

Smt. Helen Dawngliani
Addl. District & Sessions Judge

SR No.117/2010
In CrI.Tr. No.1174/2010
U/s 376(2)(f)/342/448/506 IPC

Versus

Date of hearing **19.3.2014, 31.3.2014 & 4.4.2014**
Date of Judgment **16.4.2.14**

For the Prosecution	Mrs. Rose Mary, Addl. PP Ms. Rosy Lalnuntluangi, APP
For the Accused	Mr. J.N. Bualteng, Advocate

JUDGMENT & ORDER

1. The story of the prosecution in brief as it unfolded during the course of trial is that on 6.5.2010 written FIR was submitted by Lalramzauvi of Mission Vengthlang at Kulikawn Police Station to the effect that on the said date at around 2:30pm her daughter X, 6 years, who was on her way back from school was dragged inside a house at Mission Vengthlang and raped by Lalfakzuala S/o Vanlalenga Sailo of Tlangnuam

On the basis of the said information, Kulikawn P.S Case No.70/2010 dt. 6.5.2010 u/s 376(2)(f) IPC was registered and investigated into. Upon completion of investigation, having found prima facie case against the accused Lalfakzuala for the offence punishable u/s 376(2)(f)/342/448/506 IPC Charge sheet was laid against him and committed for trial.

The name of the prosecutrix is withheld in the Judgment and she is referred with the letter 'X'.

2. Copy of the Police Report and all connected documents were delivered to the accused.

3. Charge u/s 376(2)(f)/511/342/448/506 IPC was framed against the accused. The charges were read over and explained to the accused in the Mizo language which is known to him to which he pleaded not guilty and claims for trial.

4. POINT(S) FOR CONSIDERATION:-

1. Whether the conduct of the accused on the person of X amount to 'attempt' u/s 511 IPC to commit the offence of rape as defined u/s 375 IPC and the accused thereby guilty of the offence punishable u/s 376(2)(f)/511 IPC ?

2. Whether the accused wrongfully restraint X within the meaning of Section 340 IPC and the accused thereby guilty of the offence punishable u/s 342 IPC?

3. Whether the accused committed house trespass within the meaning of section 442 IPC and the accused thereby guilty of the offence punishable u/s 448 IPC?

4. Whether the accused committed criminal intimidation within the meaning of section 503 IPC and the accused thereby guilty of the offence punishable u/s 506 IPC?

5. In order to prove the guilt of the accused, the prosecution examined 10 witnesses. The accused was examined u/s 313 Cr.P.C and 3 witnesses for the defence were examined. The Ld.Counsels are heard.

Mrs. Rose Mary, the Ld. Addl.PP made reference to the evidence adduced by the prosecution witnesses and submitted that almost all the prosecution witnesses deposed that the victim was made to lie on the bed with white bed sheet and the accused pulled down the underwear of the victim and also mentioned that the accused threatened the victim with a knife. Mr.Israela himself deposed that the knife was found on the table which was not put by him and thus the witnesses strongly corroborate with each other. The incident occurred in the house of Pu.Israela who was out of the house and locked the door which was broke open by the accused. The Ld. Addl.PP also argued that for a minor girl of barely 6 years it was not possible to narrate the incident without refreshing her memory and without telling her what to say in the Court and more over the victim appeared in the Court many months after the incident and that for a girl of her age it is difficult to understand the conduct of the accused upon her. The mother of the prosecutrix stated that her daughter contracted VDRL. The medical examination also shows inflammation on the lower vagina of two pin point redness and that the same can be caused by sexual assault. There prosecution has also proved by cogent evidence that the accused stopped the prosecutrix on her way back from school. Even the defence witnesses admit that the house of Pu.Israela was ransacked by the accused. The Ld. Counsel therefore prays to convict the accused for the offence punishable u/s 376(2)(f)/342/506/448 IPC.

On the other hand, Mr. JN Bualteng, Ld. Defence Counsel submitted that in order to constitute the offence of rape there has to be evidence of penetration. The Ld. Counsel argued that presuming but not admitting that the prosecutrix was not tutored by her mother her statement does not mention anything about penetration. As such the offence of rape is not made out. The Ld. Counsel further submitted that the prosecutrix stated in her cross examination that she was tutored and instructed by her mother and that she stated as exactly told by her mother. The Ld. Counsel submitted that the whole story against the accused is concocted and an after thought in as much as the story put forth by the mother of the prosecutrix is only based on hearsay. Turning to the medical evidence, the Ld. Counsel argued that the medical officer clearly stated that the hymen of the prosecutrix was intact, no sign of abrasion, no seminal stain was seen and only two pin point redness appeared on the hymen. The medical officer did not find any other sign of force and the medical officer further deposed that redness can be caused by accident, disease etc. With regard to the charge u/s 342/506/448 IPC, the Ld. Counsel argued that none of the prosecution witnesses had seen the incident and that they made their statements on the basis of assumptions and are not reliable. The Ld. Counsel has placed reliance on the following cases:-

1. Bhagwan Singh versus State of M.P (2002) 4 SCC 85
2. Narendra Kumar versus State (NCT of Delhi) CrI.Appeal No.2066-67 of 2009.

6. DISCUSSION, DECISION AND REASONS THEREOF:-

The evidence adduced by the prosecution witnesses may be briefly highlighted:-

PW No.1/Lalramzauvi is the mother of X. She stated that she is a widow and looking after two children. She stated that on 6.5.2012 while she was working at Vaivakawn, she was informed that an untoward incident happened to her daughter. She rushed home and found her daughter X in the house of Israela with other neighbours. Her daughter embraced her and said one bad man deceived her by saying that she (her mother) was inside the house. So she followed the man inside the house, the man threatened her with a knife and sexually assaulted her. The witness further stated that when she checked the private part of her daughter she found that it was red and there was bruises. She also witnessed the seizure of the torn underwear of her daughter which she identified in the court. The witness further stated that from the day of the incident X was suffering from VDRL and that HIV test result was awaited. She stated that she lodged the FIR at Kulikawn PS. She exhibited the FIR as Ext.P-1 and her signature as Ext.P-1(a), the seizure memo as Ext.P-2 and her signature as Ext.P-2(a). In her cross-examination, she

admitted the suggestion that there was no penetration of the penis into the private part of her daughter.

PW No.2/ X identified the accused and stated that when she was on her way back from school she met on person who told her that her mother was inside her house. When she entered the house, she did not see her mother and the accused made her sleep on a white bed. She further stated that the accused tore her underpant and forced his penis into her private part and that she felt pain and cried. She also stated that the accused threatened her not to make noise and that after sometime she came out. On re-examination, she stated that she has not made any false statement in connection with the incident. In her cross examination she admitted that she was instructed by her mother of what to say in the court and that she stated exactly as told by her mother.

PW No.3/ J.Lalzarliana lives in the same neighbourhood with Israela. He stated that one afternoon when students started coming home from school his neighbour Pari told him that X was sexually molested in the house of Pu. Israela. He went towards the house of Pu.Israela and saw the accused outside the house. He stated that the house was locked and it was broke open and some furnitures were upside down. He spoke to X and she was crying, she stated to him that the accused pulled down her panty by force and poked his finger inside her private part. As more people started coming, he could not ask her more questions. Someone from the crowd informed the Police and the accused was arrested by the Police in his presence. He stated that Pu.Israela was a bachelor and that he had gone out and locked the door.

In his cross examination he admitted that the accused was drunk on that day and had a quarter full of IMFL bottle was recovered from his possession. He did not ask many questions to the prosecutrix and admitted the suggestion that the victim stated that the accused tried to rub her private part with his male organ. The owner of the house Pu. Israel was an elderly person of about 50 years, he was bachelor and working in the Government and so he usually goes out of his house.

PW No.4/Laltanpuui stated that one day when she was at home Partei called her and when she came out of the house Partei told her that while X was on her back from school one person had done something to her and she also said that she saw the accused putting down the victim from an empty house of Pu. Rela. She went to the place of occurrence and saw the accused and X. At that time only she, Partei and Pu.Lianzama alongwith the accused and X were present. When she spoke to the prosecutrix, the prosecutrix stated that she was threatened by the accused with a knife, that he put her on a white bed, forcefully removed her panty and sexually molested her. The witness also stated that when they went inside the

house the furnitures were upside down and that she also saw an alluminium knife on the floor. She informed the matter to her husband who in turn reported to the Police at Kulikawn PS. She further stated that by the time the Police arrived there were many people and the Police arrested the accused. She stated that the owner of the house Pu.Israela was not at home and the door was broke open. She also stated that the accused possessed a bottle of liquor.

In her cross-examination, she stated that while they stood outside the house of Pu. Israela the accused did not try to run away, she also stated that the prosecutrix did not tell her how the accused tried to molest her and she did not ask her. She also admitted the suggestion that X, the girl child was not weeping when they were there but when her mother arrived she started crying. She also admitted that she did not check the private part of X and admitted that the girl did not complain of any pain on her private part.

PW No.5/Zothanpari stated that on 6.5.2010 in between 1:30 to 2:00pm while she was on her way back from school with her son, she saw the accused putting down the victim who appeared to be about 6-7 years old out of the house of Pu.Isareal by holding her beneath his underarm. She stated that when she looked at the victim she looked frightened and her hair was shabby and untidy. She stopped and asked her if she knew the person who was holding her and she replied in the negative. The witness stated that from the appearance of the girl and from the manner she answered her she felt that there was something wrong and unusual. She gave assurance to the girl and stood by her side and told her to tell the truth. The victim then stated to her that while she was on her way back from school, the accused called her from the house and said that her mother was inside the house. So she went inside the house, the accused held her and put her on a white bed and he was holding a knife with his other hand and that he threatened her not to make noise. She further told her that the accused pulled down her panty and insert his male organ into her private part. The girl further told her that she felt pain and that after sometime the accused put her outside the house. On hearing this she was surprised and called out to people nearby and some people came up. They entered the house belonging to Pu.Israela and found that the house was ransacked by the accused. They looked for the accused and found him on the ground floor and apprehended him. Some of them informed the Police and the accused was arrested. In her cross examination she stated that she has not known the accused before and that she saw him for the first time on 6.5.2010. She admitted the suggestion that the accused is related to Pu.Israela, owner of the house. She further stated that she did not check the private part of the prosecutrix in order to see any violent or unusual marks on that day. She saw the Police recovering (seizing) an almost

empty bottle of IMFL from the accused. She also admitted that though the furnitures were ransacked nothing was reported missing.

PW No.6/Lalawmpuii stated that in the month of May, 2010 while she was posted in the CAW Cell, she witnessed seizure made by ASI Rothalngliani of pink nylon underwear of X, Black T Shirt & short pant seized from the accused. She identified the seized materials in the material exhibits and exhibited the seizure memos as Ext.P-2 & 3 and her signature as Ext.P-2(b) & 3(a) respectively.

PW No.7/Lalremsangi witnessed the seizure of black T.Shirt and black short pant of the accused and identified the same in the court. He exhibited his signature in the seizure memo as Ext.P-39b). In his cross-examination, he stated that while he put his signature in Ext.P-3 the clothes were still worn by the accused and admitted that he did not see the wearing apparel of the accused in the court.

PW No.8/Israela is the owner of the house. He stated that while he was in the office he was informed that he needed to go home and re-arrange his furnitures. When he reached home he saw that this furnitures and home appliances were ransacked and was told that the accused was the culprit. He also stated that he saw the knife on the table which he did not put. He was also told that the accused committed rape inside his house.

In his cross examination he stated that he did not know the accused but later he was informed that the accused was the adopted son of Vanlalenga Sailo of Tlangnuam. He does not know the prosecutrix though he was later told that they were living in the same neighbourhood. He admitted that none of the people present in his house used the word rape in his presence and that he did not hear from the mouth of those present speaking of 'pawngsual' (assault for the purpose of sex.

PW No.9/ Dr.Mary Lalengkimi stated that she examined X at Civil Hospital Aizawl on 6.5.20 @5:45pm. Upon examination, the victim was found physically and mentally normal. On genital examination, no stain, bruising or laceration were found. On the hymen there was inflammation of two pin point redness on the lower margin. Hymen was intact. She further stated that such inflammation can be caused by sexual assault, accident or infection. The witness further stated that as she examined the prosecutrix on the same day of the incident it was not possible to find any traces of sexually transmitted diseases. She exhibited the Medical Examination Report as Ext.P-4 and her signature as Ext.P-4(a). In her cross-examination, she reiterated that the hymen was intact. She further stated that it is possible for the hymen to remain intact in case of an attempt being made by an adult male to a girl of 6 years for sexual intercourse. She stated that she did not find any seminal stain

on the clothes including the underwear of X. She could not say the cause of pin point redness on the lower margin of the hymen

PW No.10/ASI Rothangliani stated while she was posted in the CAW cell, one Lalramzauvi of Mission Vengthlang lodged a written FIR at Kulikawn Police Station and since the offence involved crime against women, it was endorsed to her for investigation. During investigation she found that the door was locked but the accused broke opened socket and entered. There was no one inside the house. The accused ransacked the house and thereafter came out of the house and saw the prosecutrix who was on her way back from school. She further stated that the accused pulled X inside the house and attempted to have sexual intercourse with X and also threatened her with a knife. When she visited the place of occurrence she found that the television set has fallen on the ground, the washing machine has fallen sideways and the cushions were lying on the floor. She seized a knife from the house which was identified by X. As the prosecutrix described the accused to the first person she saw on the basis of the clothes he was wearing i.e Black T.shirt and black shorts she seized the same. She also seized the original birth certificate of X and after making a photocopy returned the original to her family. She recorded the statement of the woman who X saw as she came out of the house of Israela, she also recorded the statements of those persons who apprehended the accused. She formally arrested the accused who was already apprehended by the crowd. She forwarded the prosecutrix for medical examination on the same day. As she was not competent in her capacity as ASI to file the charge sheet she submitted her Report to SI/Christy Fanai, Incharge CAW Cell. She further stated that she knew SI Christy Fanai filed the charge sheet but the said officer has unfortunately died. She exhibited the Seizure memo of black T Shirt and Black shorts as Ext.P-3 and her signature as Ext.P-3©, Seizure memo of knife as Ext.P-5 and her signature as Ext.P-5(a), copy of the Birth Certificate of X as Ext.P6, Arrest Memo as Ext.P-7 and her signature as Ext.P-7(a) and she exhibited the seized materials as Ext.M-1. In her cross examination she stated that on being endorsed for investigation she immediately went to the place of occurrence and met X and her mother at the place of occurrence, she did not personally check the body of X, to her X appeared to be normal. She stated that she seized the knife from the owner.

7. Examination of accused u/s 313 Cr.P.C is one of denial. He stated that he was drunk on that day and does not know what he did. However, he stated that though he cannot recollect what he actually did on that day he think that to some extent there is exaggeration.

8. At this stage the evidence adduced by the defence witnesses may be briefly highlighted:-

DW No.1/C.Lalrindika stated that he has known the accused since childhood and from the character of he accused which is known to him he does not think that he could have committed the offence of rape. According to this witness even while cracking jokes the accused does not crack filthy joke with sex colour and he knows that the accused does not misbehave with the opposite sex. In his cross-examination, he stated that he and the accused are permanent resident of Tlangnuam and that the incident occurred in some other locality. As he was not with the accused on the date of the incident, he does not know for what purpose he went to the said locality. He admitted that it is his personal opinion that the accused could not have committed the offence of rape based on his knowledge on the character of the accused.

DW No.2/Lalhmangaihzualla stated that the accused was living with him at the relevant time. He stated that he never knew that the accused takes liquor but on the day of the incident the accused was very drunk. As he could not move properly, he made him lie down on bed and he thought that the accused was sleeping so he went to the neighbouring houses. But then he heard that the accused ransacked one house and he immediately rushed to the said house but did not see such things. He also went to the hospital and learnt that nothing wrong was done to the victim. From what he saw from the house alleged to have been ransacked and from what he heard from the hospital he believe that the allegation against the accused is wrong. On the night of the incident his elder brother Lalenga went to the house of X and gave them Rs.500/- Later he and Upa Lalringhleia went to the house of X to enquire about the matter but they did not pay attention to them any continued to play cards. He read the medical report of X and the report does not indicate anything unusual and that the girl was happily running around. In his cross-examination, he stated that the accused is the son of his deceased sister, he admitted that on the date of the incident the accused was drunk. He also admitted the suggestion that as he believed that the accused was not in a position to move out of the house, he went out of the house. The Doctor who examined X told him that there was nothing wrong. He did not personally read the contents of the medical report of X. He admitted that he and Upa Lalringhleia went to the house of X to ask for pardon.

DW No.3/Zanghingi stated that while she was in her house she heard that one house nearby was ransacked. She went to the said house. She saw the accused outside the house looking around blindly and he was drunk. Two women and one man reached the place before her and they too were looking around blindly. The

door of the house was widely opened and she could see that the furnitures were ransacked. Some of them suggested that the matter should be reported to the Police. She continued to stand outside where the accused was also there and though the accused was not smelling of alcohol she could make out from his look/eye that he was not in proper senses (Zu rim phei chu ka hre thei lova mahse a mit mengah a a phut). More people came and Pu. Israela also came. When the Police arrived they went inside the house and when they came out they took the accused with them in their vehicle. The girl was also standing among the crowd outside the house, she presume that the allegation is false. In her cross examination she stated that she does not remember the exact time she heard about the incident but it was after school and it must be around 3:00pm, there were around 5/6 persons when she reached the place of occurrence, when she reached outside the house of the incident she saw X, she admitted the suggestion that the household properties were ransacked, she denied the suggestion that she was not amongst the first ones to reach the place of occurrence.

9. Coming to the offence punishable u/448 IPC. In order to commit house trespass there has to be criminal trespass. As per section 441 IPC the offence of criminal trespass is committed by a person who enters into/upon a property in possession of another with an intent to commit offence or insult/annoy/intimidate the person in possession of such property.

9.A. Keeping in mind the ingredient of the offence, upon examination of the evidence, it is seen that PW No.8/Israela owner of the house stated that one day while he was in the office, at around 3:00pm he was informed that he needed to go home and rearrange his furnitures as it was 'irregular'. PW No.5/Zothanpari stated that she saw the accused putting down the victim out of the house of Pu. Israela by holding her by underarm. PW No.2/X stated that while she was on her way back from school she met one person who told her that her mother was inside the house but when she entered the house her mother was not there. PW No.10/ASI Rothangliani stated that during investigation she learnt that the accused broke open the socket and entered the house. The accused in his examination u/s 313 Cr.P.C stated that he went inside the house of Pu.Israela but does not remember if he ransacked his firnitures. PW No.3/J.Lalzarliana stated that when he went up towards the house of Pu.Israela, he saw the accused standing outside the said house, the house was locked but it was broke open by the accused and some of the goods including the TV were upside down. The said witness further stated that Pu.Israela had gone out and locked the door as he was a bachelor. In his cross-examination, he further stated that the owner of the house Pu.Israela would be

around 50 years and a bachelor working in a Govt.Department so he usually goes out on daytime. PW No.4/Laltanpuui also stated that the house where the incident took place was the house of Pu.Israela who was away from his house as he is a Govt.servant and that the door seems to be broken open by the accused. She further stated in her cross-examination that the furnitures inside the house were in chaotic condition and the furnitures such as T.V was upside down. DW No.3/Zanghingi stated that the door of the house was widely opened but she only peeped and saw that the furnitures were ransacked and that someone from the crowd informed the owner of the house Pu.Israela who also arrived.

9.B. The accused in his examination under section 313 Cr.P.C admitted that he had gone inside the house of X. The evidence highlighted above would also show that the accused went inside the house in the absence of its owner. It is also clear from the evidence adduced by the prosecution as well as defence i.e DW No.3 that the furnitures inside the house were ransacked. It is also seen from the above evidence that as the owner of the house was called home since he was away at his work place at the time of the incident and he being a bachelor was living alone in the said house.

9.C. Intention being a state of mind has very often to be gathered from the surrounding facts and circumstances of the case. From the manner the household properties were ransacked it appears that the accused did not enter the house for a lawful purpose. Since it is clearly proved that the owner of the house was not at home at the time of the incident, the act of entering the house without the permission of its owner, in the absence of the owner/occupant and throwing around the furnitures is nothing but an offence of trespass. Taking the test of reasonable man, the said conduct of the accused would annoy, insult and intimidate the owner.

10. Accordingly, from the evidence and materials available on record, I find that the prosecution has been able to prove by cogent and reliable evidence that the accused committed the offence of house trespass and accordingly he is convicted of the offence punishable u/s 448 IPC.

11. Coming to the offence punishable u/s 342 IPC. Wrongful confinement is a form of wrongful restraint and that such restraint must prevent that person from proceeding beyond certain circumscribed limits.

11.A. In this connection, PW No.2/X stated that when she was on her way home, she met one person who told her that her mother was inside the house. When she went inside, she did not find her mother. She also stated that the accused threatened her with a knife and that after sometime she went out.

PW No.3/Zothanpari who was on her way back from school with her son saw the accused putting down the victim out of the house of Pu.Israela and holding her by underarm. She further stated that the girl looked frightened and her hair was shabby and untidy.

The knife was seized on being identified by X. The incident complained off occurred inside the said house.

From the evidence it appears that PW No.3/Zothanpari was the first person who saw the accused and X when they came out from the house. From the deposition of this witness, it is seen that from the appearance of X she could sense that there was something wrong and she started talking with her.

PW No.4/Laltanpuui stated that when they went inside the house of Pu.Israela all the goods such as TV and washing machine were upside down and that she also saw an aluminium knife lying on the floor. PW No.8/Israela stated that he saw the knife on the table where he did not put. Accordingly, from the evidence of these two witnesses it is seen that the knife could be easily seen in the house though they contradicted in the place they saw the knife inside the house.

11.B. It therefore appears from the evidence that X entered the house of Pu.Israela as the accused told her that her mother was inside. Finding that her mother was not inside the house, had there not been any obstruction, she could have come out of the house then and there. The evidence shows that she was on her way back from school alone and as such there is no reason why she could not have left the house by herself if not for any obstruction to leave the house or to move in the direction she wanted to proceed. I also do not find any reason to doubt the statement of PW No.3/Zothanpari who could sense from the look of X that there was something wrong. The witness saw the accused and X coming out from the house.

11.C. It may also be borne in mind that during the relevant time the prosecutrix was barely 6 years old. It has come in evidence that the accused was drunk. It is also in evidence that the furnitures and appliances inside the house were ransacked. The knife was also easily available. Under such circumstance, a minor girl of such a tender age would not dare leave the house unless told by the accused and even verbal obstruction would be sufficient to hold back the prosecutrix from proceeding in the direction she wanted to go.

12. Accordingly from the materials and evidence on record, I find that the offence of wrongful confinement has been made out and the accused is thus convicted of the offence punishable u/s 342 IPC.

13. Turning to the offence punishable u/s 506 IPC it is for the prosecution to prove that the accused threatened the prosecutrix with an injury to her

person/reputation/property or to the person/reputation of any person to whom the person is interested.

13.A. In the case at hand, PW No.2 X stated that she was threatened with a knife by the accused. PW no.8 Israela owner of the house stated that his knife was on the table where he did not keep. PW No.4/Laltanpuui who was amongst the first ones to reach the place of occurrence stated that when they went inside the house all the goods including the TV, Washing machine were upside down and one aluminum knife as also lying on the floor. PW No.5/Zothanpari is the first one to see the accused and X. She stated that from the appearance of X she doubted that there was something wrong and unusual. She also stated that when she looked at the victim, she looked frightened and her hair was shabby and untidy. The witness further deposed that when she asked the prosecutrix whether she knew the accused she replied in the negative.

13.B. The prosecutrix stated that she was threatened by the accused and she also stated that the accused used a knife to threaten her. It may be noted that the present incident came to light after PW No.5/Zothanpari spoke to X when she noticed an unusual look on her face. The statement of PW No.5 lends credibility to the statement of the victim that she was threatened by the accused.

13.C From the evidence on record it is seen that the knife was easily visible in the house though PW No.4 and 8 differ regarding the place where they saw the said knife. The victim was barely 6 years old at the time of the incident and there was no one else in the house.

13.C. Considering the age of the victim, the manner in which she was made to enter the house by the accused, the furnitures being ransacked inside the said house and the manner in which the accused conducted himself upon X as well as the presence of a knife which was easily visible in the house lend credibility to the statement of X that she was threatened by the accused and that the accused used the knife to threaten her.

14. For the reasons indicated above, I find that the threat of the accused with a weapon i.e knife rises reasonable apprehension of injury to the person of X and accordingly, the ingredient of the offence of criminal intimidation has been made out.

15. Turning to the offence punishable u/s 376(2)(f)/511 IPC, the sine quo non for the offence of rape is penetration of the male organ into the vulva or pudendum of a woman. The extent of such penetration is not material.

16. The term “Attempt” has not been defined in the Indian Penal Code. According to ‘Halsbury’s Law’s of England’, vol-9, page 259, “Criminal attempt” has been defined as:-

“Any overt act immediately connected with the commission of an offence, and forming part of a series of acts which, if not interrupted or frustrated, would, if the offence could be committed, end in the commission of the actual offence, is, if done with a guilty intent, an attempt to commit the offence, whether the offence which is attempted is one that could or could not have been committed. Merely to make preparations for the commission of an offence is not to attempt to commit the offence. An act, in order to be a criminal attempt, must be immediately and not remotely, connected with and directly tending to the commission of an offence.”

17. The prosecutrix in her examination-in-chief had stated that when she entered the house, she did not see her mother and the accused made her sleep on a white bed. She further stated that the accused tore her underpant and forced his penis into her private part and that she felt pain and cried. She also stated that the accused threatened her not to make noise and that after sometime she came out. But in her cross examination she stated that her mother instructed her what to say in the court and that she stated exactly as her mother told her to say. In her re-examination she clarified by saying that there is no false in her deposition in connection with the incident.

Though the prosecutrix stated that her statement was truth but from her reply during cross examination it is clear that she as a child is easily swayed and vulnerable to tutoring, living in the world of make believe and that during the time gap between the incident to the time she appeared in the court she could have forgotten the details of the incident, her statement require to be examined with more circumspection.

18. The honb’le ApexCourt in the case of **Changan Dame versus State of Gujarat, 1994 Cr.LJ 66(SC)** has held that *evidence of child witness is not reliable who is under the influence of tutoring.*

In the case of **State of Karnataka versus Shantappa Madivalappa Galapuji & Ors** reported in **2009(3) Cr.R.297 (SC)** the honb’le Apex Court was dealing with an appeal in which the High Court reversed the finding of conviction passed by the Trial Court and the honb’le Apex Court remanded the matter back to the Honb’le High court for fresh consideration has held as follows:-

“7. The decision on the question whether the child witness has sufficient intelligence primarily rests with the trial Judge who notices his manners, his

apparent possession or lack of intelligence, and the said Judge may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligation of an oath. The decision of the trial court may, however, be disturbed by the higher Court if from what is preserved in the records, it is clear that his conclusion was erroneous. This precaution is necessary because child witnesses are amenable to tutoring and often live in a world of make-believe. Though it is an established principle that child witnesses are dangerous witnesses as they are pliable and liable to be influenced easily, shaken and moulded, but it is also an accepted norm that if after careful scrutiny of their evidence that Court comes to the conclusion that there is an impress of truth in it, there is no obstacle in the way of accepting the evidence of a child witness”.

Further, In the honb’le Apex Court in the case of **State of UP versus Krishna Master & Ors., AIR 2010 SC 3071** has held as follows :-

12. Part of the statement of a child witness, even if tutored, can be relied upon, if the tutored part can be separated from untutored part, in case such remaining untutored part inspires confidence. In such an eventuality the untutored part can be believed or at least taken into consideration for the purpose of corroboration as in the case of a hostile witness. (Vide: Gagan Kanojia & amp; Anr. v. State of Punjab, (2006) 13 SCC 516).

19. PW No.5/Zothanpari was the first person who saw X and accused coming out of the house of Pu Israela. PW No.3/J. Lalzarliana and PW No.4/Laltanpuui reached the place of occurrence soon after PW no.5. As such PW Nos. 3, 4 & 5 were the first persons to reach the spot. On a reading of the statements of PW Nos. 3&5 regarding the statement of X before them, it appears that the prosecutrix does not have consistency in the manner she narrated the conduct of the accused upon her person.

From the materials on record, it is seen that what the prosecutrix has been saying consistently is that the accused made her lie down on a white bed and that he pulled down her panty. However, there is variation in her statement regarding the conduct of the accused on her person thereafter.

20. PW No.5/Zothanpari who first saw the accused with X out from the house of Pu.Israela could see from the look of X that she was frightened. Accordingly, from the statement of PW No.5 it can be safely inferred that the accused committed wrong upon X.

21. Attempt is the direct movement towards the commission after preparation have been made. The crucial test is whether the last act, if uninterrupted and unsuccessful should constitute a crime. In the instant case, as stated above, the

prosecutrix herself is liable to tutoring, only those part of her statement where she maintains consistency are being relied upon. Accordingly, as stated above, what the prosecutrix have been stating consistently is that the accused made her lie down on white bed and that he removed her underpant. The subsequent conduct of the accused have to be inferred from the other evidence. Since the prosecutrix was medically examined on the same day of the incident itself, the medical examination report is expected to be of some help in arriving at a finding. The medical examination shows that her hymen was intact, there was no bruising or laceration except inflammation of two pin point redness on the lower margin of the hymen. As the medical officer as specifically written that the inflammation was of two pin point redness, the same would suggest that the inflammation was a small/minor one only of the size of a pin point. As such, the medical evidence does not lend much support to the prosecution case of attempted sexual assault. Further, there is no evidence and no materials from the record to suggest that the accused failed to commit the offence only because of intervention of unforeseen circumstance which the accused could not foresee or intended. The determination of the accused to commit the offence despite resistance and its consequent failure only due to intervention of unforeseen circumstance appears to be missing.

22. Accordingly from the evidence on record, it will be too far fetched to conclude that the ingredient of attempt to commit the offence of sexual assault have been proved by the prosecution.

23. The next question that comes up therefore is whether the conduct of the accused on the person is completely innocent? Whether conduct of the accused on the person of X, a girl child, would outrage her modesty as defined u/s 354 IPC?

24. For better appreciation of the case, the definition given u/s 350/351/354 IPC are reproduced below:-

“350. Criminal force – Whoever intentionally uses force to any person, without that person’s consent, in order to the committing of any offence, or intending by the use of such force to cause, or knowing it to be likely that by the use of such force he will cause injury, fear or annoyance to the person to whom the force is used, is said to use criminal force to that other.”

“351. Assault. – whoever makes any gesture, or any preparation intending or knowing it to be likely that such gesture or preparation will cause any person present to apprehend that he who makes that gesture or preparation is about to use criminal force to that person, is said to commit an assault”

“354. Assault or criminal force to woman with intent to outrage her modesty.- whoever assaults or uses criminal force to any woman, intending to

outrage or knowing it to be likely that he will thereby outrage her modesty, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both”.

On careful scrutiny of the evidence on record, there may not be an element of assault as submitted by the Id. Defence Counsel. However, an element of use of criminal force upon the victim by the accused is clearly present from the evidence.

It is reiterated that the statement of the prosecutrix which is found reliable and for which reliance is being placed as been highlighted above i.e the accused made her lie down on the bed which was covered with a white bed sheet and removed/pulled down her underpant.

It is within the knowledge of any normal human being that the act done by the accused upon the body of the victim, a woman, would outrage her modesty. A person is guilty of an indecent assault if he intentionally assaults the victim and intends to commit not just an assault but an indecent assault i.e. an assault which right minded persons would think is indecent. In the instant case, the evidence explaining the conduct of the accused upon the body of the victim, cannot be regarded as decent. ‘Woman’ as defined in section 10 IPC denotes a female human being of any age.

25. At this stage, I may refer to the decision of the hon’ble Apex Court in *Rupan Deol Bajaj –vs- Kanwar Pal Singh Gill* reported in (1995) 6 SCC 194 wherein it was held –

“14. Since the word ‘modesty’ has not been defined in the Indian Penal Code we may profitably look into its dictionary meaning. According to Shorter Oxford English Dictionary (3rd Edn.) modesty is the quality of being modest and in relation to woman means “womanly propriety of behavior; scrupulous chastity of thought, speech and conduct”. The word ‘modest’ in relation to woman is defined in the above dictionary as “decorous in manner and conduct; not forward or lewd; shame fast”. Webster’s Third New International Dictionary of the English Language defines modesty as “freedom from coarseness, indelicacy or indecency; a regard for propriety in dress, speech or conduct”. In the Oxford English Dictionary (1933 Edn.) the meaning of the word ‘modesty’ is given as “womanly propriety of behavior; scrupulous chastity of thought, speech and conduct (in man or woman); reserve or sense of shame proceeding from instinctive aversion to impure or coarse suggestions”.

15. *In State of Punjab v. Major Singh* a question arose whether a female child of seven and a half months could be said to be possessed of ‘modesty’ which could be outraged. In answering the above question

Mudholkar, J., who along with Bachawat, J. spoke for the majority, held that when any act done to or in the presence of a woman is clearly suggestive of sex according to the common notions of mankind that must fall within the mischief of Section 354 IPC. Needless to say, the “common notions of mankind” referred to by the learned Judge have to be gauged by contemporary societal standards. The other learned Judge (Bachawat, J.) observed that the essence of woman’s modesty is her sex and from her very birth she possesses the modesty which is the attribute of her sex. From the above dictionary meaning of ‘modesty’ and the interpretation given to that word by this Court in Major Singh case it appears to us that the ultimate test for ascertaining whether modesty has been outraged is the action of the offender such as could be perceived as one which is capable of shocking the sense of decency of a woman. When the above test is applied in the present case, keeping in view the total fact situation, it cannot but be held that the alleged act of Mr. Gill in slapping Mrs Bajaj on her posterior amounted to “outraging of her modesty” for it was not only an affront to the normal sense of feminine decency but also an affront to the dignity of the lady – “sexual overtones” or not, notwithstanding.

26. Therefore, after considering the facts and circumstances of the case, the law involved, evidence adduced by prosecution witnesses, statement of accused recorded u/s 313 Cr.PC. and having regard to the judicial authorities cited above, this court is of the view that the victim as well as the other prosecution witnesses are able to inspire confidence of the court and there is no reason to disbelieve their evidence. That being the position, it is found that in the course of trial, the prosecution has succeeded in bringing home the charge u/s 354 IPC against the accused Lalfakzuala beyond reasonable doubt.

27. Accordingly, accused **Lalfakzuala** is convicted of the offence punishable u/s 354/342/506/448 IPC.

28. Sentence will be passed on 24.4.2014 after hearing the parties.

29. Judgment is pronounced in open court and given under my hand and the seal of this Court on this the 16th day of April, 2014.

Sd/- HELEN DAWNGLIANI
Addl. District & Sessions Judge
Aizawl Judicial District : Aizawl

ORDER

24.04.2014

Accused Lalfakzuala is present along with his Id. Counsel. Id. Addl. PP is also present.

Heard both parties.

Accused Lalfakzuala stated that he is looking after a shop and prays that leniency may be shown to him by imposing fine in lieu of sentence.

Mr. J.N. Bualteng, Id. Defence Counsel adopted the submission of accused and further submitted that the accused is now running a shop. The Id. Counsel also submitted that after his released from Jail on bail, the accused has reformed himself and has given up his earlier habit of consuming liquor. On the aforesaid ground, the Id. Counsel therefore prays that leniency may be shown by imposing fine and without further sentencing the accused.

Mrs. Rose Mary, the Id. Addl. PP submitted that no reasonable ground has been given to show leniency. In many cases, leniency are prayed on the grund that the convict has a number of dependants however in the instant case, the ground made for leniency is not of any dependency but the accused having to remain absent from his shop due to detention. The Id. Counsel further submitted that in the instant case, the victim is a girl of tender age and considering the trauma, she must have gone through there is no ground to show leniency against the accused and prays that maximum sentence of imprisonment and fine be imposed upon the accused for all the offence for which he has been convicted.

Heard the parties. In the instant case, the victim is a child of barly 6 years. As highlighted in the Judgment, the incident came to light when PW No.5/ Zothanpari saw the accused and the prosecutrix outside the house and she could make out from the look of the girl that she was frightened, her hair was shabby and untidy. The accused at the time of his arrest as per record was about 26 years. It is also in evidence that a knife was used by the accused at the time of the incident. It is also in evidence that the furniture inside the house were ransacked. The medical evidence also shows inflamation of two pin point redness on the lower margin of her hymen. It is also a settled position that victims of sexual assault/sexual offences are often stigmatised andn the record also shows that the victim is looked after by her mother who is a widow. It is needless to mention that the prosecutrix and her family will have eb bare the mental scar as a result of the incident for the rest of their lives.

On the other hand, while seeing the rights of the accused, it is noticed that he has no criminal antecedents, no properties were reported to have been damaged or stolen as a result of the incident. There is also no evidence to suggest that as a result of the incident the prosecutrix could not lead a normal life. At the time of his arrest as stated above, the accused was about 26 years.

Upon balancing the right of the accused as well as the right of the victim, a balance has to be strike since imposition of sentence is the only means by which the Court can show its abhorrance to the offences for which the accused have been convicted. Undoubtedly, sentencing would involve certain eliment of guess work.

Keeping in mind the facts and circumstances of the case, the sufferings of the victim, the nature of the crime, the age and antecedents of the accused, the following sentence is passed: -

1. For his conviction u/s 342 IPC, accused Lalfakzuala shall undergo Simple Imprisonment for a period of 3 months.
2. For his conviction u/s 448 IPC, accused Lalfakzuala shall undergo Simple Imprisonment for a period of 3 months.
3. For his conviction u/s 506 IPC, accused Lalfakzuala shall undergo Simple Imprisonment for a period of 2 months.
4. For his conviction u/s 354 IPC, accused Lalfakzuala shall undergo Simple Imprisonment for a period of 7 months.

Considering the antecedents of the accused, the sentences so passed shall run concurrently.

Accused Lalfakzuala is committed to judicial custody to serve the remaining sentences.

In terms of Section 428 CrPC, detention period already undergone by the accused during investigation and trial shall be set off from the sentence.

This Order shall form part of Judgment dt.16.04.2014.

Sd/- HELEN DAWNGLIANI

Addl. District & Sessions Judge

Aizawl Judicial District : Aizawl

Memo No:...../AD&SJ(A)/2014 : Dated Aizawl, the 24th April, 2014
Copy to: -

1. Accused Lalfakzuala through Counsel Mr. J.N. Bualteng, Advocate.
2. Special Superintendent, Central Jail, Aizawl.
3. PP/Addl. PP, Aizawl District, Aizawl.
4. District & Sessions Judge, Aizawl.
5. District Magistrate, Aizawl District, Aizawl.
6. DSP (Prosecution), District Court, Aizawl.
7. i/c G.R.Branch.
8. Registration Section.
9. Guard File.
10. Case Record.
11. Calendar Judgment.

P E S H K A R

APPENDIX

(A) **PROSECUTION EXHIBITS**

- Ext. - P-1 FIR
 - P-1(a) Signature of PW.No- 1
- Ext. - P-2 Seizure Memo of pink nylon underwear
 - P-2(a) Signature of PW. No- 6
- Ext. - P-3 Seizure Memo of black T-shirt and black short pant
 - P-3(a) Signature of PW.No-6
 - P-3(b) Signature of PW.No- 7
 - P-3(c) Signature of PW.No-10
- Ext. - P-4 Medical Examination Report
 - P-4(a) Signature of PW.No-9
- Ext. - P-5 Seizure Memo of Knife (Steel)
 - P-5(a) Signature of PW.No-10
- Ext. - P-6 Copy of Birth Certificate of victim
- Ext. - P-7 Arrest Memo
 - P-7(a) Signature of PW.No-10
- Ext. - M-1 Parcel of seized material

(B) **DEFENCE EXHIBITS- None**

(C) **EXHIBITS PRODUCED BY WITNESSES - None:**

(D) **COURT EXHIBITS- None**

(E) **PROSECUTION WITNESSES:**

- PW.-1 – Lalramzauvi
- PW.-2 – Prosecutrix
- PW.-3 – J. Lalzarliana
- PW.-4 – Laltanpuui
- PW.-5 – Zothanpari
- PW.-6 – Lalawmpuui
- PW.-7 – Lalremsangi
- PW.-8 –
- PW.-9 – Dr. Mary Lalengkimi
- PW.-10 – ASI Rothangliani

(F) **DEFENCE WITNESSES - :**

- DW 1 – C. Lalrindika
- DW 2 – Lalhmagaihzuuala
- DW 3 – Zanghingi

(G) **COURT WITNESSES- : None**