

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

PRESENT

Smt. Helen Dawngliani
Addl. District & Sessions Judge

Session Case No.92/2013
In Crl. Tr. No.82/2013
U/s 376(2)(i)/511/448 IPC
r/w 6(a) PP (Entry into India) Rule 1950

Ref :- Champhai P.S Case No.56/2013 dt.14.4.13 u/s 376(1) (2)(i)/511/448 IPC
r/w 6(a) PP (Entry into India) Rule 1950

State of Mizoram

Versus

Chawithanga Accused

Date of hearing 11.7.2014

Date of Judgment 17.7.2014

APPEARANCE

For the Prosecution Mrs. Rose Mary, Addl. PP

For the Accused Mr. R. Thangkanglova, Advocate

JUDGMENT & ORDER

1. The prosecution story of the case in brief is that on 14.4.2013 @ 12:00pm one Kawlneihkimi W/o F.Vanlalchhunga R/o Melbuk village lodged a written FIR at Champhai Police Station stating that on 13.4.13 @ 4:00pm she had gone out to buy vegetables leaving behind her two children namely X, 8 years and Lalzemawii 4 years who were both sleeping. When she returned about 20 minutes alter Chawithanga S/o Kulnghina R/o Rinpi, Halkha District Myanmar entered into her house and attempted to rape her daughter X by leaning against her daughter without wearing his pants and her daughter's pant and underwear were also removed by hi and that she also saw seminal stain around the private part of her said daughter.

On the basis of the said information, Champhai P.S Case No. No.56/2013 dt.14.4.13 u/s 376(1)(2)(i)/511/448 IPC r/w 6(a) PP (Entry into India) Rule 1950 was registered and investigated into. Upon completion of investigation, having found prima facie case against the accused Lalhluta for the offence u/s

376(1)(2)(i)/511/448 IPC r/w 6(a) PP (Entry into India) Rule 1950 charge sheet was laid against him. The case was then 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. R. Thangkanglova, Advocate was assigned to defend the accused at the State expense u/s 304 Cr.P.C.

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

5. During the course of trial, the prosecution examined 4 witnesses. The accused was also examined u/s 313 Cr.P.C. the accused declined to lead defence evidence. The Id. Counsels are heard.

Mrs. Rose Mary, the Ld. Addl. PP submitted that though the prosecutrix herself could not say in clear terms what the accused did to her, and that the offence of attempted rape can be committed even without the prosecutrix sustaining any injuries as the accused himself admitted that he went to the house of X on that day and also admitted that he was drunk.

On the other hand, Mr. R. Thangkanglova, the Ld. State Defence Counsel there is no evidence to the effect that the accused attempted to commit rape upon X, there is no eye witness to the alleged incident. According to the Ld. Counsel it appears from the evidence and materials on record that the mother and the accused were merely walking passed in the house of the victim and there is no clear evidence of what actually happened on that day. The Ld. Counsel argued that none of the statements of prosecution witnesses corroborated with one another and that the prosecution has failed to lead any evidence that the accused was a foreigner and that he entered India without having a valid Passport. In the absence of any evidence against the accused, the Ld. Counsel argued, the accused has to be honorably acquitted.

6. DISCUSSION, DECISION AND REASONS THEREOF:-

At first, the evidence adduced by the prosecution witnesses may be briefly highlighted:-

PW No.1/X stated that the accused is her father's friend. She stated that on the date of the incident her father had gone out to help his friend Rama in the construction of his house. She was at home with her mother and two younger siblings. They washed clothes and thereafter they watched TV and she fell asleep. When she got up she saw her mother standing near her and the accused stood near the window. She was woken up by her mother and asked her if she does not know anything (engmah i hrelo em ni?). When the accused left her mother called him back saying that he could not walk off so lightly but the accused did not stop. The Police took her underpant but she does not know what happened to her underwear. The Police did not record her statement. Cross examination was declined.

PW No.2/F.Vanlalchunga is the father of X and he stated that while he was in the house of Rama his wife called out to him and said "a sual a nia". By the time he reached his house the accused had left but they ran after him and caught him. His wife told him that she saw the accused with his pant removed and that she saw some liquid which appeared as a semen to her on the underwear of X which she was still wearing. His wife lodge the FIR as he is illiterate but he has separated with his wife she has left for Myanmar. He stated that he cannot recollect the date of birth of his daughter but stated that she is 10 years old and reading in Class-IV. Cross examination was declined.

PW No.3/ Dr. Lawrence Lalramenga Ralte examined X at District Hospital, Champhai on 13.4.13. Upon examination she was found physically and mentally sound, stain was found on her underwear and as it could not be examined they did not examine the stain, there was no mark of violence on her body, her hymen was intact, vaginal swab sent for examination gave a negative finding for spermatozoa.

On 14.4.13 he examined the accused. The accused stated to him that due to drunkenness he attempted rape upon X. Upon examination he was found physically and mentally healthy, genital organs were fully developed, no stain was detected on his clothes, there was laceration on frenulum of prepuce, there was no abrasion, the laboratory report taken from the glands penis of the accused for presence of spermatozoa was negative. He exhibited the Medical Examination Report of X as Ext.P-1 and his signature as Ext.P-1(a), Medical Examination Report of accused as Ext.P-2 and his signature as Ext.P-2(a).

PW No.4/SI Lucy Zosangzuali is the Investigating officer. She stated that FIR was received on 14.4.2013 at Champhai Police Station. During investigation, she visited the place of occurrence which is the house of X at Melbuk, she examined the complainant, forwarded X for medical examination and also recorded her statement as well as the statements of prosecutrix's younger sister and

the VCP of Melbuk. She forwarded the accused for medical examination and recorded his statement. She seized the Birth Certificate and underpant of X. She submitted charge sheet against the accused for the offence punishable u/s 376(2)(f)/511/448 IPC r/w 6(a)PP(Entry into India) Rules. She exhibited the charge sheet as Ext.P-3 and her signature as Ext.P-3(a). In her cross examination she stated that the incident occurred on 13.4.2013, she does not remember the age of X at the time of the incident, she visited the place of occurrence on the date when FIR was lodged.

7. Examination of accused u/s 313 Cr.P.C is one of denial. He stated that he committed mistake in entering the house of X drunk. He stated that the father of x is his friend. He complained of being assaulted by the mob.

8. In the case at hand, the accused is facing trial for the offence punishable u/s 376(2)(i)/511/448 IPC.

Dealing first with the offence punishable u/s 376(2)(i)/511 IPC. The sine quo non for the offence of rape is penetration of the male organ into the vulva or pudendum of the woman. The extent of such penetration is not material. In order to commit an offence of attempt to rape, it is for the prosecution to prove that the accused when he laid hold of the victim not only intended to have sexual intercourse with the victim but that he intended to do so despite resistance from the victim and that he failed to consummate only due to interference which was not foreseen by the accused. In order to commit an offence, first there has to be intention followed by preparation and then an attempt to commit the offence. If the attempt succeed then the offence is committed, if it fails then the person is guilty of offence of attempting to commit an offence.

9. In the case at hand, PW No.1 and 2 who are the prosecutrix and her father does not know the actual conduct of the accused on the person of X. The accused admitted in his examination u/s 313 Cr.P.C that he entered the house of X and that he was drunk. PW No.1/X also stated that when she was woken up by her mother she saw the accused standing near the window and her mother stood near her. She also stated that thereafter the accused left but her mother called him back and stated that he could not go out so lightly and that she would tell her father but the accused proceeded on. As such, it is clear from the evidence of PW no.1 and the statement of 'X' u/s 313 Cr.P.C that the accused went to the house of X on the date of the incident.

A. Apart from this, there is no evidence of the actual conduct of the accused on the person of X on the said date. Therefore, turning to the medical evidence, PW No.3/Dr. Lawrence Lalramenga Ralte stated that he examined X at District Hospital, Champhai on 13.4.2013. As per the medical examination report of X which is at Ext.P-1, X was medically examined on 13.4.2013 @11:50pm. During examination she was found physically and mentally healthy. There was no mark of violence on her body. No laceration or injury was seen on her external genitalia and she did not sustain any bodily injury. The doctor also deposed that vaginal swab which was sent for laboratory examination does not find Spermatozoa. The said Doctor also examined the accused on 14.4.2013 @ 7:20am. As per the finding of the said medical examination, the accused was found physically and mentally sound, no seminal stain was detected on his clothes, his genital organs were fully developed, there was no abrasion but there was laceration at the frenulum of the prepuce of the penis. Laboratory report taken from the glands penis for presence of spermatozoa was negative.

B. Accordingly, from the medical examination of the prosecutrix herself, there is no finding which can suggest sexual assault or trace of recent sexual activity. From the medical examination of the accused which was conducted on the next morning of the incident, the presence of laceration on the frenulum of the prepuce of Penis raises some doubt and the possibility of the same being connected with the charge of attempted sexual assault. But there is no other supporting evidence that the said laceration was caused due to attempted rape on a minor girl. As per Section 3 of the Indian Evidence Act, *a fact is said to be 'proved' when after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists.*

C. The yardstick therefore is that of a prudent man. In the case at hand, laceration on the frenulum of the prepuce of Penis may cause doubt as to the possibility of it being caused by sexual intercourse or attempted sexual intercourse. But at the same time, it is equally true that such laceration can be caused by any other reasons. As such, in the absence of any corroborative evidence, it would be too far fetched to conclude that such laceration was caused by an attempt to have sexual intercourse.

10. Turning to the offence punishable u/s 448 IPC. It is for the prosecution to prove (i) that the accused committed criminal trespass (ii) that such criminal

trespass was committed by entering into, or remaining in, a building, tent, or vessel and (iii) that such building tent, vessels, was used as a human dwelling or as a place of worship or as a place for custody of property.

In order to commit criminal trespass, the entry must be with the intent to commit offence/insult/annoy/intimidate.

In the case of Md. Shafique Versus Maleka Khatun reported in (1955) 60 CWN 440 it was held that *in the absence of any definite finding that some specific offence was intended to be committed, it would be wrong to convict an accused person under this section, where the intent to commit an offence is relied as an element of the offence.*

In the case at hand, the entry of the accused into the house of X is not disputed. According to PW No.1/X when she woke up she saw the accused standing near the window and he was fully dressed. She did not know what the accused did not her and she also stated that she has not heard what her mother said to the others regarding the conduct of the accused on her person. PW No.2/F.Vanlalchunga who is the father of X stated that by the time he reached his house the accused was not there. But he ran after the accused and caught him. The accused in his examination u/s 313 Cr.P.C stated that he was wrong in entering the house of X when he was drunk but he denied that he had any intention to sexually exploit the prosecutrix.

Accordingly, from the evidence on record, the ingredient of criminal trespass appears to be missing.

ORDER

11. Accordingly, accused Chawithanga is acquitted of the offence punishable u/s 376(2)(i)/511/448 IPC.

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

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

14. Pronounced in open court and given under my hand and the seal of this court on this the 17th day of July, 2014.

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

Memo No.:_____/AD&SJ(A)/2014 **:** **Dated Aizawl, the 17th July, 2014**
Copy to: -

1. Chawithanga through Counsel Mr. R. Thangkanglova, Advocate.
2. Special Superintendent, Central Jail, Aizawl.
3. District & Sessions Judge, Aizawl Judicial District, Aizawl.
4. District Magistrate, Aizawl District, Aizawl.
5. PP / Addl. PP, Aizawl.
6. DSP (Prosecution), District Court, Aizawl.
7. 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 Medical Examination Report of victim
P-1(a) Signature of PW No. 3
- Ext. P-2 Medical Examination Report of accused
P-2(a) Signature of PW No. 3
- Ext. P-3 Charge Sheet
P-3(a) Signature of PW No. 4

B. DEFENCE EXHIBITS- None

C. EXHIBITS PRODUCED BY WITNESSES - None

D. COURT EXHIBITS- None

E. PROSECUTION WITNESSES:

- P.W. No. 1 - Prosecutrix
- P.W. No. 2 - F. Vanlalchunga
- P.W. No. 3 - Dr. Lawrence Lalramenga Ralte
- P.W. No. 4 - SI Lucy Zosangzuali

F. DEFENCE WITNESSES - : None