

**Serial No. 01**  
**Supplementary List**

**HIGH COURT OF MEGHALAYA**  
**AT SHILLONG**

Crl. A. No. 11 of 2022

Date of Decision: 23.08.2022

Shri Anwar Hussain Sheikh

Vs.

State of Meghalaya & Anr.

**Coram:**

**Hon'ble Mr. Justice W. Diengdoh, Judge**

**Appearance:**

For the Petitioner/Appellant(s) : Mr. K. Ch. Gautam, Adv. with  
Ms. C.B. Sawain, Adv.

For the Respondent(s) : Mr. B. Bhattacharjee, AAG, with  
Ms. I. Lyngwa, GA.

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

**JUDGMENT AND ORDER**

1. On an FIR dated 19.02.2015 filed by one Standhope Lamare, wherein he has reported to the Officer-in-Charge, Jowai Police Station of an incident which took place on 19.02.2015 itself involving his minor daughter aged about 15 years who had gone for tuition to the residence of the accused/appellant

herein and during the time that she was there, the accused/appellant had touched her body inappropriately. Jowai P.S Case No. 26(2) of 2015 under Section 7/8 of the Protection of Children from Sexual Offences (POCSO) Act, 2012 was registered and investigation ordered.

2. The Investigating Officer (IO) accordingly conducted the investigation by following due procedure and on conclusion of the same, has found that a *prima facie* case under Section 7/8 POCSO Act, 2012 is well established against the appellant and he was accordingly sent up for trial before the Court of the learned Special Judge (POCSO), Jowai under Special Session Case No. 3 of 2015.

3. The learned Special Judge taking cognisance of the case has framed charges under Section 7/8 POCSO Act against the appellant and at the trial, 5 (five) prosecution's witnesses were examined and one defence witness was also examined on behalf of the accused/appellant.

4. On appreciation of the evidence and the materials on record, the learned Special Judge, vide Judgment and Order dated 18.04.2022 and sentence of even date, has convicted the appellant and sentenced him to undergo simple imprisonment of three years with fine of ₹ 5000/- ( rupees five thousand) only, in default thereof, to undergo a further simple imprisonment of one month.

5. Being highly aggrieved and dissatisfied by the findings of the learned Trial Court, the appellant has preferred this appeal on the ground stated therein

and has made a prayer before this Court to set aside and quash the impugned judgment and order dated 18.04.2022.

6. Heard Mr. K. Ch. Gautam, learned counsel for the appellant who has submitted that before going in the merits of this appeal, the first and preliminary issue may be taken up by this Court by hearing the appellant on the issue of age determination inasmuch as the proceedings before the POCSO Court is for trial of cases of sexual offences against children or a child below 18 years and as such, it is *sine qua non* for a POCSO court to decide on this issue even before proceeding for further evidence.

7. Pressing that the issue of determination of age has to be taken up as a preliminary point, Mr. Gautam has submitted that before the POCSO Court can even take cognisance of the case, the foundational fact has to be proved and the age of the victim must be established by the prosecution before the Court can resort to the provision of Section 29 of the POCSO Act which speaks of presumption or reverse burden cast upon the accused who is presumed to be guilty of having committed the offence as alleged and has to prove his innocence to discharge such a burden. In this case, no document was ever exhibited, no medical examination was carried out to determine the age of the victim who is a student of class 10, who according to her, was aged 16 years at the relevant period. In this regard, the case of Sri Joubansen Tripura vs. The

State of Tripura: 2021 SCC Online Tri 176, para 13 and 17 was cited by the learned counsel to support his case.

8. In reply to this preliminary argument, Mr. B. Bhattacharjee, learned AAG has submitted that the proposition of the appellant on the issue of age determination cannot be considered by this Court at this juncture, since this question was not raised at the relevant time before the Special Court. Referring to the provision of sub-section 2 of Section 34 of the POCSO Act, the learned AAG has further submitted that the provision speaks of a situation when any question arises before the Special Court as to whether a person is a child or not, then the Special Court shall determine the age of such person after satisfying itself about the same.

9. It is also submitted that the appellant/accused has not raised this question before the Special Court and even in the evidence of PW-1, when in his examination-in-chief he has stated that he is the father of the victim girl who is aged about 16 years, the appellant has chosen not to confront PW-1 on this issue in his cross-examination, which is also the same as regard the evidence of PW-2, who as the mother of the victim has also stated that her child was about 16 years old at the time of the incident. Here too, there is no cross-examination on this aspect. To raise this issue at the appellate stage, it is incumbent upon the appellant to prove that the victim was a major at the

relevant time but nothing on record has revealed that the appellant has raised the question of determination of age.

10. In reply, the learned counsel for the appellant has submitted that the learned AAG has relied on what was stated by PW-1 and PW-2 respectively as regard the age of the victim, however, what they have actually stated is just an approximation, there is no exact details given as to the actual date of birth. It is also submitted that as far as determination of age of a minor is concerned, there is a process and procedure which is required to be followed with clear reference to Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules, 2007, which process has not been resorted to in the proceedings under challenge. Therefore, the age of the victim not being confirmed, the learned Special Court could not have exercised jurisdiction under the POCSO Act and to convict the appellant thereunder.

11. This Court, on consideration of the issue of age determination raised at this stage, has given thought to it and is of the opinion that it is an important issue going to the root of the matter upon which the fate of the appellant was decided and as such, should therefore be decided as a preliminary issue to be answered.

12. As submitted by the learned counsel for the appellant, one of the objectives of the Protection of Children from Sexual Offences Act, 2012 is for the enforcement of the right of all children to safety, security and protection

from sexual abuse and exploitation. The Act therefore, revolves around the issue of the wellbeing and potential exploitation of a child. Section 2(d) of the Act defines a child as any person below 18 years. It stands to reason that only those cases involving abuse and exploitation of a child would come within the domain and jurisdiction of a Special Court designated and notified to try cases involving such offences.

13. What could be understood from the above is that, an offence against a child has to be tried by the Special Court. However, it is incumbent upon the Court to be certain right from the inception of a case that the case before it involves a child by the definition found in the said POCSO Act. In this context, the age determination is very vital before further proceedings are initiated.

14. The case of Joubansen Tripura(supra) cited by the appellant has persuasive value before this Court for the fact that the concept of foundational facts in POCSO Act have to be considered by the Court, proof that the victim is a child being one of such foundational facts. Para 13 and 17 of the same can be reproduced herein for better elucidation:

“13. As we have said in the first part of this paragraph that prosecution will commence trial with an additional advantage of presumption against the accused but, prosecution is legally bound to establish foundational facts which sets the prosecution case in motion. If the prosecution succeeds to establish the foundational facts, then, it will be the obligation of the accused to prove his innocence, but, standard of proof again will be on the basis of preponderance of probabilities. Keeping in view the aforesaid principles, we shall proceed to decide as to whether the prosecution has been able to establish the

foundational facts of the instant case. Foundational facts in POCSO Act include:-

- (i) the proof that the victim is a child;
- (ii) that alleged incident has taken place;
- (iii) that the accused has committed the offence; and
- (iv) whenever physical injury is caused, to establish it with supporting medical evidence.

17. It may safely be said that presumptions under Sections 29 and 30 of the POCSO Act do not take away the primary duty of prosecution to establish the fundamental facts. This duty is always on the prosecution and never shifts to the accused. POCSO Act has no different connotations. Parliament is competent to place burden on certain aspects on the accused especially those which are within his exclusive knowledge. It is justified on the ground that, prosecution cannot, in the very nature of things be expected to know the affairs of the accused. This is specifically so in the case of sexual offences, where there may not be any eye witness to the incident. Even the burden on accused is also a partial one and is justifiable on larger public interest.”

15. From the above, it can be understood that proof or determination of age of the victim in a POCSO case is foundational and for such an important issue which begs consideration, the same can be raised at any stage of the lifetime of the case, even before the appellate forum. Therefore, to say that this Court cannot decide on this issue at the appellate stage would be far from the truth.

16. How the age of a person considered to be a child is to be determined is found in the said provision as pointed above, that is, under Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules, 2007. In the context of this case, this procedure is required to be followed as there is nothing on record to indicate the actual age of the victim either by medical or documentary

evidence. As has been pointed out by the learned counsel for the appellant, even the parents of the said victim have not been able to give her exact date of birth and approximation without any basis cannot be accepted by the Court.

17. The contention of the learned AAG that the provision of sub-section 2 of Section 34 of the POCSO Act requires that a question on age determination be raised by the defence before the Special Court which was not done so in this case, for the process to be initiated, cannot be accepted by this Court since the said provision has not specifically provided that such a question should come from the side of the defence or the prosecution. Logically, since it is the prosecution's case that has to be prosecuted, it would not be improper to infer that this burden would lie with the prosecution and failure to do so would result in an adverse inference.

18. Again, as submitted by the learned counsel for the appellant that the victim in question is a girl of Class-X and was said to be approximately 16 years old at the time of the occurrence, however what is required is for the exact age to be determined, also finds acceptance by this Court.

19. At this juncture, this Court would not go into the merits of the case, that is, to discuss the evidence adduced and the materials on record, but would direct that the learned Special Court should take up the exercise of determination of the age of the victim in accordance with Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules, 2007 and to allow the parties to produce



relevant documents, examine and cross-examine the witnesses and to be heard on the issue and thereafter to decide on the issue.

20. In view of the observations made above, the impugned judgment and sentence dated 18.04.2022 is hereby set aside and quashed.

21. This matter is remanded to the court of the learned Special Judge (POCSO), Jowai to determine the age of the victim and to pass the final order upon appreciation of evidence under the changed circumstances.

22. Considering the fact that the matter requires some time till it is concluded, in the meantime, the prayer of the appellant in the related misc. application for grant of bail is allowed.

23. The appellant is directed to be released on bail on condition that he shall not abscond or fail to appear before the Court as and when required and that he shall abide by whatever verdict is rendered by the Trial Court in the final analysis in accordance with law.

24. Appeal disposed of accordingly.

**Judge**

Meghalaya

23.08.2022

“N. Swer, Stenographer”