

**IN THE COURT OF THE ADDITIONAL SESSIONS JUDGE-III  
AIZAWL JUDICIAL DISTRICT : AIZAWL.**

**PRESENT**

Smt.Helen Dawngliani  
Addl. District & Sessions Judge-III

SR No.8/2012  
In Crl.Tr. No.2577/2011  
U/s 341/342/323/376(1) IPC

Ref:- N.Vanlaiphai P.S C/No.10/2011 dt.14.11.2011 u/s 341/342/323/376(1) IPC

State of Mizoram

Versus

H. Thantluanga	.....	Accused
Date of Hearing	.....	27.11.2013, 11.12.2013 & 13.01.2014
Date of Judgment	.....	20.01.2014

**A P P E A R A N C E**

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

**J U D G M E N T & O R D E R**

1. The prosecution story of the case in brief is that on 14.11.2011 one Chhanhima of Lungchhuan lodged a written FIR at N.Vanlaiphai Police Station to the effect that on 13.11.2011 in between 11:00 am to 12:00 noon, his daughter X, 15 was assaulted and raped by her teacher H.Thantluanga of Lungchhuan.

On the basis of the said information, N.Vanlaiphai P.S Case No.10/2011 dt.14.11.2011 u/s 341/342/323/376(1) IPC was registered and investigated into. Upon completion of investigation, having found prima facie case against the said H.Thantluanga for the offence u/s 341/342/323/376(1) 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. As the accused did not have the means to engage a counsel on his own, Mr. JN Bualteng, Advocate was assigned to defend the accused at the State expense u/s 304 Cr.P.C.

4. Charges u/s 341/323/376(1) 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.

5. The prosecution examined 5 witnesses. Accused was examined u/s 313 Cr.P.C one witness for the defence as also examined. The Ld. Counsels are heard.

Mrs. Rose Mary, the Ld. Addl. PP submitted that the prosecutrix on solemn oath deposed that she was born on 27.2.1997 and was reading in Class-VIII during the relevant time. The accused assaulted her on two occasions and her nose bled and she sustained injuries/bruises at different parts of her body and the injury she sustained on her breast has not completely healed. Thereafter, the accused had sexual intercourse with her without her consent and that there was no point in shouting as she was sexually assaulted in the middle of the jungle. The accused left X near the hill and she was found by her parents. According to the Ld. Addl. PP, the statement of X is trustworthy and duly corroborated by the other evidence. The Ld. Counsel argued that the injuries described by the prosecutrix have been duly corroborated by medical evidence and the statement of X to the effect that she was found by her parents @ 10:00pm is also corroborated by PW No.2. PW No.3 witnessed the seizure of the wearing apparel of X including her underwear which were seized before she took bath and changed. The medical evidence shows presence of spermatozoa from the vaginal smear and the medical officer opined that the prosecutrix was subjected to sexual intercourse. The Ld. Counsel argued that the lone defence witness does not know whether the accused and X were still having an affair and the witness stated that when he saw X in the cemetery with another boy he made a phone call to the accused and the accused came to the cemetery. The Ld. Counsel argued that in the given facts and circumstances of the case, when the accused learnt that X was roaming around with another boy, out of jealousy and anger, he assaulted the prosecutrix by forcing her to sit on his bike and took her to the jungle and that the prosecutrix was barely 14 years whereas the accused was about 31 years. The Ld. Addl. PP therefore submits that they have lead cogent and reliable evidence and prays to convict the accused.

On the hand, Mr. JN Bualteng, Ld. State Defence Counsel submitted that with regard to the offence punishable u/s 341/342 IPC, from the cross-examination of the prosecutrix herself, it is clear that when she boarded the motorcycle of the accused, she did not shout for help. She further stated that she could have left the place but she did not do so. The Ld. Counsel further submitted that non-examination of eye witness casts doubt on the prosecution case. With regard to the charge u/s 323 IPC the Ld. Counsel argued that the prosecution has failed to prove the essential ingredient of the offence and in support of his submission he stated that the prosecutrix herself deposed that the accused slapped her and kicked her, the medical evidence shows that the injuries were of simple nature and this would not amount of grievous injury which is the essential ingredient of the offence. In support of his submission, the Ld. Counsel has placed reliance in the case of Nawal Ram Versus State of Rajasthan, 2005 Cri.LJ 4726(Raj). For the offence punishable u/s 376(1) IPC, the Ld. Counsel argued that the age of the prosecutrix have not been proved. The medical evidence shows that there was no fresh injury or bloodstain on the private part of the prosecutrix. However, the sper cell was found on the vaginal smear but the medical officer failed to sent sample of the accused for laboratory examination. As such the

prosecution failed to establish that the accused had sexual intercourse with X. Mr. JN Bualteng argued that from the statement of the informant it is seen that the prosecutrix did not disclose anything when she was found and on their way home which clearly indicated that the FIR itself is concocted and an afterthought. The Ld. State Defence Counsel argued that the statement of the prosecutrix is not trustworthy and that there are difference and improvement from her statement u/s 161 Cr.P.C. Further the prosecutrix stated on oath that prior to the present incident she did not have sexual intercourse but the medical officer stated that he was told by X that she had earlier indulged in sexual intercourse and the finding of old hymenal rupture support the statement of X before the Doctor. The Ld. Counsel argued that the onus of proof never shifts and that the prosecution has failed to prove its case beyond reasonable doubt and that the benefit of such doubt has to be given to the accused.

6. POINT(S) FOR CONSIDERATION:-

1. Whether the accused on 13.11.2011 wrongfully restrain X within the meaning of Sec. 339 IPC and the accused thereby guilty of the offence punishable u/s 341 IPC?
2. Whether the accused on 13.11.2011 voluntarily caused hurt to X within the meaning of Sec. 321 IPC and the accused thereby guilty of the offence punishable u/s 323 IPC?
3. Whether the accused had sexual intercourse with X amounting to rape as defined U/s 375 IPC and the accused thereby guilty of the offence punishable u/s 376(1) IPC?

7. DISCUSSION, DECISION AND REASONS THEREOF :-

In order to prove the guilt of the accused, the prosecution examined 5 witnesses. The evidence adduced by the prosecution may be briefly highlighted:-

PW No.1/X is the prosecutrix. She stated that she knew the accused as they belong to the same village. She stated that she was born on 27.2.1997. On 13.11.2011 after attending the morning church service, she was roaming around the cemetery with her friends. Pa Enga, accused and their friends were consuming liquor under a tree near the cemetery. The accused asked her friends Zeli and Mali to call her. When she went to the accused he started kicking and slapping her. At that time the accused was drunk. But she remained quiet and started to cry. The accused then told her to climb on his motorcycle which she resisted and then he started kicking and slapping her and his nose started to bleed at that time his friends were not there and her other friends were also crying. The accused threatened her and due to the threat she boarded his motorcycle and the accused rode his motorcycle in a very fast speed towards Vengpui. He stopped just above the house of Nu Eki and told her to sit properly and she told the accused that she would jump down to which he said she could jump down but continued to ride the bike. As his motorcycle was still moving she did not jump down. The accused continued to proceed further and at the outskirts of the village he lowered his speed from a place near the Banyan tree and proceeded further down in between the bushes. He stopped his motorcycle in between the bushes and pushed her down and the accused stood beside her and again threatened her and asked her what she was doing at the cemetery. She told him that they went there to roam around.

He assaulted her again and this time her nose started to bleed again. She sustained injuries/bruises on different parts of her body and the injury she sustained on her breast has not completely healed. Thereafter he assaulted her and this time he also pulled her hair and started to commit sexual intercourse with her. She did not shout for help as it was in the middle of the jungle but resisted the accused. Thereafter the accused went back to his motorcycle and took liquor from there and started to consume again. They remained in that place for a long time and she returned back with the accused in his motorcycle. They stopped at a hill and he proceeded but she did not dare to go home and remained there alone for a long time. At around 10:30 PM her parents found her in the said place and she returned home with them. Her parents got the information from her friends who went with her to the cemetery and she disclosed everything to her parents. In her cross-examination by the Ld. State Defence counsel, she stated that she did not shout for help at the time of boarding the motorcycle of the accused and her friends who were nearby also did not try to help her. She denied the suggestion that she used to have a love affair with the accused. She admitted the suggestion that from the time she boarded the motorcycle up to the time the offence was committed she never shouted for help. She denied the suggestion that she did not board the motorcycle of the accused and proceeded with him in the said motorcycle and that the scar on her breast is a result of the scratch from a bark where she fell upon when the accused pushed her down. To her knowledge the accused did not carry any weapon with him. There are 3 houses in between the cemetery and Vengpui locality. She admitted that there were some people at Vengpui kawn and she did not ask for help from these people. The accused never restrained her movements by tying me with a rope or other things. After the incident she must have remained with the accused for half an hour. She admitted that she could have left the place immediately but she did not dare to go. She denied that she has had previous sexual intercourse prior to the incident. She denied the suggestion that she was not born on 27.2.1997.

PW No.2/Chhanhima is the father of X and the informant. He stated that his daughter was born in the year 1997 and during the year 2011 she was reading in Class-VIII. 13.11.2011 was a Sunday and after he attended the afternoon church service his daughter Lalchhanchhuahi who is the younger sister of the prosecutrix told him that that some people from their village told her that her elder sister was assaulted by the accused and that he took her away in his motorcycle. They immediately started looking for his daughter and they found her near the hill at about 10:00pm. Since it was dark at that time he did not notice any injury on her. From there they took her home and in her house she saw bleeding on her nose and some injuries/bruises on her body. On the next morning before he lodged the FIR. He did not ask much question to his daughter as she is very scared of him. In his cross-examination, he denied the suggestion that he pretended not to know about the affair between his daughter and the accused though he is aware of it. He stated that Manghaka and Mabawla proceeded ahead of them and they were the first one to see his daughter though he followed them. When they found his daughter at the hill they did not talk and quietly proceeded towards their house. He admitted that from the hill up to their house his

daughter never said she was assaulted and raped by the accused. He stated that they did not lodge the FIR on the same night as the nearest PS was located at 15 KM from their village.

P/W No. 3/ F.Lalchhuankima and PW No.4/F.Lalmangaihzualla are Constables in the Mizoram Police. They stated that the prosecutrix changed her clothes in the PS and kept her clothes in a polythene bag and from the said polythene bag the I/O made a seizure of the underwear and they put their signatures in the seizure memo. They exhibited the seizure memo as Ext. P-2, signature of PW No.3 as Ext.P-2(a) and signature of PW No.4 as Ext.P-2(b) and the seized material as Ext.M-1.

P/W No. 5/ Dr. Lalmuanawma Jongte examined the accused and X at N.Vanlaiphai PHC on 14.11.2011. He examined X @ 2:20 PM and recorded her age as stated by her i.e. 14 years and by appearance also she appeared to be about 14 years. Upon examination, the prosecutrix was found physical and mentally sound. There was stain on her underwear. There was scratch marks over her left arm, right breast, right eye and leg. On genital examination, he found rupture of hymen since the prosecutrix had earlier indulged in sexual intercourse with the accused as stated by her, no fresh tearing of the hymen was found. Vaginal smear was sent for laboratory examination. The laboratory examination report found presence of sperm cell. He exhibited the medical examination report of X as Ext.P-3 and his signature as Ext.P-3(a).

On the same day at about 3 PM, he examined the accused. Upon examination, he was found physically and mentally sound. There was no marks of violence or injuries on his body. On genital examination, he found that his secondary sexual characters are matured. Since the accused was found physically and mentally sound with no deformity in his genital organs, medically it would be safe to presume that he can perform sexual intercourse. He exhibited the medical examination report of the accused as Ext.P-4 and his signature as ext.P-4(a). In his cross-examination, he stated that he did not find any fresh injury or bloodstain while examining the private part of the prosecutrix. The rapture of the hymen was an old rapture. There were scratch mark/injuries on the body of the prosecutrix. Sperm cells were found from the laboratory examination of the vaginal smear. He did not send the seminal sample of the accused for laboratory examination.

8. Examination of accused u/s 313 Cr.P.C is one of denial. According to the accused, he and the prosecutrix were having an affair during the relevant time. He denied to have sexual intercourse with X and also denied to have assaulted the prosecutrix.

9. The evidence adduced by the lone defence witness may also be briefly highlighted.

D/W No. 1/Lalengkima stated that he has been living in Lungchhuan village since childhood. He is a married man with children. On Sunday after church service @ 11:30 AM he went to the cemetery along with his labourers. At the cemetery, he saw the prosecutrix with one boy (tlangval). They saw him and then they ran away from him. He made a phone call to his friend/accused and told him to come to the cemetery. When he came he told the accused of what

he saw. The accused and the prosecutrix met at the Anganwadi Centre near the cemetery. They rode in the motorcycle of the accused as she said she will go with him. They proceeded towards Vengpui. Thereafter the friends of the prosecutrix also went to Vengpui and ask the prosecutrix to go home with them but she did not want to go home with them. In the afternoon he made a phone call to the accused and ask of their whereabouts. After the phone call the accused came to his house and when he ask him about the matter the accused stated that the prosecutrix did not want to go home. So both of them went to Vengchhak tlang where the prosecutrix was there. He persuaded the prosecutrix to go home as he knew that her parents were looking for her but she was adamant and stated that she did not want to go home. His daughter Malsawmkimi also persuaded the prosecutrix. The prosecutrix stated that she wanted to elope with the accused. Thereafter he and his daughter left them and had their meal. At night he went to the said Vengchhak tlang along with the father of the prosecutrix and due to persistence from her father she went home with him though she was reluctant to go home. He stated that he is related to the parents of the prosecutrix. In his cross-examination, he admitted that the accused and the prosecutrix were having a love affair and denied that suggestion that he does not know whether on that Sunday/incident the accused and the prosecutrix were still having an affair or not. He admitted that he made a phone call to the accused as he saw the prosecutrix with another boy. He denied that the accused forced the prosecutrix to board his motorcycle. He admitted the suggestion that he did not see the accused assaulting the prosecutrix and does not know about the bleeding of nose of the prosecutrix due to assault by the accused as well as the injuries sustained by the prosecutrix on different parts of her body. He admitted that at the relevant time the prosecutrix is 14 years old. He denied that suggestion that the accused had sexual intercourse with the prosecutrix and admitted the suggestion that he does not know of any misunderstanding or hatred between the 2 families.

10. In order to constitute the offence punishable u/s 341 IPC it must be proved that the accused must have voluntarily obstructed X from proceeding in the direction in which she has the right to proceed. In the case at hand, X during cross examination stated that she did not shout for help when the accused told her to board his motorcycle and her friends who were nearby did not try to help her. She further stated, *“The accused never restrained me from my movements by tying me with a rope or other things. After the incident I must have remained with the accd for half an hour. It is a fact that I could have left the place immediately but I did not dare to go. It is not a fact that I was never threatened by the accd.”* She also stated *“To my knowledge the accd did not carry any weapon with him.”*

11. Upon a reading of the provision of sec.339 IPC which defines “wrongful restraint” it implies that the obstruction should be so complete and successful so as to prevent the person obstructed from proceeding in any direction in which he has the right to proceed. In other words, it should appear to the person obstructed that it will be impossible, difficult or dangerous to proceed and by actually causing it to be impossible, difficult or dangerous for that other person to proceed.

12. Keeping in mind the ingredient of the offence on one hand and the evidence on the other hand, it appears that the prosecutrix was not completely restrained or debarred from proceeding in the direction she wanted to go. On the contrary, from her cross-examination it is seen that she knew she could have left the place but she did not do so as she did not dare to do so. The accused was not armed with any weapon and at the most it was only a verbal threat without any further action or obstruction.

13. Keeping in mind the materials and evidence in hand, it appears that the prosecution has not been able to prove by cogent and reliable evidence that the accused wrongfully restrained X so as to come within the definition of wrongful restraint u/s 339 IPC and punishable u/s 341 IPC.

14. With regard to the offence punishable u/s 323 IPC it is for the prosecution to prove that the accused by his act caused bodily pain, disease or infirmity to the complainant and that he did such act intentionally or with the knowledge that it would cause hurt etc.

In the case at hand, X stated that the accused assaulted her by slapping her and kicking her. She stated that her nose bled. She stated that due to the assault she sustained injuries/bruises on different parts of her body and that injury on her breast has not completely healed. In her cross-examination, she stated that she sustained only injuries and there is no fracture of bones. She also stated that the scar on her breast is as a result of scratch mark from the bark where she fell upon when she was pushed down by the accused.

PW No.2/Chhanhima who is the father of X stated that he saw bleeding on the nose of X and some injuries/bruises on her body.

PW No.5/Dr.Lalmuanawma Jongte who examined X at N.Vanlaiphai PHC on 14.11.2011 depose that upon examination of X, he found scratch marks over her left arm, right breast, right eye and leg.

15. From the evidence adduced by the prosecutrix herself, it appears that the accused did not use any weapon and that the manner of assault was by slapping and kicking. She also stated that the accused pulled her hair. Ordinarily, a person who is slapped or kicked can sustain injuries such as laceration, bruises, swelling, fracture or cut injuries. However, the prosecutrix suffered only 'scratch' injuries. Further the prosecutrix herself stated that the scratches on her breast was from the bark where she fell upon when she was pushed down by the accused.

The accused in his examination u/s 313 Cr.P.C denied to have assaulted the prosecutrix and stated that while he and X were sitting under the banyan tree some children saw them. On the suggestion of X they ran to the bushes to hide themselves. When they could no longer hear the noise of children they went back under the banyan tree. He stated that while running through the bushes the prosecutrix got scratches from the thorns and when they went back under the banyan tree she showed them to him and he noticed scratches on her breast and knees.

The prosecutrix deposed *“The accd. continued to proceed further and at the outskirts of the village he lowered his speed from a place near the Banyan tree and proceeded further down in between the bushes. He stopped his motorcycle in between the bushes and he pushed me down and the accd stood beside me and again threatened me and asked me what we were doing at the cemetery and I told him that we went there to roam around. He assaulted me again and this time my nose started to bleed again. Sustained injuries/ bruises at different parts of my body and the one I sustained on my breast has not completely healed till date.”*

16. Statement u/s 313Cr.P.C is not evidence. But the credibility of the statement made u/s 313 Cr.P.C can be appreciated in the light of the other evidence and materials. In the case at hand, according to the accused the scratches were due to thorns while they ran into the bushes and not attributable to him. The prosecutrix on the other hand stated that she was assaulted by the accused. She also stated that the accused stopped his motorcycle in between the bushes and pushed her down. Accordingly, both of them admitted that they were among the bushes. Medical examination was conducted on 14.11.2011 which is the next day of the incident. As stated above, on medical examination the injuries seen on the body of X were - scratch marks on her left arm, right breast, right eye and leg. No other injuries were found on her body at the time of medical examination.

17. Upon examining the evidence of the prosecutrix, statement of accused u/s 313 Cr.P.C as well as the medical examination report of the prosecutrix, I am of the considered view that the probability factor leans in favour of the accused.

18. Turning to the offence punishable u/s 376(1) IPC, it is first necessary to have a finding on the age of X.

PW No.1/X stated that she was born on 27.2.1997 and in the year 2011 she was reading in Class-VIII. Her said statement was not shaken during cross-examination though she stated that she was not sure whether the Police seized her Birth Certificate or not.

PW No.2/Chhanhima who is the father of X stated that X was born in the year 1997 though he did not remember the date and month. He also stated that during the year 2011 his said daughter was reading in Class-VIII. During cross-examination, this witness denied the suggestion that his daughter was above 16 years in the year 2011.

PW No.5/ Dr.Lalmuanawma Jongte who examined X on 14.11.2011 stated that he recorded the age of X as 14 on the basis of statement made by her and the prosecutrix appeared to be the age stated by her. In his cross-examination he stated that he reaffirmed his said statement by stating that he wrote the age of the prosecutrix as 14 years on the basis of information given by her as he believed the said information.



The lone defence witness DW/Lalengkima stated that he is related to the parents of X. In his cross-examination, he stated that at the relevant time, to his knowledge, the prosecutrix was reading in Class-VIII. He also admitted the suggestion that at the relevant time, the prosecutrix was 14 years old. He also admitted that he does not know of any misunderstanding or hatred between the two families.

Accordingly, from the evidence and materials in record, I do not find any reason to doubt that during the year 2011 the prosecutrix was below 16 years but above 12 years.

19. The sine quo none for the offence of rape is penetration. In the instant case, as the prosecutrix was below 16 years old at the time of the incident, any sexual intercourse with her would amount to the offence of rape since she has not legally attained the age to exercise her discretion. The accused denied to have ever had sexual intercourse with the prosecutrix though the prosecutrix asserts that she was forcefully subjected to sexual intercourse by the accused. The accused in his examination u/s 313 Cr.P.C however, stated that he was having an affair with the prosecutrix and that during the relevant time he wanted to put an end to their affair.

20. The prosecutrix stated that she was forced by the accused to board his motorcycle which he drove to the jungle. She stated that she was assaulted by the accused and that she was subjected to sexual intercourse by the accused in the outskirt of the village in between the bushes. According to the prosecutrix she was at the cemetery with her friends and was called by the accused who was there with his friends one of whom was Pa Enga and they were consuming liquor. The accused forced her to board his motorcycle. She also stated that thereafter she remained with the accused in the said place for a long time with the accused and returned with the accused in his motorcycle. The accused stopped at the hill and then proceeded on. However, she remained there alone as she did not dare to go home and her parents found her there at around 10:30pm. In her cross-examination she denied that she was having an affair with the accused. She stated that from the time she boarded the motorcycle to the time the offence was committed, she never shouted for help. She also stated that there were three houses in between the cemetery and Vengpui and that there were some people at Vengpuikawn but she did not ask help from these people. She also stated that the accused did not restrain her movements by tying her with a rope or other things. She further stated that after the incident she must have remained with the accused for about half an hour. She denied to have sexual intercourse prior to the incident.

21. In cases involving sexual offences it would not be wrong to state that convictions are based on the testimony of the prosecutrix herself since all the other evidence are only corroborative. The credibility of the prosecutrix has to be appreciated in the given facts and materials of each case.

It therefore appears from the statement of X that she was forced by the accused to board his motorcycle and he rode away with her. It also appears from the evidence of the prosecutrix

that her friends and the friends of the accused were also there. The prosecutrix could name one of the friends of the accused as Pa.Ek-a. The lone defence witness is Lalengkima and upon appreciation of the evidence of the lone defence witness, it appears that he is the one named by the prosecutrix. According to the prosecutrix, she went to the cemetery after morning Church Service. As such, it would be around mid-day or early noon time. In the presence of so many people around, if any force was used upon the prosecutrix by the accused to board his motorcycle and ride away with her, there were many people including the friends of the prosecutrix who could have alerted her family. DW No.1/Lalengkima stated that the *“the accused and the prosecutrix met at the Anganwadi Centre near the cemetery. They rode in the motorcycle of the accused as she was will (willing) to go with him”*. However, PW No.2/Chhanhima who is the father of X stated that after attending the afternoon Church service his daughter Lalchhanchhuahi told him that she was told by some of the villagers that the accused assaulted her sister X and took her away in a motorcycle. Further the prosecutrix herself clearly deposed that there were some people at Vengpui but she did not shout for help. She also stated that from the time she boarded the motorcycle of the accused to the time the offence was committed, she never shouted for help. Accordingly, reasonable doubt exists on the statement of the prosecutrix that she was forced by the accused to board his motor cycle.

On further appreciation of the evidence of the prosecutrix she stated that the accused never restrained her movement by tying her with a rope or other things, she also stated that she must have remained with the accused for about half an hour after the incident. It is also in evidence that she left the place with the accused and rode back on his motor cycle.

Therefore upon appreciation of the conduct of the prosecutrix, the probability factor leans in favour of the defence to the effect that the accused and X were having a love affair at the relevant time.

22. As stated earlier, since X was below 16 years at the time of the incident, the question of consent is of no relevance. The prosecutrix in clear terms stated that she was sexually assaulted by the accused. The incident complained of occurred on 13.11.2011 in the noon time. According to the prosecutrix, she had gone to the cemetery along with four of her friends to roam around. She stated that the accused asked her friends Zeli and Mali to call her.

DW No.1/Lalengkima stated that when he saw X with another boy at the cemetery he made a phone call to the accused and told him to come to the cemetery.

The accused in his examination u/s 313 Cr.P.C also mentioned about the presence of the friends of X namely Mali and Zeli at the cemetery. The accused also stated that there is an Anganwadi Centre about 50-60 metres from the cemetery.

Accordingly, from the evidence on record it appears that the cemetery was not located at an isolated place and was frequented by villagers. Further, it is also seen from the evidence that the prosecutrix did not go there alone.

23. The accused denied to have sexual intercourse with the prosecutrix. He stated that on the said day the prosecutrix met another boy below the cemetery but does not have any knowledge if she had sexual intercourse with the said boy.

24. The medical evidence is that the hymen of the prosecutrix has ruptured and the laboratory report of the vaginal smear taken from X shows presence of spermatozoa. The medical examination report finding presence of spermatozoa is a clear indication of recent sexual intercourse. The incident complained off occurred in the afternoon of 13.11.2011, FIR was lodged on 14.11.2011 and medical examination was done on 14.11.2011 itself.

25. In the case at hand, as stated earlier, according to the prosecutrix, she was sexually assaulted by the accused after he took her away in his motorcycle from the cemetery. It was already night time by the time the prosecutrix was found by her family. She spent time alone with the accused in the afternoon on that day. Coupled with this, it appears from the evidence that the two of them were having an affair. Accordingly, in the absence of any evidence to the effect that the prosecutrix had sexual intercourse with another boy she met at the cemetery on that day, I find no reason to doubt the statement of the prosecutrix that she was sexually assaulted by the accused. Further, presuming the statement of defence that the prosecutrix met another boy at the cemetery to be true, it can be seen from the evidence that at the cemetery the prosecutrix was with her friends and the evidence also reveal that the cemetery was not located at an isolated place and on the contrary was frequented by villagers. As such, the possibility of the prosecutrix indulging in sexual intercourse/act with the said boy is remote. On the other hand, on the afternoon of 13.11.2011, X was with the accused in an isolated place with no other persons coupled with the evidence that the two of them were having an affair at the relevant time makes the story of the prosecutrix more probable that she was sexually assaulted by the accused since any sexual intercourse with a minor would amount to rape.

26. Turning to the argument of the Ld. Defence Counsel that non examination of the Investigating Officer is fatal to the prosecution case, in this regard it is seen that the Investigating Officer despite due receipt of summons failed to appear before the Court to adduce his evidence. The conduct of the Investigating Officer is not only unbecoming of a person belonging to a disciplined force it also has to some extent created adverse inference on the investigation. It is noted that apart from submitting that non-examination of the Investigating Officer is fatal to the prosecution case, the Ld. State Defence Counsel did not elaborate his submission and has not made any submission in what manner the defence have been prejudiced due to non-examination of the Investigating Officer. If non-examination of Investigating Officer, per se, is fatal/defeats the prosecution case, it would mean that the entire justice delivery

system would be at the whims of a Police Officer. This situation, according to my understanding is not the intention of the legislature. Non-examination of Investigating Officer no doubt puts the court on guard to be more circumspect. As pointed earlier, any prejudice caused due to non-examination of the Investigating Officer have not been placed before this Court by the Ld. Defence Counsel. Upon appreciation of the entire evidence and the materials on record, I fail to find in what manner or on what issue the accused is prejudiced due to non-examination of the Investigating Officer. In this regard the honble Apex Court in the case of **Ramdeo vs. State of U.P.**, reported in **1995 Supl. (1) SCC, 547**, has held that *it is always desirable for the prosecution to examine the Investigating Officer. However, non-examination of the Investigating Officer does not in any way create any dent in the. Prosecution case, much less affect the credibility or otherwise trustworthy testimony of the eye witness.* Similarly, in the case of **Bahadur Naik v. State of Bihar, AIR 2000 SC, 1582, 2000 Cri.L.J. 2466** it was held by the Apex Court that **non-examination** of an **Investigating Officer** was of no consequence when it could not be shown as to what prejudice had been caused to the appellant. Accordingly, I am of the view that none examination of the case I/O, in the instant case does not defeat the prosecution case.

27. For the reasons indicated in the preceeding paragraph, I find that the prosecution has been able to prove by cogent and reliable evidence that on 13.11.2011 the accused sexually assaulted X.

28. Accordingly, accused H.Thantluanga is convicted of the offence punishable u/s 376(1) IPC while acquitting of the offence punishable u/s 341/323 IPC.

29. Sentence will be passed on 24.1.2014 after hearing the parties.

30. Give copy of the Judgment free of cost to the accused.

31. Pronounced in open court and given under my hand and the seal of this court on this the 20<sup>th</sup> day of January, 2014.

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

**ORDER**

**Dt.28.01.2013**

Accused H. Thantluanga is produced from judicial custody. Ld. Defence Counsel and Addl. PP are present.

Heard the parties.

Accused H. Thantluanga prays for leniency by submitting that his parents have divorced and that he has been living with his aged mother and that he is the sole bread earner of his family. He also stated that he was having an affair with prosecutrix and he did not use force upon her and that till date the two families continue to maintain cordial relation till date. He also submitted that he is now 32 years old without any criminal antecedents. The accused also stated that from the time of the incident to the time of his conviction he has been working as a Teacher in the Govt. Middle School having a monthly salary. However the accused does not know whether he has confirmed or not.

Mr. J.N. Bualteng, Ld. State Defence Counsel adopted the submission of the accused and prays to show leniency by further submitted that the accused stand to lose his job by his conviction which itself is a sufficient punishment.

On the other hand, Mrs. Rose Mary, the Ld. Addl. PP submitted that no reasonable ground has been made out to show leniency to the accused and that there are no materials to show that the accused is a Govt. employee working as a Teacher. The Ld. Counsel therefore prays to impose sentence as mandated by law.

Heard the parties. This Court has already recorded the finding that during the relevant time, the accused and the prosecutrix were having an affair. The prosecutrix at the relevant time was 14/15 years and she being a minor the question of consent is of no relevance.

While considering the question of sentence, it is the nature and gravity of the crime but not the criminal which are germane for consideration of appropriate sentence. The Hon'ble Apex Court in the case of State Vs. Lekhram reported in 2006 Cri. LJ 2139(SC) has considered that minor giving consent to sexual intercourse is a mitigating factor and in the said case it was directed that the sentence be set off to the period already undergone by the accused which was about 1 ½ year.

In the case at hand, from the FIR itself, it is seen that the accused during the relevant was the Teacher of the prosecutrix. As a result of his conviction, the accused stand to lose his job. The same in itself is a punishment as the accused and his family would be deprived of their livelihood. However, it is the duty of the Court to balance the right of the victim with that of the accused and the only tool that can be used by the Court to send a message of its abhorance towards such a crime is by imposing an appropriate sentence of imprisonment.

For the reasons indicated above, considering the age of the accused, his criminal antecedents, the fact that he and the family of the prosecutrix continue to maintain cordial relation and that during the relevant time he was having an affair with the prosecutrix who was a minor and that the accused by his conviction would stand to lose his job are sufficient ground to impose a sentence lower than a minimum prescribed. The Bombay High Court in the case of Gopinath Vs. State of Maharastra reported in Cri. LJ 1277 has held that imposition of sentence of 1 year Rigorous Imprisonment was proper. In the said case the prosecutrix was a minor below 16 years and a willing partner to the coitus.

Taking the cue from the decision of the Hon'ble Bombay High Court as well as that of the Apex Court, I am of the opinion that sentencing of the accused should be tampered with mercy.

Accordingly, accused H. Thantluanga is sentenced to undergo Rigorous Imprisonment for 1 (one) year and to pay a fine of Rs. 10,000/- (Rupees ten thousand) in default to suffer another RI for 2 (two) months.

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

Bail bond stands cancelled and accused is committed to judicial custody to serve the remaining sentence.

Give copy of the Judgment & Order free of cost to the accused.

This Order will form part of the Judgment dt.20.01.2014.

Case stands disposed off.

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

Memo No: \_\_\_\_\_AD&SJ/(A)/2013 : Dated Aizawl, the 28<sup>th</sup> January, 2014  
Copy to: -

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

**P E S H K A R**

**APPENDIX**

**A. PROSECUTION EXHIBITS**

- Ext. P-1 FIR
  - P-1(a) Signature of PW No. 2
- Ext. P-2 Seizure Memo
  - P-2(a) Signature of PW No. 3
  - P-2(b) Signature of PW No. 4
- Ext. P-3 Medical Examination Report of the victim
  - P-3(a) Signature of PW No. 5
- Ext. P-4 Medical Examination Report of the accused
  - P-4(a) Signature of PW No. 5
- Ext. M-1 Seized Article

**B. DEFENCE EXHIBITS- None**

**C. EXHIBITS PRODUCED BY WITNESSES - None**

**D. COURT EXHIBITS- None**

**E. PROSECUTION WITNESSES:**

- P.W. No. 1 - Rozampuii
- P.W. No. 2 - Chhanhima
- P.W. No. 3 - F. Lalchhuankima
- P.W. No. 4 - F. Lalmangaihzuala
- P.W. No. 5 - Dr. Lalmuanawma Jongte

**F. DEFENCE WITNESSES - :**

- D.W. No. 1 - Lalengkima