

Smt.Helen Dawngliani
Addl. District & Sessions Judge

SR No.201/2010
In CrI.Tr. No.1361/2010
U/s 376(2)(e) IPC

State of Mizoram

Versus

Rothangpuia Accused

Date of hearing 27.06.2014

Date of Judgment 11.07.2014

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| For the Prosecution | | Mrs. Rose Mary, Addl. PP Ms. Rosy, Asst. PP |
| For the Accused | | Mr. Lalramhluna, Advocate |

1. The prosecution story of the case in brief is that on Lalrinmawia of Tlangkhang village lodged a written FIR at Mamit Police Station to the effect that on the said date, his wife X 28 years came to Mamit to visit their relative who was hospitalized and attended by him. As Tlangkhang is not motorable, X went back walking with Raothangpuia S/o Lianzuala of Tlangkhang who is also the husband of X's younger sister. On the way Rothangpuia sexually assaulted X twice inspite of having the knowledge that X was carrying three months pregnancy.

On the basis of the said information, Mamit P.S Case No.18/10 dt. 17.5.2010 u/s 376(2)(e) IPC was registered and investigated into. Upon completion of investigation, having found prima facie case against the accused Rothangpuia for the offence punishable u/s 376(2)(e) IPC Charge sheet was laid against him and committed for trial.

2. Copy of the Police Report and all connected documents were delivered to the accused. As the accused did not have the means to engage a counsel on his own, Mr. Lalramhluna, Advocate has been assigned to defend the accused at the State expense u/s 304 IPC.

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

4. During the course of trial the prosecution examined 8 witnesses. The accused was examined u/s 313 Cr.P.C and two witnesses for the defence including the accused himself were examined. The accused examined two defence witnesses. The Ld. Counsels were heard.

Mrs. Rose Mary, the Ld. Addl. PP submitted that the prosecution proved their case beyond reasonable doubt. The Ld. Counsel submitted that Tlangkhang is a small village of barely 7 houses and they were all related to one another. The accused is also the brother-in-law of X being the husband of X's younger sister. Accordingly, it is quite natural that she in good faith went home with the accused even though she knew that he was consuming liquor. Being related to one another and belonging to the same village there is no reason for the accused not to know that X was pregnant. According to the Ld. Counsel from the prosecution evidence it is clear that PW no.1, the husband of X came to know about the incident through a telephone call made from the house of Tevena. The said Tevena appeared but turned hostile. His statement is wholly unreliable and FIR being lodged on the date of the incident itself lends credibility to the statement of PW No1 and PW No.2 that the matter was informed to PW No.1 through telephone. The Ld. Counsel argued that the statement of X is reliable and she has clearly stated that despite resistance from her she was overpowered by the accused more so as it was in the middle of the jungle where there were no other persons and the prosecutrix had no other option but to continue walking to her village and since it was during monsoon the statement of the prosecutrix that she often slipped as the road was slippery appears to be reasonable. The conduct of the accused in evading arrest and absconding after arrest shows that he was guilty. According to the Ld. Counsel the conduct of the prosecutrix in immediately informing the incident though the first house was that of the accused's elder brother shows that the statement of X is truthful and the conduct of the prosecutrix spending the night with her children in the house of a Preacher shows that she was not a consenting party. According to the Ld. Counsel the prosecutrix could have kept quiet about the incident if she was a consenting party because no one saw them and no one could have suspected them but the fact that she made immediate disclosure shows that the act was committed against her will and consent.

On the other hand, Mr. Lalramhluna, the Ld. State Defence Counsel submitted that according to the victim they left Mamit at about 3:00pm, she was

seen off by her husband at around 1:00pm thereafter, she waited for the accused who was consuming liquor and infact it was she who bought liquor for the accused and she also stated that her husband might not know that she was waiting for the accused. As such from the conduct of the victim towards the accused even from before they started to walk back to their village, it is clear that any sexual intercourse between them cannot but be consensual. Secondly, there is no proof of the alleged seizure and when the seized materials were placed before the Investigating Officer in the court it was incomplete/some items were missing and no seizure witnesses were arrayed as prosecution witness. Thirdly, though PW/Vanlalvena was declared hostile by the Prosecution the Investigating Officer during cross examination admitted that the statement of Vanlalvena to the effect that it was the prosecutrix who sexually provoked the accused was correct. The next submission is that when the prosecutrix and her children spent the night in the house of PW/Vanlalchhawna, this witness did not state that he was informed by the prosecutrix that she was threatened by the accused and the fact that the prosecutrix did not sustain any injuries clearly shows that the sexual intercourse was consensual and adds credibility to the defence evidence. The Ld. Counsel also argued that the evidence adduced by PW/Vanlalvena, who was declared hostile by the Prosecution have not been shaken. The Ld. Counsel therefore submitted that there are serious doubts in the story put forth by the prosecution more particularly when the same is compared with defence evidence and the statement of the Investigating Officer himself. The Ld. Counsel therefore prays to acquit the accused by giving him the benefit of doubt.

5. POINT(S) FOR DETERMINATION:-

Whether the accused had sexual intercourse with X within the meaning of section 375 IPC knowing that she was pregnant and thereby guilty of the offence punishable u/s 376(2)(e) IPC?

6. DISCUSSION, DECISION AND REASONS THEREOF :-

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

PW No.1/Lalrinmawia is the husband of X and the informant. He stated that after spending about 3 days in the hospital at Mamit attending their child, he called his wife to give them some money to buy medicines. On the day his wife came their child was also discharged from the hospital. But he and their child stayed back at Mamit as they wanted to go for faith healing and he sent back his wife as they had minor children at home. His wife left at around 1:20pm. At dusk when he made a phone call to Tevena he stated that his wife had not reached home. But

later he received a phone call from Tevena who informed him that his wife X was raped by the accused twice and that her clothes were fully spoilt. He also stated that during the relevant time his wife was carrying 3 months pregnancy but the accused might not know about it. Not long thereafter, he lodged the FIR which he exhibited as Ext.P-1 and his signature as Ext.P-1(a). In his cross examination he stated that if his wife had gone straight from Mamit to their village she could have reached their village during day time, he admitted that his wife started off late because she waited for the accused and he saw his wife and the accused starting out from Mamit at about 1:20pm, he denied that his wife and the accused used to have a love affair, his wife did not sustain any injuries but there was bleeding from her private part and her cheek was swollen. He denied the suggestion that his wife falsely implicated the accused due to hatred.

PW No.2/X is the prosecutrix. She stated that the accused is the husband of her younger sister. During the year 2010 she was living with her family at Tlangkhang village. In the month of May 2009, she had gone to Mamit with the accused and his elder brother Hmangaihzaau. At that time her daughter was hospitalized at Mamit and her husband attended her in the said hospital and since they ran short of money, she had gone to Mamit to give them money to buy medicines. She does not know for what purpose the accused and his brother went to Mamit. The elder brother of the accused did not go back with them as he could not finish his work at Mamit so she returned with the accused towards her village by walking. She could smell liquor from the accused and he said he was going to rape her thereafter she ran from him but he could catch her easily. There were no other persons around at that time. He threatened to kill her and that he will bring dishonor to her family. He strangled her on her neck and beat her with a stone on her back, shoulder and back of her head. He tore her pant and under pant and committed rape on her at a place called Chawlhmun which was in the middle of the jungle. Thereafter she got up and put on her wrap around (puan) since her pant was already torn and she continued walking towards her home and pleaded the accused not to do anything to her in the name of God. Then he said there was no need to take the name of God and that he will keep committing rape on her. Thereafter the accused kicked her and willfully removed his shoes and told her to pick up his shoes. At that time it has just drizzled and the ground was slippery. Then when they reached near the garden of his father he said he will again rape her and that he will tell the others that he had consensual sexual intercourse. Again she pleaded with him not to do anything to her in the name of God but he did not pay heed and he dragged her uphill. By that time it was already dark and they were still

in the middle of the jungle. When she ran from him he always ran passed her and she was overpowered by him. He again committed rape beyond the garden of his father which is uphill. At that time she was carrying some provisions such as dal, sugar and tea leaves and such provisions had fallen off from her basket while the accused dragged her near the garden of his father. At that time she was 3 months pregnant and it was known to the accused. Somehow even after she was raped she continued walking towards her village with all her strength and the first person she met was the wife of the accused's elder brother and she informed her about the incident. She borrowed a flash light from the house of the elder brother of the accused and also vaguely informed the incident to the wife of the accused's elder brother but since she was scared that the accused was still after her she did not give her the full information. Then she went to the house of Tevena who is the relative of her husband and told them about the incident. Her village consisted of 7 houses and all of them are relatives. She is illiterate. Then she went into the house of Pa Chhawna and told him about the incident and that she was still afraid of the accused and dared not stay in her house or the house of Tevena. So she spend the night in the house of Pa Chhawna. From the house of Tevena she made a phone call to her husband who informed the Police and they arrived at about 1 am in the house of Pu Chhawna. The Police seized her clothes including her underwear. And the accused was arrested soon after. She was medically examined at Mamit the next day. While the accused was taken for medical examination he absconded. In her cross examination she stated that she has 5 children. She did not have a telephone when she went to Mamit. She admitted the suggestion that she waited for the accused while he was consuming liquor before she returned home with him. After she handed over the money to her husband she told him that she was going back home. She does not remember the time when she handed over the money to her husband but when she started back home with the accused it was about 3 p.m. it is possible that she must have waited for the accused for about 1 hour after she told her husband that she was going home. She admitted that her husband was not aware of the fact that she waited for the accused after she left the hospital to go home. She denied the suggestion that she was a consenting party to the sexual intercourse She did not sustain injuries on her body but after the incident her body was aching. She denied the suggestion that she used to have love affair with the accused. She denied the suggestion that since she was afraid of her husband she lied to him by implicating the accused of raping her.

PW No.3/Vanlalvena was declared hostile on the prayer of the Ld. Addl. PP. He stated that he heard from the prosecutrix that she was the one who sexually

provoked the accused to have sexual intercourse with her and she even said she told the accused challengingly if he was impotent. On being cross examined by the Ld. Addl. PP the witness stated that at the time of the incident the husband of X was not in their village and that he had gone to Gunbura. He knew that the prosecutrix was not pregnant at the relevant time and that she had gone to take ration the prosecutrix came back from Mamit with the accused and his elder brother but the elder brother parted ways from them before reaching our village. He does not know whether the daughter of the prosecutrix was hospitalized at Mamit during the relevant time. He also does not know if the prosecutrix had gone to Mamit to give money to them. He denied the suggestion that the prosecutrix did not tell him that she was the one who sexually provoked the accused to have sexual intercourse with her. To his knowledge, the prosecutrix was not pregnant at the time of the incident. He denied the suggestion that the prosecutrix was pregnant at the time of the incident. He admitted the suggestion that the prosecutrix and her husband does not have any misunderstanding or enmity with the accused. On being examined by the Ld. State Defence Counsel the witness stated that he was not summoned to the P/S during investigation of this case and he did not put his signature anywhere. He has no knowledge and have not seen any seizure made by the Police in connection with this case. He has no knowledge and have not seen the Police seizing panty, T. Shirt and half pant which are shown to him in the court in CMR No. 30. He heard from the prosecutrix that she was the one who made the move to have sexual intercourse with the accused.

PW No.4/Lalnunpuui is the wife of PW No.3/Vanlalvena. She identified the accused and stated that they live in the same locality and are related to each other. She also knows X , the prosecutrix, but does not know her proper name. One night, the said X told her that she was raped by the accused Rothangpuia and also said that she will not spend the night in her house. She knew that she spent the said night in the house of a preacher namely Pu Chhuana. In her cross examination, she admitted the suggestion that the prosecutrix did not tell her the place and time of the incident. Her statements recorded by the Police u/s 161 CrPC which is read out in the Court are correct but she cannot remember whether X told her that she was threatened or not. The Preacher VL Chhuana is living alone in his house. She knew that the prosecutrix spent the night in the house of the said preacher.

PW No.5/Vanlalchhuana worked as a Missionary at Tlangkhang village. He stated that x and her children spent a night in his house and he thought that they were scared as they were only woman and children with no adult male member because X told him that her husband was at Mamit attending their sick child. On

the next morning they left his house after the Police arrived and came to his house. The prosecutrix did not tell him about the incident. In his cross examination he stated that they came to him at dusk but it was not yet night time, he did not ask the prosecutrix why they spent only that night in his house whereas her husband was already away in the hospital at Mamit for a number of days. He denied the suggestion that on the said night he had sexual intercourse with X and that the reason why she spent the night in his house was because she was interested in him.

PW No.6/ Dr. Zosangpuui examined X on 18.5.10 @ 11:15 AM. Usually as a matter practice while conducting medical examination, she ask about the brief history of the incident. She knew that the victim was a married woman with 4 children. Upon examination, the victim was found physically and mentally sound. No seminal stain was found and according to the victim, she has changed her underwear and the same was seized by the Police. Upon genetal examination, the secondary sexual characters of the victim were fully developed, there was old rupture of hymen, vaginal swabs were taken and on the spot from the slides, and there were presence of spermatozoa however, as a matter of precaution vaginal swabs and slides were sent for Laboratory examination. From her findings, she formed that the opinion that there was recent sexual intercourse . She exhibited the medical examination Report of X as Ext.P-2 and her signature as Ext.P-2(a). In her cross examination, she stated that she did not find any injuries on the body and external genetalia of the prosecutrix. From the smear taken, they only found traces of semen. From the slide which was taken at the spot, they found presence of spermatozoa. She admitted the suggestion that since some time (1 day) lapse between the incident to the time of examination, there is possibility of the prosecutrix indulging in sexual intercourse with other persons. The 3 slides were taken by the Police and she did not receive back any laboratory report. She denied the suggestion that the presence of spermatozoa cannot be found 24 hours after the sexual intercourse since examination was done one day after the incident.

PW No.7/P.Lalhmingthanga is the Investigating Officer. He stated that he retired as Inspector of Police in the month of September, 2011. From 2007 to September 2011 he was posted as O/c of Mamit Police Station. On 17.5.10, Lalrinmawia husband of the instant victim lodged a written FIR regarding the present case at Mamit PS. Accordingly Mamit PS Case No. 18/10 dt.17.5.10 u/s 376(2)(e) IPC was registered against Rothangpuia whose name was mentioned in the FIR as the culprit. In the FIR it was also written that the informant and Rothangpuia are brother in laws (nuphal). He conducted investigation during which he visited the place of occurrence which is the road between Mamit and

Tlangkhang. The place of incident was particularly known as Bungzawl. When he visited the Place of Occurrence he found the bushes twisted and stones placed in an improper position. As the victim herself went to the PS, he recorded her statement at the PS. He also seized the panty, half pant and t-shirt of the prosecutrix and forwarded her for medical examination. During investigation, he learned from the informant and the victim that she was pregnant and this was also indicated in the medical examination report. He arrested the accused on the same evening when the FIR was lodge and send him for medical examination. The accused absconded while he was produced for medical examination and he was re-arrested on 23.5.10. He interrogated the accused and also recorded the statement of witnesses. He sent the seized materials and controlled blood sample of the accused and the victim to the FSL for examination. Having found prima facie case, he laid Charge Sheet against the accused Rothangpuia. He exhibited the charge sheet as Ext. P-3 is the Charge Sheet and his signature as Ext. P-3(a), Seizure Memo as Ext. P-4 and his signature as Ext. P-4(a). He identified the material exhibits i.e. half pant and t-shirt marked as Ext. M-1 as the once seized by him. In his cross examination he admitted the suggestion that in the Seizure Memo at Ext. P-4, only the initials of the Seizure Witnesses are there without their names written, he also admitted the suggestion that he has not included the seizure witnesses as Prosecution Witness while laying the Charge Sheet. He found the statement of Vanlalvena, PW No. 3 correct when he stated that it was the victim who challenged the accused to show her manliness to her. There were no witnesses when he collect the items sent to FSL for examination. He admitted the suggestion that in the seized materials he did not keep any identification mark. He also admitted the suggestion that the material exhibit at Ext. M-1 contains only 2 items i.e. half pant and a t-shirt whereas in the Seizure Memo at Ext. P-4 the seized materials contain half pant, t-shirt and panty. He denied the suggestion that that as he mentioned 3 items as seized materials and the material exhibit contains only 2 items, the two are not the same and the ones shown to him in the Court were not the items seized by him in this case. He also stated that the parties made a compromise. He also seized the letter of compromise and made a Seizure Memo for the same. He did not collect the result of the laboratory examination report of 3 slides of vaginal swab taken from the victim. He does not know whether the prosecutrix walked back with the accused towards her village from Mamit with the knowledge of her husband. He denied the suggestion that since the accused and the prosecutrix were major, the sexual intercourse was consensual but voluntarily stated that it appears that they did not have much problem (harsatna lutuk an neiin ka ring lo).

PW No.8/R.Vanlalkima is the Assistant Director in the FSL Aizawl since the year 2003. He stated that requisition was received from Mamit PS for examination of 4 exhibits which were separately packed inside a paper envelop addressed to the Deputy Director, FSL. The exhibits contained, 1(one) underpant of the victim with suspected stain which was marked as Ext. A, smear on 3 slides which was marked as Ext. B, vaginal swab of the victim which was marked as Ext. C and urethral swab of the accused which was marked as Ext. D. By use of scientific instruments available in the FSL the exhibits were examined and it was found that Ext. A, B & C shows presence of semen, Ext. A belongs to blood group AB, Ext. B belongs to blood group AB, Ext. C belongs to blood group A, Ext. D was undetermined because of insufficiency of urethral swab. Since he did not deal with the testing of DNA he cannot say whether Ext. A, B & C which shows the presence of semen or that the said semen originate from the accused or not. He exhibited the FSL Report as Ext. P-5 and his signature as Ext. P-5(a). In his cross examination, he stated that the Forensic Science Laboratory functions under the Home Department (Police), all the facilities in connection with their work in the FSL are provided by Home/Police Department. He denied the suggestion that since FSL functions under the Home/Police Department they do not arrive at a finding against the wish of the Police Department. Smear on 3 slides were taken from the posterior joint of the prosecutrix. The said smear in 3 slides were taken by the Medical Officer. Only the urethral swab was taken from the accused. No determination could be made from the urethral swab due to insufficiency of the swab. The controlled blood sample of the accused was not sent to them for determination of his blood group. As such, he does not know the blood group of the accused. He does not know to whom the blood of blood group AB found in Ext. A & B belongs.

6. The accused in his examination u/s 313 Cr.P.C stated that he had consensual sexual intercourse with X, he denied having knowledge about the pregnancy of X.

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

DW no.1/ Thantluanga stated that he knew the accused and X. On 17.5.2010, he had gone to the forest (ram kal – tumbu khawrhin). On his way back when he was about to reach the road he heard some sound and heard the man saying “Nupui nei lai te ka nia, a tih chi loh” and then the woman said “a ho em mai”. He did not want them to see him but he saw them having sexual intercourse. The said act was committed on the road (ramhnuai kawng, Mamit panna vantlang kawng). The said road was a public road and not a short cut. While he saw them, he also saw the woman lying on top of the man. As he was embarrassed with the

scene he did not watch them for long. To him he is of the impression that the woman is of loose character (lepchiah deuh ni in ka hria). He did not wear a watch on that day but it was in the evening and he presumed it to be around 5 PM. In his cross examination he denied the suggestion that he has never heard of the prosecutrix sleeping around with other men. He has not actually seen X having sexual intercourse with non-Mizo men. He does not know the whereabouts of the husband of the prosecutrix on and around 17.5.2010. His house and that of the prosecutrix are close by. He admitted the suggestion that the road where he saw them was a public road and not a bypass/short cut and that there are passers by on the said road. The said road connects Tlangkhang and Mamit. He heard about the arrest of the accused on the same day itself and he knew that the Police arrived in their village the day after he saw the accused and the prosecutrix. He did not see anyone who could have seen the act of the accused and the prosecutrix and no one saw him also. He admitted the suggestion that he did not watch the accused and the prosecutrix for long. He denied the suggestion that he did not see the accused and the prosecutrix having sexual intercourse on the roadside and that he did not see the prosecutrix on top of the accused so also the accused top on the prosecutrix during the intercourse. He admitted that he did not tell anything to the Police when they came and arrested the accused.

DW No.2/Rothangpuia is the accused. He stated that he did not sexually assault X and it was she who sexually assaulted him. On the date of the incident, he had gone to Mamit to buy medicine for his father. He did not find the medicine at Mamit and thought of staying overnight in the said village. However, the prosecutrix asked him to return to his village despite his reluctance since both of them belonged to the same locality. She purchased a packet of liquor for him. On their way back home, she challenged him whether he was unable to have sexual intercourse after taking liquor. He told her to leave but she held his hands and she pressed his right hand against her breast. In the process of removing his hand from her breast her cane basket (em) also fell down. She pulled him for quite a distance towards Tlangkhang village. At that time, he told her that he was potent and can have sexual intercourse. He then suggested that they should go to the nearby rest house (chawlhbuk) but she said that there was no need for it. Accordingly, they had sexual intercourse in the middle of the road. Infact during the intercourse she was on top of him but he also lied on top of her. Thereafter they proceeded towards Tlangkhang village. Again, the prosecutrix suggested that they should indulge in sexual intercourse. Accordingly, they had sex for the second time. Thereafter, after the second sexual intercourse was over, she asked him to pay her the price for it. He

told her that he will not pay her to which she said that she will get him arrested and that she knows many ways by which she can get a man arrested. As he could not walk properly, she walked ahead of him. They did not reach Tlangkhang village together. On the next day when the Police arrived, he evaded arrest (ka inthiar fihlim a). but later surrendered himself to the Police in the house of Ramngaihsanga at Mamit. In his cross examination, he stated that on 17.5.2010 he went to Mamit with X and his elder brother Hmangaihzauva and X had taken some snail (chengkaw) for sale. He denied the suggestion that X's daughter was hospitalised at Mamit at that time. He knows Thangsiama. On the said day he consumed liquor with Thangsiama at Bethel Veng, Mamit before leaving for Tlangkhang with X, he admitted that he stated before the Police '*X chuan haw puiah min sawm a, min lo zu hawsan rawh ka ti a, mahse min nghak tlat a, hemi hnu hian Tlangsiama nen hian Bethel vengah zu kan in leh a, hemi hnu hian Tlangkhang panin X nen chuan kan haw dun ta a ni*'. He admitted that the prosecutrix is his wife's elder sister. He denied the suggestion that he stated before the Police '*Mamit khaw pawn km 6 vel thleng hian motor a kal theia, motor kal theih loh chin ke a kal a nghaihna hmun kan thlen atanga 3 km vel kan kal hnu chuan Lalramthari @ Mary chu ka fiam ta a, nupui te u mah ni la, tih i chakawm rum rum alawm ka ti a, hemi hnu hian ka sual ta a, chawlhbuk bul lawkah chuan a tang zo ta lova, ka pawl ta a, hetah hian ka chi pawh ka ti tla ngei a ni*'. He does not know that the prosecutrix was pregnant. He admitted the suggestion that on the next day of the incident when the Police arrived he was not arrested as he escaped from the Police. He denied the suggestion that he knew about the pregnancy of the prosecutrix. He also denied the suggestion that on their way back to their village he committed sexual assault twice upon the prosecutrix despite her resistance. He does not know of the presence of anyone around during the time of intercourse. He denied the suggestion that he did not buy medicine for his children before he surrendered to the Police myself. He admitted the suggestion that on the said day after reaching his village, he went to the house of his brother Hmangaihzauva before going home. He denied the suggestion that he did not state to the Police that the prosecutrix bought liquor for him and challenged him whether he was able to have sexual intercourse after having liquor.

8. The sine quo none for the offence of rape is penetration of the male organ into the vulva or pudendum of the woman. In the case at hand, the accused admitted that he had sexual intercourse with X twice on the date of the incident but stated that it was consensual. Therefore, the issue to be decided is whether the sexual intercourse were performed within the meaning of rape as defined u/s 375 IPC and whether the

same was done by the accused with the knowledge that X was pregnant? It may also be mentioned that as the accused admitted having sexual intercourse with X, it would not be necessary to deliberate upon the findings of FSL.

9. At the outset, it may be noted that the victim, accused and some of the witnesses are from a rural background. As such their evidence cannot be appreciated with the same yardstick that may be applied in the case of educated urban witness.

10. By now it is a settled position of law that in cases involving sexual offences conviction can be based on the sole testimony of the prosecutrix if it inspire confidence of the court and that the other evidence are only corroborative.

11. PW No.2/X stated that the accused strangled her on the neck, beat her with a stone on her back, shoulder and back of her head. He tore her pant and committed rape upon her at a place called Chawlhhmun which was in the middle of the jungle. While narrating the second incident she stated she was carrying some provisions such as dal, sugar and tea leaves in a caned basket and they fell as the accused dragged her uphill beyond his father's garden and raped her again. In her cross examination she stated that she did not sustain injuries on her body but that she had body ache. PW No.6/Dr. Zosangpuii who examined the prosecutrix on 18.5.2010 @ 11:15 am stated that X did not sustain any injuries on her body and external genitalia.

12. In the case of **State versus Manjanna** reported in **AIR 2000 SC 2231** it has been held that *Ordinarily, where forcible sexual intercourse is committed there would be injury on the person of the victim. Absence of any injury on the person of a woman alleged to have been raped may go a long way to indicate that the alleged sexual intercourse was a peaceful affair and the story of a stiff resistance put up by the prosecutrix is false or an afterthought*". In the case at hand, the prosecutrix stated that her pant was torn and she had to wear the wrap around (puan). The incident occurred on the road in the middle of the jungle. As regard the second incident, she stated that she was dragged uphill by the accused and the provisions which she was carrying also fell on the ground. Therefore, considering the place of occurrence and the manner in which the accused acted upon her, it would be reasonable to expect the prosecutrix to suffer some injuries or atleast some minor scratches on her body. However, it would not be just or reasonable to throw overboard the prosecution story only due to absence of injury.

13. What is “consent” and “against her will” appearing in section 375 IPC? In the case of **State Of U.P. vs Chhoteylal** decided on 14 January, 2011 in connection with **Criminal Appeal No. 769 of 2006**, the Supreme Court observed thus-

“The expressions ‘against her will’ and ‘without her consent’ may overlap sometimes but surely the two expressions in clause First and clause Secondly have different connotation and dimension. The expression ‘against her will’ would ordinarily mean that the intercourse was done by a man with a woman despite her resistance and opposition. On the other hand, the expression ‘without her consent’ would comprehend an act of reason accompanied by deliberation.

Similarly, in the case of **Deelip Singh @ Dilip Kumar versus State of Bihar** reported in **(2005) 1 SCC 88** the honble Apex court held as follows :-

“12...The expression “against her will” seems to connote that the offending act was done despite resistance and opposition of the woman”.

In **Rao Harnarain Singh Shoji Singh versus State** reported in **AIR 1958 Punj 123** it has been held as follows :-

“7. Consent is an act of reason accompanied by deliberation, a mere act of helpless resignation in the face of inevitable compulsion, non-resistance and passive giving cannot be deemed to be consent”.

14. In this regard, it is clear that the opposition and resistance so also the consent which involve the mental element manifested in the voluntary participation of the victim has to be at the time of the commission of the offence. Though the physical resistance can be inferred from the circumstances such as injury, tearing of clothes etc. the mental element cannot but be inferred from the conduct of the victim herself at the time of commission of the offence. In this connection the subsequent conduct of the victim would also be a relevant fact.

In the instant case, it appears from the evidence that the house of the elder brother of the accused is the first house in the village (khawtawntirh). The Prosecutrix reached the village before the accused and she stated that she entered the house of the accused’s elder brother and vaguely informed the incident to the wife of accused’s elder sister. She did not make a full disclosure as she was scared of the accused. Then she went to the house of Tevena and informed the matter to them and also made a phone call to her husband from the house of Tevena. The said Tevena is related to her husband. PW No.1/Lalrinmawia who is the husband of X also stated that he received phone call from Tevena to the effect that the accused raped his wife two times and that her clothes were fully spoilt/torn. From the evidence it is seen that the said Tlangkhang village consisted of 7 houses only.

One Vanlalvena S/o LB Sanga of Thlangkhang village was examined as PW No.3 but declared hostile on the prayer of the Ld. Addl. PP. Though the said witness stated that he heard from the prosecutrix that she was the one who sexually provoked the accused, the fact that FIR was lodged on the same afternoon by the husband of X who was in Mamit cannot be denied. It is seen from the evidence that the said Tlangkhang village is not motorable. As such, it is very unlikely that someone would walk to Mamit to tell the incident to the husband of the accused. The time factor has also to be kept in mind. It is seen from the record that FIR was lodged on 17.5.2010 itself. As such, the statement of X to the effect that they made a phone call from the house of Tevena and that as per the said information, FIR was lodged by PW No.1 who was already in Mamit appears to be truthful. The subsequent conduct of the prosecutrix in immediately informing the incident is relevant fact for deciding on the question of consent of the prosecutrix.

15. At the same time it may be noted that in the instant case, the victim stated that the accused tore her pant. She also stated that the Police seized her said pant. However, the said witness was not made to identify the seized pant and seizure have not been proved. It may also be noted that she said she told the incident to the Preacher in whose house she spent the night with her children but the Preacher (PW No.5/Vanlalchhuana) stated that he was not informed of the incident and he thought that they were scared because X said her husband was at Mamit. The conduct of the prosecutrix in not disclosing to the Preacher the reason why she and her children had to spent the night in his house appears to be a little strange.

16. DW No.1 who is a chance witness claimed to have seen the incident. According to him, from what he saw, the sexual intercourse between the accused and X was consensual. According to the Ld. Addl. PP this witness is unreliable and that Tlangkhang village being only 7 houses, they ought to know each other and the said witness clearly lied when he stated that on the date of the incident the husband of X had gone to Gunbura. This witness did not know whether the husband of the victim was attending their child at Mamit though he stated that his house and the house of X were close by and that being close neighbours they know about any incidents or happenings in the family including any sickness within the family.

In the case of **State of U.P versus Roop Singh** reported in **1995 SCC (Crl.) 1043** the honb'le Supreme Court has held *even though the witness is a chance witness but he gives cogent reasons for his presence near the scene of occurrence, the evidence of a chance witness is not unreliable.*

In the case at hand, the said witness explained that he happened to be in the said place to collect bamboo shoots (tumbu khawrh) in the jungle. His presence in the forest have not been falsified. He also stated that he did not want them to see him but he saw them having sexual intercourse. The prosecutrix also stated that there were no other persons around at that time. Accordingly, the witness appeared to be correct when he stated that he did not want them to see him. From this witness it can be inferred that he does not have good impression on the character of the prosecutrix. However, there is also no evidence to suggest of any enmity or misunderstanding between them so much so as to make wild allegation of infidelity on a married woman.

Statement similar to that of DW No.1 was made by PW No.3/Vanlalvena who stated that she was told by the prosecutrix that it was she who sexually provoked the accused.

17. In the instant case, the Investigating Officer was examined as PW No.7. He deposed that upon investigation he found prima facie case against the accused and laid charge sheet for the offence punishable u/s 376(2)(e) IPC. However, this Police Officer during cross examination admitted the suggestion that he did not include seizure witness as prosecution witness in the charge sheet. He also stated that he find the statement of PW No.3/Vanlalvena correct when he stated that it was the prosecutrix who challenged the accused to show his manliness to her. While denying the suggestion that as the accused and prosecutrix were major the sexual intercourse was consensual, the Investigating officer voluntarily stated “harsatna lutuk an neiin ka ring lo” (meaning I believe they did not have much problem).

While laying charge sheet against the accused on one hand, this Police Officer who has since retired from service, on the other hand clearly demolished his own finding in the investigation by his oral testimony. It is also noticed that in the seizure memo only the signature/initial of the witnesses are present. The name of seizure witnesses are not known though some witnesses are listed in the charge sheet as seizure witness, as the Investigating officer himself stated that he did not array the seizure witness as prosecution witness in the charge sheet the same cannot but be accepted.

The oral testimony of the Investigating Officer has created serious doubt in the prosecution story and the finding arrived from the said investigation.

17. Upon weighing the evidence adduced by the prosecution and the defence, the uncertainty of the Investigating officer, the presence of a chance witness, the absence of any injury on the person of X and seizure not being proved, there

appears to be possibility of two views. Criminal trial in India proceed with the presumption of innocence of the accused. It is a settled principle of criminal jurisprudence that where two views are possible the one which favour the accused has to be applied. For the aforesaid reason, the question whether the accused had the knowledge of X's pregnancy is not discussed.

ORDER

18. Accordingly, accused Rothangpuia is acquitted of the offence punishable u/s 376(2)(e) IPC by giving him the benefit of doubt.
19. As per section 437-A Cr.P.C accused Rothangpuia shall continue to be on bail for another period of 6 months.
20. Seized material under CMR No.305/2010 shall be destroyed.
21. Copy of Judgment & Order shall be given to the accused free of cost.
22. Pronounced in open court and given under my hand and the seal of this court on this the 11th day of July, 2014.

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

Memo No.: _____/AD&SJ(A)/2014 : Dated Aizawl, the 11th July, 2014

Copy to: -

1. Accused Rothangpuia through Counsel Mr. Lalramhluna, Advocate.
2. District & Sessions Judge, Aizawl Judicial District, Aizawl.
3. District Magistrate, Aizawl District, Aizawl.
4. PP / Addl. PP, Aizawl.
5. Director General of Police, Mizoram.
6. Superintendent of Police, Mamit District, Mamit.
7. DSP (Prosecution), District Court, Aizawl.
8. G.R. Branch.
9. Registration Section.
10. Guard File.
11. Case Record.
12. 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 Medical Examination Report of victim
 - P-2(a) Signature of PW No. 6
- Ext. P-3 Charge Sheet
 - P-3(a) Signature of PW No. 7
- Ext. P-4 Seizure Memo
 - P-4(a) Signature of PW No. 7
- Ext. P-5 FSL Report
 - P-5(a) Signature of PW No. 8

- Ext. M-1 Seized Article containing half pant and T-shirt

B. DEFENCE EXHIBITS- None

C. EXHIBITS PRODUCED BY WITNESSES - None

D. COURT EXHIBITS- None

E. PROSECUTION WITNESSES:

- P.W. No. 1 - Lalrinmawia
- P.W. No. 2 - Prosecutrix
- P.W. No. 3 - Vanlalvena
- P.W. No. 4 - Lalnunpuii
- P.W. No. 5 - Vanlalchhuana
- P.W. No. 6 - Dr. Zosangpuii
- P.W. No. 7 - P. Lalhmingthanga
- P.W. No. 8 - R. Vanlalkima

F. DEFENCE WITNESSES - :

- D.W. No. 1 - Thantluanga
- D.W. No. 2 - Rothangpuia