

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

PRESENT

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

**SR No.140/2010
In GR 460/2010
U/s 376(1) IPC**

Ref :- Bairabi P.S Case No.16/2010 dt.5/7/2010 u/s 376(1) IPC

State of Mizoram

Versus

Laltanpuia Accused

Date of hearing 17.12.13 & 13.01.2014

Date of Judgment 27.01.2014

A P P E A R A N C E

For the Prosecution Mrs.Rose Mary, Addl.PP

For the Accused Mr. SL Thansanga 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 5/7/2010 @ 3:30pm one X of Bawngkawn Venglai lodged a written FIR at Bairabi Police Station to the effect that on the previous night at about 10:00pm, Laltanpuia of Helipad Veng, Bairabi forced her inside his bedroom with an intent to sexually assault her and physically assaulted her causing a bleeding.

On the basis of the said information, Bairabi P.S. Case No.16/2010 dt.5/7/2014 u/s 376/511 IPC was registered and investigated into. Upon completion of investigation, having found prima facie case against the accused Laltanpuia for the offence punishable u/s 376/323 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.SL Thansanga, Advocate was assigned to defend the accused at the State expense u/s 304 Cr.P.C.

4. Charges u/s 376(1) IPC was framed against the accused. The charge was 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. In order to prove the guilt of the accused, the prosecution examined 7 witnesses. Accused was examined u/s 313 Cr.P.C and three defense witnesses have been examined. Thereafter, the Ld. Counsels are heard.

Mrs. Rose Mary, the Ld. Addl. PP submitted that the prosecution have been able to prove by cogent and reliable evidence that the accused committed rape upon the prosecutrix. In support of her submission the Ld. Addl. PP submitted that the injuries sustained by the prosecutrix is a clear prove that she resisted the accused and it is also admitted by the defence that the prosecutrix took shelter in the house of the next door neighbour. According to the Ld. Counsel the prosecutrix stayed in the house of the accused only because he offered to help her in finding a person who cheated her for Rs,45000/-. As a result of the physical assault the prosecutrix was hospitalized for two days. The Ld. Counsel submitted that the statement of the prosecutrix is reliable and prays to convict the accused.

On the other hand, Mr. SL Thansanga, Ld. State Defence Counsel submitted that took this court through the evidence adduced and submitted that the accused and X met at Kolasib and had liquor together. She willingly followed the accused to Bairabi and that both of them slept together in the house of the accused at bairabi. They drank liquor together and thereafter they had a misunderstanding regarding their future course of action to live together as husband and wife which resulted in minor assault leading to the filing of the FIR. According to the Ld. Counsel it is clear that during the relevant they were eloping. According to the Ld. Counsel the prosecutrix nowhere stated that the accused had sexual intercourse with her and she stated that she has forgiven the accused and desire that the case should stop. The Ld. Counsel therefore prays to acquit the accused.

6. POINT(S) FOR CONSIDERATION

Whether the accused had sexual intercourse with X amounting to rape as provided u/s 375 IPC and the accused thereby guilty of the offence punishable u/s 376(1) IPC?

7. DISCUSSION, DECISION AND REASONS THEREOF:-

PW No.1/X is the prosecutrix. She stated that prior to the incident she had spoken to the accused over phone. She stated that she was cheated by one person who claimed to be from Bairabi. She gave that person Rs.45000/- to buy a scooty but the said person escaped from her. The accused offered to help her in locating the said person and said that she could put up in his house. So she went to Bairabi and stayed in the house of the accused. After dinner when she lied down on her bed the accused tried to have sexual intercourse with her. But since she resisted him, he did not have sexual intercourse with

her and that at that time there was no one else in the house. On the next day the accused helped her in finding the person who cheated her, but they could not find him. At night the accused once again came to her room and tried to have sexual intercourse with her. This time also she fought back and sustained injuries on her lower lip. She ran out of the house and ran into the neighbour's house where she spent the night. The accused also tore her clothes which were seized by the Police. On the next day, the cut on her lips was stitched at Kolasib, she also sustained injuries on her chest and was hospitalized for two days. She could not say whether the accused penetrated or not since she struggled and pushed him. The accused pulled down her pant and underpant upto her thigh. She exhibited the FIR as Ext.P-1 and her signature as Ext.P-1(a). In her cross examination she stated that she stated that the man to whom she gave Rs.45000/- is known to her as mama and she employed him as taxi driver for about 6 months. She stated that she met the accused at Rengtekawn and at Kolasib they met in the house of his elder sister and on that they both of them consumed liquor. She stated that they proceeded to Bairabi in the afternoon by maxi cab. She also stated that she has forgiven the accused in the name of God and desire that the case should come to an end. She also stated that she is now married and her husband knows about the present case.

PW No.2/Lalengzauva is the father of X and a resident of N.Chawnpui, Kolasib District. He saw the laceration on the upper lip, torn shirt and broken necklace of his daughter. On the next day, his daughter and his son-in-law went to Bairabi to lodge FIR. He also stated that at Kolasib, one Sangkunga spoke on behalf of the accused and requested for a compromise but his terms of compromise was not acceptable to them.

PW No.3/Vanlaltluangi stated that X is her neice. She is a resident of Bairabi and stated that sometime in the month of July, 2010 X went to her and stated that she was sexually assaulted by the accused in his house near Helipad and also assaulted her. She saw some injury marks on the body of X. She also saw clothes of X which were torn by the accused. The prosecutrix also told her that the accused deceived her by saying that he will help her in finding the taxi driver who borrowed her money. In her cross examination, she stated that the prosecutrix was a widower. She admitted that when the prosecutrix came to her house at Bairabi she had been staying a couple of nights at Bairabi and a night at Kolasib. She also admitted that she and her niece were living in the same village at the relevant time and even at present.

PW No.5/Lalzamliani is the mother of X and witnessed the seizure of underwear and T.Shirt of X and identified the seized material marked as Ext.M-1. She exhibited the seizure memo as Ext.P-2 and her signature as Ext.P-2(a). In her cross examination she stated that at the relevant time, X, her daughter was not living with them and as such she does not know if her daughter was in the habit of drinking liquor. She denied the suggestion that her daughter and the accused eloped to Bairabi

PW No.7/ Dr.Zorinsangi Varte examined X at District Hospital Kolasib on 6.7.2010. On local examination she found scratch marks on her right breast, swelling of

lower lips, abrasion and scratch marks of both the elbows and contusions on her back and right upper arm. She sent vaginal swab for laboratory examination which shows presence of spermatozoa. She did not conduct genital examination and stated that she failed to do so since this was her first case of sexual assault. She exhibited the medical examination report as Ext.P-2 and her signature as Ext.P-2(a), Ext.P-3 which is the laboratory examination report. In her cross examination, she stated that X did not sustain any injuries on her genital organ. The other injuries on her body were minor injuries. She also stated that though spermatozoa was detected, medically, it is not possible to say from whom it originated. The victim stated to her that the incident occurred two days before the examination. The victim could have sustained injuries mentioned in Ext.P-2 due to accident. In her re-examination she clarified that she was told by X that the incident occurred on the night of 4.7.2010 in the house of the accused.

PW No.8/ASI K.Laldingliana stated that FIR was received at Bairabi PS on 5.7.2010. Bairabi PS Case No.16/10 dt.5.7.2010 u/s 376/511IPC was registered. The O/C endorsed the case to him for investigation. During investigation, he visited the place of occurrence which is the house of the accused at Helipad Veng, Bairabi. He recorded the statement of Lalawmpuia, a widow and neighbour of the accused in whose house X took shelter on the night of the incident. He recorded the statements of the prosecutrix, her father, paternal uncle, Lamuankimi elder sister of accused and her husband. He arrested the accused on 11.7.2010. He stated that he could not immediately arrest the accused as he went straight to Aizawl from his place of work i.e garmurra. He forwarded the prosecutrix for medical examination at District Hospital, Kolasib. He also interrogated the accused and during interrogation the accused admitted to have assaulted X but denied attempt to rape. From his investigation, he found that on the previous night of the incident the accused and prosecutrix had sexual intercourse. On the night of the incident the accused once again tried to have sexual intercourse with X which was resisted by her. He submitted his report to the O/C. He also seized the underwear and t Shirt of X. He exhibited the arrest memo as Ext.P-4 and his signature as Ext.P-4(a), Seizure Memo as Ext.P-2 and his signature as Ext.P-2(a). In his cross examination, he stated that he conducted most of the investigation and SI/NK Nath, O/C recorded the statement of only one seizure witness. He also stated that from his investigation he found that the accused and the complainant had sexual intercourse at Kolasib and Bairabi. He admitted that prior to the incident complaint off, the accused and X had consensual sexual intercourse twice but denied that the prosecutrix resisted the accused only because of a small fight.

PW No.9/ NK Nath stated that during the year 2010 he was posted at Bairabi as Officer-in-charge. He stated that ASI Laldingliana conducted the investigation and on completion of investigation the said ASI Laldingliana handed over the investigation report to him. On the basis of the statement of X while laying charge sheet against the accused he altered the charge to sec.376/323 IPC though at the time of lodging the FIR the offence u/s 376/511 IPC was registered. He exhibited the Charge sheet as Ext.P-5 and

his signature as Ext.P-5(a). In his cross examination he stated that during investigation, X denied to have sexual intercourse with the accused as Kolasib. He stated that neither the accused nor X stated that the purpose of the visit of X to Bairabi was because she had some problems regarding purchase of scooty. No further steps was taken by ASI Laldingliana regarding the seized material like sending it to FSL since the same was already washed.

8. Examination of accused u/s 313 Cr.P.C is one of denial. The accused stated that he had an affair with the prosecutrix and admitted to have consensual sexual intercourse with her. He also admitted that when the prosecutrix spitted liquor on his face he became very angry and slapped her and at that moment the prosecutrix ran out and went to the house of his neighbour Lalawmpuii.

9. At this stage, the evidence adduced by the defence may be briefly highlighted:

DW No.1/ Nunthari is the mother of the accused. She stated that the prosecutrix came to her village and stayed in their house it Saturday though she could not recollect the date, month and year. She came with the accused. At that time, she was outside the house cooking pig food (kawtah vawk chaw ka lo chhum). Both of them were sitting under the fan inside the house. Then she entered the house and asked the woman where she was from, to which she stated that she is from Aizawl and that she is living in a rented house. After having a small conversation with X, she washed herself and went back to her house. She stated that after the death of the father of the accused she remarried and lived with her husband. The accused continued to live in the main house of his deceased father. However, as her house is closely located to the house of the accused she often visited him and it remains to be her second home. She returned back to the house of the accused to feed the pig and at that time she saw the accused and the prosecutrix preparing meal. She remained in their house till the time they went into bed. She stated that she knew that on that night both of them slept on the same bed. The next day was the Sunday and in the morning, she went to the house of the accused to feed pig and then went to attend Church service. Even during that time, the accused and the prosecutrix were together. On Sunday afternoon, the accused and the prosecutrix came to her house, the prosecutrix cooked dinner and they had dinner in her house. She stated that she knew that on Sunday, both of them were happy. She went to their house on Sunday night and knew that even on Sunday night both of them slept together on the same bed. On Monday, till midday, there was no abnormality in their behaviour. When she went back on Monday afternoon to feed the pigs, she saw that X was drunk. And she(X) jokingly ask her whether she should address her as her mother or not. She told her X that she was willing to accept her as his daughter and left the house soon after. While she was still in their house she wanted to have more liquor and ask her son to buy some more liquor for her and her son told her that it was enough, however as she insisted her son bought two polythene bags of local made liquor for her. She was still in their house while

both of them were pouring out the liquor from the polythene packet. Though she was annoyed with their behaviour, she kept silent. Then the prosecutrix suggested that both of them should shift to her rented house at Aizawl where it would be easier to earn a living and she also asked him to sell off his land and cattle. Her son objected to her suggestion and from then they had argument. As both of them were drunk, in the heat of the moment, the prosecutrix kicked the accused on the groin and at that time, her son gave her a slap on the face. She became angry and ran to the Police Station and informed the Police that she was raped by her son. In her cross examination, she admitted the suggestion that at the time when accused came to Bairabi with the prosecutrix she was not living in the same house with the accused. She denied the suggestion that no one else was at home on the two nights when the prosecutrix stayed with the accused. She stated that during the relevant time her grand son who must be about 12/13 years was living in the same house with the accused. He had a separate bedroom. She stated that it was before sunset when she entered the house of the accused. Thereafter, she returned to home. She did not go back to the house of the accused at night. She admitted that the prosecutrix spent two nights in the house of the accused. She admitted the suggestion that she was not present in the house of the accused when the prosecutrix told him to sell off his land and cattle. And also admitted that she did not see the prosecutrix kicking the accused on the groin and did not see him slapping the prosecutrix on the face. She stated that she does not know whether the accused committed rape on the prosecutrix and when he tried to sexually assault her for the second time, the prosecutrix resisted him by kicking his groin.

DW No.2/Lalnunkimi _ is the sister of the accused. She stated that in the year 2010 her brother reached their house with the prosecutrix, she met them on the next morning. She saw both of them lying down on the bed and woke them up and she also told them she has made tea for them. At that time, the prosecutrix said she would prefer liquor to tea. At that time, her elder brother told her that she should not start drinking liquor from morning and that they should at least respect her (his younger sister). At that time, the prosecutrix was smelling of liquor. Her brother and the prosecutrix were embracing each other when she saw them. Though she insisted that she would take liquor her brother stopped her and they had tea. Thereafter they began cooking and have food together. They remained in the house and watch TV together. They spent almost the whole day in that manner. In the afternoon, she gave soap and towel to the prosecutrix before she took bath and thereafter she left their house, as she had to look after the shop of her mother. On the next day after when she went to the house of the accused, she learned that they have some altercation on the previous night and the prosecutrix had run to the neighbour's house. Lalchhanchhuaha who lives in the said neighboring house told her that on the previous night he had sexual intercourse with the prosecutrix and told her that the woman whom her brother eloped is of a very loose moral character. He also told her that after she ran to their house they were consuming liquor together. Chhanchhuaha also

told her that he wanted to marry the prosecutrix with whom her brother eloped and in order to fulfill his desire he told his mother to write the FIR against her brother. She also felt that the said Lalchhanchhuaha acted in revenge since she did not respond his advances towards her. Chhanchhuaha also told her that even if her brother marries the prosecutrix, he has slept the said woman. She further stated that since Lalchhanchhuaha and his mother were alcoholic, both of them had died. In her cross-examination, she stated that though she used to live in the same house with her brother/accused during the relevant time she was not living with him. At that time, she was staying in the house of her mother. The house of her mother and the accused are not in the same locality and they are not closely located. When the prosecutrix and the accused arrived in the house of the accused, she was not at home. On the next day of the arrival of her brother with the prosecutrix, she remained with them for nearly the whole day. She denied the suggestion that she did not see the argument between her brother and the prosecutrix. She further stated that at that time, the prosecutrix suggested that her brother should sell of his properties in their village and that they should settled at Aizawl and this was objected by her brother saying that he is the only one to look after the house and that he has his own family. She admitted the suggestion that she was not present when her brother and the prosecutrix had an argument at night as a result of which she ran to the neighbour's house. She admitted the suggestion that she did not tell the Police personnel of what she stated in the Court regarding the advances of Chhanchhuaha towards her and what she heard from him.

DW No.3/Zirsangzela is a friend of the accused who is living at Rengtekawn, Kolasib. He stated that he was informed by the accused that he eloped and asked him to meet them. He went to Bairabi to meet the accused and his wife and when he went to their house, he saw them through the curtain that they were indulging in sexual intercourse. The three of them drank liquor together, he had meal in their house and spent the night. He left Bairabi on the next day. When he was with them he did not see them arguing but X asked if he had brought liquor with him. He learnt about the incident on the night when he reached Rengtekawn. In his cross examination he stated that he reached the house of the accused at dusk @ 6:00pm and only the accused and x were there. He did not see any other person in the house till he left on the next day.

10. In the instant case, charge have been framed u/s 376(1) IPC. It is seen from the evidence that at the time of the incident, the prosecutrix had gone to Bairabi and was putting up in the house of the accused. It is also an admitted fact that the prosecutrix during the relevant time was a widow and she was living in Aizawl with her son.

11. According to the prosecutrix, prior to the incident she had spoken to the accused over phone regarding their 'business' but saw him for the first time on the day of the incident. The prosecutrix stated that she went to Bairabi as the accused offered to help her

in locating a person who cheated her with Rs.45000/- and she put up in the house of the accused.

On the other hand, the stand of the defence is that the accused eloped (in ru) with the prosecutrix. A reading of the statements of DW No.1/Nunthari and DW No.2/Lalnunkimi who are the mother and sister of the accused gives an impression that to them, the prosecutrix staying with the accused in his house was due to elopement. Similar is the impression created by the statement of DW No.3/Zirsangzela who stated that he was informed by the accused that he eloped with X and he went to their house to celebrate their marriage. He also stated that when he reached the house of the accused, he saw through the curtain the accused and X having sexual intercourse.

PW No.3/Vanlaltluangi stated that X is her niece. The said witness is a resident of Bairabi. She admitted that before her niece came to her house, she i.e. X had been staying with the accused at Bairabi for a couple of nights.

Accordingly, if the statement of the prosecutrix is to be believed it means that she went to Bairabi and stayed in the house of the accused as the accused stated that he would help her in locating the person who cheated her with Rs.450000/-. The accused at that time, according to her was alone in his house. It would appear that during the relevant time the prosecutrix was in a desperate situation trying to get back her money back. It was such problem that she should not have any hesitation in sharing with her family. The evidence shows that her aunt PW No.3/Vanlaltluangi was living in Bairabi during the relevant time. No explanation is offered why she chose to stay in the house of the accused whom, according to her, she has never seen before. On the other hand, she had the intelligence to approach her aunt (PW No.3) after the incident. Further, the statement of DW No.3/Zirsanga to the effect that he saw the accused and the prosecutrix having sexual intercourse have not be discredited during cross examination. As such, from the facts and circumstances of the case, I am of the view that the probability factor leans in favour of the defence who stated that the accused and the prosecutrix eloped at the relevant time and that they were staying in the house of the accused.

12. In the instant case, upon careful perusal of the statement of the prosecutrix it is noticed that she has nowhere stated that the accused had sexual intercourse with her. She stated *'After having dinner the accd showed me the place to sleep. After I lied down on the bed soon after the accd came and try to have sexual intercourse with me and I fought him back. At that time there was no one in his house except him. That night he did not have sexual intercourse with me. On the next day he helped me in locating the said person but we could not find him. After dinner I went back to sleep at the same place in his house. The accd again came and try to have sexual intercourse and I fought him back and I also sustained injury on my lower lip.'* Penetration is the sine quo non for the offence of rape. It is seen from the evidence that during the relevant time, the prosecutrix was a widow with one minor son. She was a major and would fully understand the

conduct of the accused on her person. In the case at hand, PW No.7/Dr.Zorinsangi Varte who examined X at District hospital Kolasib on 6.7.2010 stated that since this was the first case she handled with regard to the offence of rape, she failed to conduct examination of the genital organ. Accordingly, no assistance can be expected from medical examination. In the absence of any evidence regarding penetration/sexual intercourse, it would not be proper to find the accused guilty of the offence of sexual assault.

13. Upon careful perusal of the statement of the prosecutrix, she has not made a clear statement of what the accused did to her person. The hon'ble Apex Court in the case of *AmanKumar &Anr vs State of Harayna reported in (2004)4SCC 379* wherein it has been held as follows :-

“10. An attempt to commit an offence is an act, or a series of acts, which leads inevitably to the commission of the offence, unless something, which the doer of the act neither foresaw nor intended, happens to prevent this. An attempt may be described to be an act done in part-execution of a criminal design, amounting to more than mere preparation, but failing short of actual consummation, and, possessing, except for failure to consummate, all the elements of the substantive crime. In other words, an attempt to consists in it's the intent to commit a crime, falling short of, its actual commission. It may consequently be defined as that which if not prevented would have resulted in the full consummation of the act attempted. The illustrations given in Section 511 clearly show the legislative intention to make a difference between the cases of a mere preparation and an attempt.”

Keeping in mind the interpretation of criminal attempt made by the honb'le Apex court, upon appreciation of the evidence of the prosecutrix in particular and the prosecution evidence in general, I am of the considered view that the ingredient of criminal attempt is lacking. Though it is no doubt true that in sexual offence conviction can be based on the sole testimony of the prosecutrix, the basic principle that the prosecution has to discharge its burden of proving atleast the essential ingredient of the offence never shifts.

14. As stated above, from the statement of the prosecutrix alone it cannot be inferred that the accused sexually assaulted her. Her statement is also insufficient in order to find the accused guilty of an attempt to commit sexual assault. But at the same time it is noticed that on 6.7.2010 when the prosecutrix was medically examined, spermatozoa was found from the vaginal swab taken from her. The prosecutrix at the relevant time was a widow with one minor son. Accordingly, she is a person of mature understanding. In the absence of any evidence of penetration/attempted penetration or ejaculation, I am of the view that it would not be proper to find the accused guilty of rape or attempt to commit rape only because spermatozoa was found from the vaginal swab taken from X who was a major at the relevant time.

18. The medical evidence shows that the prosecutrix sustained scratch marks on her right breast, swelling of lower lips, abrasion and scratch marks of both the elbows and contusions on her back and right upper arm. But charge have not been framed for the said offence. Presuming that hurt was caused to the prosecutrix, the prosecutrix herself has clearly stated that she has forgiven the accused and desire that the case should stop.

ORDER

19. Accordingly, accused Laltanpuia is acquitted of the offence punishable u/s 376(1) IPC by giving him the benefit of doubt.

20. Accused who is in custody shall be set at liberty forthwith if not required in any other case.

21. In the event of the accused being released from judicial custody, as per sec.437-A Cr.P.C he shall continue to be on bail for another 6 months.

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

23. Pronounced in open court and given under my hand and the seal of this court on this the 27th January, 2014.

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

Memo No: _____AD&SJ/(A)/2013 : Dated Aizawl, the 27th January, 2014
Copy to: -

1. Accused Laltanpuia through Counsel Mr. S.L. Thansanga, 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. 1
- Ext. P-2 Seizure Memo
 - P-2(a) Signature of PW No. 5
 - P-2(b) Signature of PW No. 8
- Ext. P-2 Medical Examination Report of the victim
 - P-2(a) Signature of PW No. 7
- Ext. P-4 Arrest Memo
 - P-4(a) Signature of PW No. 8
- Ext. P-5 Charge Sheet
 - P-5(a) Signature of PW No. 9
- Ext. M-1 Seized Materials

B. DEFENCE EXHIBITS- None

C. EXHIBITS PRODUCED BY WITNESSES - None

D. COURT EXHIBITS- None

E. PROSECUTION WITNESSES:

- P.W. No. 1 - Lalrinpuui
- P.W. No. 2 - Lalengzauva
- P.W. No. 3 - Vanlaltluangi
- P.W. No. 5 - Lalzamliani
- P.W. No. 7 - Dr. Zorinsangi Varte
- P.W. No. 8 - ASI K. Laldingliana
- P.W. No. 9 - N.K. Nath

F. DEFENCE WITNESSES - :

- D.W. No. 1 - Nunthari
- D.W. No. 2 - Lalnunkimi
- D.W. No. 3 - Zirsangzela