medical examination conducted on the survivor barely 30

hours or so after the incident, the doctor recorded a complaint of difficulty on the survivor's part to pass urine and pain in her genitals. The medical examiner then went on to discover and record that the vaginal walls were red and swollen, that the hymen was ruptured and there was redness of the fourchette and introitus.

8. Though it is true that the medical examination report did not indicate a conclusive opinion as to whether the survivor had been subjected to penetrative sexual assault, as the final opinion was reserved till after receiving the forensic science laboratory report, the deposition of the medical examiner at the trial was clear in such regard and went uncontroverted. The medical examiner deposed that though there were no external injuries found on the person of the survivor, on the examination of her genital parts he discovered "swelling and redness of the vaginal walls". He went on to reiterate the findings in his report: "Hymen ruptured. Also detected Redness in the fourchette and introitus." For good measure, the medical examiner pronounced his opinion based on the examination of the survivor: "there is sign of penetrative sexual assault." A solitary question was put to the medical examiner in his cross-examination to the effect whether the kind of injury in the private parts

of the survivor could be caused by falling or playing. The categorical reply was in the negative.

9. Thus, the place of occurrence was sufficiently established as was the complaint of penetrative sexual assault that was indicated in the FIR lodged at the Saipung Police Station in the East Jaintia Hills District on January 2, 2018.

10. There is no doubt that the survivor herself did not assert penetration and, in fact, in her initial statement she clearly stated that the appellant did not insert his penis into her vagina. At the same time, the survivor claimed that the appellant rubbed his penis on her vagina. For the offence of penetrative sexual assault, even the slightest degree of penetration would suffice. It is possible that if the outer walls of the vagina were rubbed lightly with the penis or any other object, there may not be any insertion. However, when the vaginal walls are rubbed with some pressure, insertion would be possible. In this case, the young survivor may have meant that the entirety of the appellant's organ may not have been pushed into her. However, she complained of pain, to the extent of having difficulty in urinating. Further, the examination conducted on her within close proximity of the incident revealed redness and swelling in the vaginal walls, which would be indicative of

penetration and the hymen was found to be ruptured. Even if not much significance is attached to the rupture of the hymen in the light of the survivor's assertion that the appellant may not have inserted his penis into her, the redness and swelling of the vaginal walls would be indicative of penetration. At the end of the day, the expert who examined the survivor was of the opinion that the survivor had suffered penetrative sexual assault.

11. The appellant in this case is quite a close relative of the survivor. Though her age was not formally established at the trial, there was no contest on such account by the appellant despite a charge being brought under Section 5(m) of the Act that is attracted if the victim is below 12 years of age. The survivor had gone to stay with her aunt or her cousin and was at the cousin's place when the appellant approached her. No attempt was made by the appellant to assert or establish that the appellant may not have been present at his sister's place at or about the time of occurrence. No alibi was attempted to be set up by the appellant. No case of any ill motive on the part of the survivor or the survivor's mother has been attributed. Indeed, the survivor claimed that the first person that the survivor complained to was the mother of the appellant. Rather than the failure on the part of the prosecution to call the mother of the appellant

as a witness, it appears that it was the appellant who failed to obtain a denial from his mother by citing the mother as a witness. Similarly, the sister of the appellant could also have been called by the appellant as a witness to discredit the statement or accusation of the survivor.

12. It must be appreciated that the two persons who, according to the appellant, ought to have been called as a prosecution witnesses but were not, were the mother and sister of the appellant. It is always risky for the prosecution to call close relatives of an accused as witnesses since a detraction or contradiction by any such witness would have the effect of gravely damaging the prosecution case. On the other hand, since the appellant was aware of the survivor's assertion that it was the appellant's mother to whom the survivor complained first, it was expected of the appellant to bring his mother to the witness box to deny such claim. In the appellant's failure in such regard and the abject failure on the part of the appellant to deal with the material against him that came out in course of the trial, there was little room for the trial court to find in favour of the appellant herein.

13. In the discussion on the matter in the judgment of conviction, the trial court found the survivor's statement to be believable. The trial court found the survivor's demeanor to be trustworthy. The trial court aptly

referred to the principle enunciated and often repeated by the Supreme Court that even if there may be no corroboration of the incident, when the survivor's statement appears to be trustworthy, the same cannot be shrugged off or wished away without any proper explanation. It must be remembered that such offences are generally committed in desolate places and away from where the act may be seen, for any corroboration of the actual offence to be obtained.

14. In this case, the survivor made out a believable account of the incident and, considering the circumstances, it was incumbent on the appellant to find fault with the same or to adduce evidence that would have detracted from the essence of the accusation. The bare denial on the part of the appellant in course of his examination under Section 313 of the Code is almost an admission of the presence of the appellant at the place of occurrence and the commission of the offence.

15. The trial court dealt with the evidence before it quite appropriately and arrived at the just conclusion that the appellant was guilty of committing penetrative sexual assault on the survivor. Since the girl was under 12 years of age and the assailant was a relative of the survivor, the requirements of clauses (m) and (n) of Section 5 of the Act were met, attracting punishment under Section 6 thereof as it stood prior

to the 2019 amendment. The sentence passed is in conformity with the relevant provision of the Act of 2012.

16. As a consequence, the judgment of conviction and the resultant sentence do not call for any interference.

17. Crl.A.No.14 of 2022 is dismissed.

18. 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
10.08.2022
"Lam DR-PS"