

**IN THE COURT OF ADDL.DISTRICT & SESSIONS JUDGE-I
AIZAWL JUDICIAL DISTRICT, AIZAWL**

***Sc No.447 /2012,
A/o Crl.Tr.No. 2483/2012, Kulikawn P.S Case No.109/2012
U/S 376 (2) (f) IPC***

State of Mizoram	:	Complainant
	Vrs	
C.Lalmalsawma	:	Accused

BEFORE

Vanlalmawia

Addl.District & Sessions Judge-I

PRESENT

For the opposite party	:	R.Lalremruata, Addl.PP Lily Parmawii Hmar, APP
For the Accused	:	Lalhriatpuia Advocate.
Date of hearing	:	23.11.2015
Date of Judgment	:	07.12.2015

ORDER

This instance case is referred back by the Hon'ble Gauhati High Court, Aizawl Bench in Crl A. No. 2 of 2015(J) dated 10.02.2015 quashing the judgment & Order dated 09.07.2013 passed by my Ld. District & Session Court Judgment in S.R No. 447/12 arising out of KKK P.S Case No. 109/20132 U/s 376 (2) (f) IPC with a direction that the "*Ld. Trial Court shall examined the accused/appellant U/s 313 Cr.Pc afresh by way of putting all the circumstances appearing against him for enabling to explain the incriminating circumstances including his defence case, providing him all opportunity to adduce evidence, if any, if he so desires. The Id Trial Court shall issue notice upon the accused/appellant through concern*

authority of the prison wherein the accused is presently detained, so that he can appeared before the Trial Court for his examination U/s 313 Cr.Pc, and the Id trial Court shall proceed with the trial from stage of recording the statement of accused/appellant U/s 313 Cr.Pc and the trial court while recording 313 Cr.Pc, statement of accused shall follow the guidelines laid down by this Court in the case of Abdul Hakim Quadi (Supra). The Id Trial Court shall complete the trial in accordance with law, preferable within a period of three (3) months by passing a fresh judgement”.

The prosecution story of the case in brief was that on 12.10.2012 an FIR was lodged to the O/C Kulikawn P/S by Lalmuanpuia stating that in 2012 around the month of August his niece aged about 9years, of Hlimen Vengthlang was raped by C.Lalmalsawma of Hlimen which they learnt from the teachers of Presbyterian English School. Hence Kulikawn P/S Case No. 109/12 dated 12.10.12 U/s 376 (2) (f) IPC was registered and duly investigated into.

My predecessor Court examined six (6) prosecution witnesses during his trial and sentence to undergo R.I for a period of 10 (ten) years and to pay a fine of Rs. 50,000/- I.D for three (3) year R.I. It was then preferred to appeal to the Hon’ble High Court Aizawl Bench, and the Hon’ble High Court, Gauhati, Aizawl Bench set aside and quashed and remitted back to this Court to retrial from the stage of examination of accused U/s 313 Cr.Pc.

The accused C.Lalmalsawma was examined U/s 313 Cr.Pc, and answer the question put forwarded as follow:

Q.1. It is from the evidence that you were staying at Hlimen vengthlang.

Ans : Yes, I stayed at Hlimen Vengthlang.

Q.2. It is from the evidence that the victim Lalmalsawmi was 10yrs old in 2012, and she was staying with her uncle Lalmuanpuia’s house at Hlimen vengthlang. What do you say?

Ans : Yes, she is staying at Lalmuanpuia house.

Q.3. It is from the evidence that you often visited and stayed at the victim's house. What do you say ?

Ans : Yes, I used to pay visit.

Q.4. It is from the evidence that sometime in the month of July 2012, you tried to give Rs.10/- to the victim, but she refused. Thereafter one Sunday you gave her Rs.5/- and since you often visited her house you kept on trying to give her money. What do you say?

Ans : she asked me to give Rs.30/- but I tried to give Rs.20/- as I did not have Rs.30/- and she cried.

Q.5. It is from the evidence that one Sunday(July – October 2012 while the victim was studying on her bed, you entered into her house, caught her from the back, laid her down on the bed, pulled down her under wear and you inserted your finger into her private part. What do you say ?

Ans : She herself take off her under wear and I help her in touching her private part as requested by her.

Q.6. When you entered your finger into her private part, she was bleeding, and her underwear was with blood. What do you say ?

Ans : I do not entered my finger in her vagina.

Q.7. As you entered your finger into her private part, she felt pain and she tried to shout but you kept your hand on her mouth to stop from shouting. What do you say ?

Ans : I do not entered my finger in her vagina, and I do not cover her mouth to prevent shouting.

Q.8. You then told her to pack her blooded underwear in a polythene bag and to throw away and threatened her not to disclose the incident to anyone. What do you say ?

Ans : The allegation is false.

Q.9. One Friday evening (July – October 2012) you entered into the victim's house while she was reading her homework. You then grabbed her, laid her on the bed, kept your hand on her mouth to stop shouting, pulled down her underwear up to her knee and inserted your male organ inside her private part. What do you say ?

Ans : I did not do, all the allegation are false.

Q.10. It is from the evidence that as you entered your male organ into her private part, her private part was bleeding and she felt so much pain and you told her to throw away the underwear with blood. What do you say?

Ans : The incident of allegation of rape happened in July, but FIR was filed in October. Had the allegation is true she will be admitted in the Hospital or MHIP Branch will take action against by agitation.

Q.11. It is from the evidence that you told the victim not to disclose the matter to her relatives and threatened her that if she disclosed, they would cut her arm and leg. What do you say ?

Ans : The allegation is false, the victim give statement as directed by Lalmuanpuia, I did not threatened her.

Q.12. It is from the evidence that you were then arrested on 12.10.2012 for an alleged offence punishable u/s 376(2)(i) IPC. What do you say?

Ans : I simply touch her private part as requested by the victim, to scratch.

Pi Thuamliani of Hlimen, who is defence witnessed of C.Lalmalsawma was examined and she stated that she came to know about the allegation of accused only after his arrest. She asked accused C.Lalmalsawma after his arrest as to whether the allegation is correct or not, and accused C.Lalmalsawma informed her that he touch the private part of Victim but not have sex. She knows nothing more in the case. Accused C.Lalmalsawma has attained more than 60 year of age. He had never been alleged to have committed the alleged offence in the past, and had never involved in any other crime. In her cross-examination by prosecution, the Defence witness stated that she also not know about the involvement of accused in the instance case before arrest of him. She knows only

about incident of the instance only from the statement of accused. It is not a fact that I give defence statement for the reason that accused is my brother.

The accused C.Lalmalsawma answered almost all the questions in negative and his main answer in the examination U/s 313 Cr.PC is that he did not inserted his finger nor penetrated his male organ in the vagina of victim and his allegation is false. The statement of his defence witness does shake the prosecution evidence already recorded as all what she know about the incident is only form the accused C.Lalmalsawma only.

In my considered view there may be no full insertion of finger, and full penetration of male organ in the vagina of the victim. If there was full insertion of finger or full penetration of male organ, the hymen of about year old girl must be rapture but however penetration (whether full or not) is sufficient to commit rape as defined in Section 375 IPC. But it can be presumed that the victim might have given her statement before the Medical Officer beyond the incident, following the dictation of the complainant, as the finding of Medical Officer is only "partially intact "of her hymen.

During the examination of accused C.Lalmalsawma U/s 313 Cr.Pc and examination of defence witness, while accused was in the Judicial Custody, Dr Lalhriatzuali Ralte Health & Medical Officer, Central Jail, Aizawl give the health condition of accused C.Lalmalsawma, who is under her treatment in the Central Jail, Aizawl, which seen as Follow:

This is to certify that C.Lalmalsawma, 69 years, S/O Sawithuama, R/O Hlimen is suffering from hypertension who is under treatment twice the past 4 months. In spite of treatment from jail, his BP is still not under control (BP in the range of 160/90). Besides this, he complains of pain in the @ Clavicles area and @ chest. He was diagnosed with colloid goiter, and for his chronic cough, he was referred to Falkawn DTC numerous times and eventually was advised to get Brooches' copy done at CHA, besides this, he complains of decreased hearing in the ear since the past 4 months. He also complains of dimness of vision since

about 4 months. He may need further medical management at a higher centre for his varied ailments.

Mr. Lalhriatpuia, Advocate, Ld Counsel for the accused submitted his written argument as follow:

1. The story of the prosecution in brief is that on 12.10.12, a written FIR was lodged at Kulikawn Police Station by Lalmuanpuia stating that on 2012 around the month of August his niece Lalmalsawmi, 9 years of Hlimen Vengthlang was raped by Lalmalsawma of Hlimen which they learnt from teachers of Presbyterian English School. Hence, a case was registered u/s 376(2)(f) IPC against the accused Lalmalsawma and committed him for trial.

2. The prosecution cited as many as nine witnesses but during the trial only five of them were examined.

3. PW-1 Lalmuanpuia, the informant and the maternal uncle of the victim deposed that, "On morning of 12.10.2012 my mother told me that the victim was raped by the accused for several time at her tea stall. Thereafter I returned home and I asked the incident to the victim and she told me that the accused raped upon her in our residence for two times and she also further told me that the accused inserted his male organ into her private part and she suffered injury on her private part and the accused put his hand on the top her mouth during the said incident. So, I submitted FIR to the Kulikawn Police Station."

4. PW-2 who is the victim deposed that, "Sometime in the month of July, 2012 the present accused tried to give me Rs 10/- and I did not receive the said money. Thereafter, one Sunday he gave me Rs 5/-. He often visited our residence and he tried to give me money but I did not receive any money. After sometime, the accused also invited me to go to the place under the house of Pu Malsawma but I declined. Thereafter one Sunday around noon when we were staying in our residence with my friend Lalduhawmi the accused entered into our residence and he tried to give me money but I declined and we went outside and we collected flowers at the time the accused followed me and when

I was on the tree the accused tried to catch hold of me and I also resisted, thereafter we went home and while I was reading my lesson on my bed the present accused entered into my residence and suddenly caught hold of me from my back side and thereafter he laid me on the bed and he pulled down my underwear upto my knee and he inserted his finger into my private part and I felt serious pain in my private part and some blood was coming out and my underwear was full of blood, in the meantime I try to shout and the accused put his hand on the top of my mouth. The accused also threatened me not to disclose the matter to anyone and if I disclosed the matter the incidence would be published in our locality and local cable television. Thereafter, the accused instructed me to pack my said underwear which was full of blood in a polythene bag and throw it away. Thereafter one Friday evening I was reading my homework on my bed the accused entered into our bedroom and caught hold of me and he lay me on my bed, I shout for help and he suddenly put his hand on the top of my mouth and he pulled my underwear upto my knee and he inserted his male organ into my private part and some blood was coming out from my private part and I feel so much pain in my private part and thereafter he threatened me if I disclose the matter to grandparents and my maternal uncle they would cut my arm and leg, so, I did not disclose to anyone. In fact I was compelled to throw away my underpant which was full of blood again under the instruction of the accused. Since I used to be a brilliant student, I had repeatedly failed to pass in a class test after the said incident. Suspecting my performance and character, on 9.10.2012 our school principal and Miss Ethel enquired if I have any personal problem and I disclosed the incident to them. As a result, my said principal and Miss Ethel told my grandfather and my grandmother told my maternal uncle and my said uncle asked me the incident. Thereafter, he submitted FIR to the Police Station concerned."

5. PW-3 J. Lalhlimpaia deposed that, "The present victim is reading in class-III in our school, I came to know from the neighbor of the victim that the present accused was suspected to have sexual offence with the victim and I was informed by the shopkeeper of the locality that the victim often used money to

the shop. Thereafter on 9.10.2012 we enquired the matter with our teacher Miss Ethel Zotluangpuii and we asked the matter to the victim inside the staff room, the victim denied that she have sexual intercourse with the present accused and thereafter Miss Ethel asked as to whether the accused had given money or not she replied her that the accused often give money and Miss Ethel also asked why the accused gave money and the victim further reply her that the accused inserted his finger into her private part. Then Miss Ethel also asked as to whether the accused penetrated his male organ into her private part or not and she replied her that the accused inserted his male organ into her private part. After sometime we informed the grandmother of the victim. Then they submitted FIR to the Kulikawn Police Station."

6. PW-4 Ethel Zotluangpuii deposed that, "The present victim is reading in class-III, I came to know from the neighbor of the victim that the present accused was suspected to have sexual offence with the victim. Thereafter on 9.10.2012 we enquired the matter with our Principal Lalhlimpaia and we asked the matter to the victim inside the staff room, the victim denied that she have sexual intercourse with the present accused and thereafter we asked as to whether the accused had given money or not she replied her that the accused often give money and i also asked why the accused gave money and she further reply me that the accused inserted his finger into her private part. Then i also asked as to whether the accused penetrated his male organ into her private part or not and she replied me that the accused inserted his male organ into her private part. After sometime we informed the grandmother of the victim."

7. PW-5 Dr Catherine Ngurbiakveli deposed that, "On 12.10.2012 at around 12:50 pm I received requisition from Women Cell, Aizawl Police Station for examination of Lalmalsawmi aged about 10 years d/o Lalrinchhana, Hlimen Vengthlang. At the time of examination the victim is physically and mentally fit. She is studying in Class 3. The victim stated that she had had previous intercourse and the last alleged rape happened in August 2012. On examination of the genital area I do not find any obvious seminal stain, her pubic hair was not yet

developed. There was no bruising or laceration in and around the external genitalia. Her hymen was partially torn but there was no sign of any injury. I do not find any sign of infection or discharge at the time of examination."

8. On careful perusal of the above depositions, the prosecution evidence are contradictory to each other and the evidence of the victim is not corroborated by any evidence. The evidence of the victim is totally senseless. How could her underpants be full of blood if the accused pulled her underpants down to her knees? Further, there should surely be blood stains on the bed sheet if her private parts were really bleeding but nothing was found. Her underpants were not even recovered. She deposed that the alleged incident took place in the month of July, 2012 while all the other witnesses deposed that it took place in the month of August, 2012. She also deposed that PW-3 and PW-4 started to have their suspicion after she repeatedly failed to pass in her class test; however, PW-3 and PW-4 both stated that they came to know from the neighbor of the victim that the present accused was suspected to have sexual offence with the victim. All the PWs stated that the accused raped the victim twice while the victim stated that she was raped only once. PW-5, who examined the victim, deposed in her cross examination that, ***"It is not a fact that the incident of rape took place sometime in the month of August 2012 while the victim was examined by me on 12.10.12."*** Hence, the medical examination of the victim deserves no consideration.

9. Therefore, from the above discussion of the evidences, the prosecution miserably failed to prove their case against the accused beyond reasonable doubt and the accused is not guilty of the charge leveled against him u/s 376(2)(f) IPC.

10. The accused was also examined under Section 313 of Cr.P.C. The accused clearly stated that he did not insert his finger or his male organ inside the victim's private part. He also stated that the victim gave statement at the instance of Lalmuanpuia. He, however, admitted that he touched the private part of the victim as requested by her, to scratch.

11. The statement of the accused is corroborated by his witness Thuamliani (DW-1). She stated that after the accused was arrested, she confronted him face to face and asked whether the allegations made against him were true and the accused admitted that he touched the private part of the victim but never raped her. During her cross examination she denied that she sided with the accused as he is her brother. Her statements may be reproduced as under-

“An man hnuah hian amah accused C. Lalmalsawma hi hmai chhanah an puhna hi a dik leh dik loh ka zawt a, ani chuan victim hi a serh chu ka khawih sak a amaherawhchu ka khawih chhe lo (Ka pawl lo) ati a ni.

Accused hi ka unaupa a nih avang chauhin amah tan zawngin thu ka sawi a ni min tih hi a dik lo.”

12. That with the above discussion it is crystal clear that there is no eye witnesses of the alleged incident nor the prosecution has not proved the guilt of the accused Lalmalsawma u/s 376(2)(f) IPC. Therefore, the accused is entitled to set him free for end of justice.

Considering the Medical report of “ Partially Intact” and on the examination of accused U/s 313 Cr.Pc as well as his health condition as Certified by Medical Officer Central Jail, and his old ages of about 69 year old, severe sentence may not be desirable, and I find then that as Special reason to show leniency to the accused and accused is also found weak, fatigue physically while producing to the Court the conviction awarded by the then District & Session Judge, Aizawl is affirmed as Convicted U/s 376 (2) (f) IPC, and in regard to period of sentence. I heard both the Ld. Addl. Public Prosecutor and Defence Counsel, and I therefore sentence him to undergo 7 R.I years imprisonment, and to pay a fine of Rs. 30000/- I.D 3 year R.I if the fine is paid, it shall be given to the victim.

The case is disposed of.

Give copy of this order to all concerned

Sd/- VANLALMAWIA
Addl.District & Sessions Judge
Aizawl Judicial District,Aizawl

Memo No _____/ADJ-I(A)/2015 : Dated Aizawl the,7th December 2015

Copy to :-

1. District & Sessions Judge, Aizawl
2. Accused C.Lalmalsawma S/o Sawithuama (L) C/O Lalhriatpuia Advocate.
3. Spl.Superintendent of Central Jail, Aizawl.
4. Deputy Superintendent of Police (Prosecution).
5. Addl.P.P
6. App
7. Judicial Section
8. Case record.
9. Guard file.

PESHKAR