

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

PRESENT

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

SR No.423/2012
In CrI.Tr. No.2213//2012
U/s 376(2)(f) IPC

Ref :- Bawngkawn P.S Case No.224 of 2012 dt.9/9/2012 u/s 376(2)(f) IPC

State of Mizoram

Versus

Radha Mohan Das	.....	Accused
Date of Hearing	.....	13.02.2014, 27.02.2014 & 13.3.2014
Date of Judgment	.....	14.03.2014

APPEARANCE

For the Prosecution	.....	Mrs. Rose Mary, Addl. PP
For the Accused	.....	Mr. James Lalrintluanga Mr. H. Lalremruata, Advocates

JUDGMENT & ORDER

1. The prosecution story of the case in brief is that on 9/9/2012 Gintumthanga of CTI Sesawng lodged a written FIR at Bawngkawn PS to the effect that sometime from the month of May of that year, one Radha Mohun Das from Silchar who was working as a salesman in the Cateen at CTI Sesawng used to sexually assault his daughter X, 11 years. Since the accused threatened his daughter, she kept silent and had the courage to make a disclosure only on 9.9.2012.

On the basis of the said information, Bawngkawn P.S Case No.224/2012 dt. 9/9/2012 u/s 376(2)(f)1 IPC was registered and investigated into. Upon completion of investigation, having found prima facie case against the accused Radha Mohan Das for the offence u/s 376(2)(f) IPC, charge sheet was laid against him. The case was then committed for trial.

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

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

4. **POINT(S) FOR DETERMINATION**

Whether the accused had sexual intercourse with X within the meaning of section 375 IPC and the accused thereby guilty of the offence punishable u/s 376 IPC?

5. During the course of trial, the prosecution examined 5 witnesses. The accused was also examined u/s 313 Cr.P.C. Defence did not lead evidence. The Id. Counsels are heard.

Mrs Rose Mary, the Ld. Addl. PP submitted that the victim is not from a respectable family and that her father is a habitual drinker and that their family are not economically well off. It therefore appears that the accused was taking advantage of the poverty of the prosecutrix. Due to the hardship faced by her family, the prosecutrix used to be engaged, oft and on, by PW Thansangi who sometimes give her snacks and food to eat. It is through PW Thansangi that the matter came to light. The Ld. Counsel argued that the accused in his examination u/ s 313 Cr.P.C admitted that the family of X used to take ration from the canteen where he was working. As the incident was disclosed late, FIR was filed belatedly but it was filed as soon as they came to know about the incident. The Ld. Counsel submitted that the name of the father appearing in the Birth Certificate of X at Ext. P-2 is not the same as the one in the FIR. In this regard, the Ld. Addl.PP submitted that the father of X belongs to Paihte community and their names are a little different from an ordinary Mizo name. As the family was residing in Aizawl, usually they have two names. According to the Ld. Counsel even if the two names are different, there is no doubt in the date of birth of X recorded in the said Birth Certificate and the defence have not brought out any evidence against the age of X. The Ld. Addl.PP submitted that the medical evidence shows that the hymen was partially torn and that it was not a fresh tear. The Prosecution evidence clearly shows that the incident was not on the same day when it came to light and as such there can be no fresh tearing of the hymen and as such the medical evidence support the prosecution case. Accordingly, the Ld. Counsel submitted that sufficient evidence have been adduced to convict the accused and therefore prays to convict the accused for the offence u/s 376(2)(f) IPC.

On the other hand, Mr. James Lalrintluanga, Ld. Defence Counsel submitted that the prosecution has failed to explain the reason for delay in lodging the FIR. The Ld. Counsel argued that while one Gintumthanga lodged the FIR as father of X, in the birth certificate, the said name does not appear as the father of X and the name of the prosecutrix is not the same. With regard to the old partial tear of hymen, the Ld. Counsel argued that though the medical officer could clearly depose that there was partial rupture of the hymen and that X was below 11 years, the doctor could not form any opinion on the time of the incident. This, according to the Ld. Counsel created doubt on the credibility of the medical officer. The Ld. Counsel also argued that Consent for medical examination of X was not obtained as per section 164-A Cr.P.C and that the Birth

Certificate of X was not proved as per sec.294 Cr.P.C. The accused has clearly denied the allegation and submitted that the accused is falsely implicated, as the family of X could not repay their debts in the Canteen which was running into thousands. The Ld. Counsel argued that the prosecution has failed to discharge its burden of proof beyond reasonable doubt and prays to acquit the accused.

6. DISCUSSION, DECISION AND REASONS THEREOF:-

The evidence adduced by the prosecution may be briefly highlighted.

PW No.1/Gintumthanga is the father of X and the informant. He stated that his daughter was born on 18.11.2001. On 9.9.2012, Pi Thansangi an MPRO noticed some abnormal behavior of his daughter. Pi Thansangi often used to engage his daughter to do domestic chores and would give her some eatables and her said daughter felt free to be with Pi Thansangi. On being asked by Thansangi, his daughter told her that the accused sexually assaulted her for 4 times. On hearing this Pi.Thansangi informed the matter to Centre Commander of Mizoram Home Guard (MRHG) who in turn called him to his bungalow. At that time, he was working in the Home Guard. He went to the Bungalow of the Commander with his wife and some leaders of NGO also came. Telephonic information was given to Bawngkawn Police Station on the same night and on the next day, the information was reduced into writing. He exhibited the FIR as Ext.P-1 and his signature as Ext.P-1(a). In his cross examination he stated that he is a habitual drinker and when he gets his salary, he used to drink liquor with his wife. He admitted that his family was having debt in the CTI Canteen and in the month of May, 2012 he believe the debt would be about Rs.7000/-. He denied the suggestion that they have falsely implicated the accused as they are unable to clear their debt. He admitted that his statement u/s 161 Cr.P.C which is read out from the record is correct and that in the said statement he did not make any mention about Pi.Thansangi. He exhibited his statement u/s 161 Cr.P.C as Ext.A.

PW No.2/ X is the prosecutrix. She identified the accused and stated that she knew him as 'Chhotu'. The accused used to work in a canteen where she and her friends often go to buy things. On one occasion, her parents sent her to the canteen to buy dal. Chhotu told her to get dal from downstairs. So she went downstairs and the accused followed her. He made her sit at one place and said that he will take the dal and then he put oil on his hands. Then he pulled down her skirt and underpant and put oil on her private part. Then he opened the zipper of his pant and took out his male organ and rubbed it around her private part. He did not introduce his male organ inside her private part. She stated that though she resisited she could not escape from him but the moment she could free herself, she ran outside and went home. She stated that she did not tell anything to her

parents. But the incident came to light on the same day as she was teased by her friend Tleipuii and then Nu Thansangi asked her about the incident. She stated that she did not tell anything to her parents as the accused threatened her by saying “I sawi chuan I chak lovang” meaning be ready to face the consequences if you make a disclosure. The prosecutrix further stated that this was the only incident the accused violated her person. Nu Thansangi informed the matter to Pu Zela of MRHG and her parents. Telephonic information was also given to the Police. In her cross-examination, she stated that she went to the Canteen alone to buy dal and in the canteen, the accused and Durga were there. When the accused followed her downstairs, Durga remained upstairs. She did not shout or called out for Durga when the accused rubbed oil on her private part as she was scared. There was steps outside the building leading to the floor below. Tleipuii was the only one who teased her. She stated that she does not remember the date, month and year of the incident. She stated that she knew her family has debts in the canteen but the same were being deducted from her father’s monthly salary.

PW No.3/Lalthansangi stated that she is working in the MPRO and posted at CTI Sesawng during the relevant time. She stated that sometime in the year 2012, on a Sunday, she went to visit her friend Tawii at Ramthar Veng, Sesawng. The prosecutrix and her friends were in the house of Tawii and her friends were teasing her like “sazu pan’ and “chhu pan”. Finding the language a bit strange, she asked them why they teased the prosecutrix like that, to which, they told her that X had sore on her private part due to swimming. Tawii also told her that she suspected that X must have been sexually exploited however, her attempt to make her talk has failed. The prosecutrix was embarrassed. Then she invited the prosecutrix to her house and offered to cook wai wai for her. When the rain stopped, she and X went to her house. They cooked wai wai and began to talk. In the beginning, X did not want to speak up and stated that the sore was due to swimming. Then when she asked X if there actually was any sore on her private part, she replied in the affirmative. She then assured X that she will bring medicine for her from Aizawl and also explained to her the danger of contracting AIDS disease. The prosecutrix began to open up and started to talk after warning her not to tell anyone. She assured X that she would keep quiet and thereafter asked X who the culprit was, in reply, X named the accused. She informed the matter to Pu Zela Centre Commander. In her cross examination, she stated that she spoke to X only once regarding the present incident, she did not see the sore (pan) on the private part of X, she does not remember when she made a disclosure to her. She does not know the exact age of X but appeared to be around 11 years old, she believed X when she stated that she was sexually assaulted by the accused. She has no knowledge whether the prosecutrix could have been sexually assaulted by any one other than the accused.

PW No.4/Dr.Catherine Ngurbiakveli is a Gynaecologist who examined X on 10.9.2012 at Civil Hospital Aizawl on requisition made by the Police. The victim stated to her that she has had previous sexual intercourse and that she has not attained menarchy. Upon examination, the prosecutrix was found physically and mentally normal. On genital examination, it was found that her pubic hair has not developed, no seminal stain/bruising/laceration, hymen was partially present but it was not a fresh tear. The prosecutrix informed her that the incident occurred some days before. As the incident occurred in May, 2012 and examination was done in September, 2012 medically no purpose would be served by sending the vaginal smear for laboratory test so she did not do the same. The prosecutrix stated to her that she was 11 years old and she appeared to be 11 years. As her age was not in the borderline, she did not conduct any test for her age. She exhibited the medical examination report of X as Ext.P-3 and her signature as Ext.P-3(a). In her cross examination, she admitted that the person by the name of Gintumthanga gave consent for medical examination of X, the age of X as 11 years is her clinical judgment though she did not conduct any separate test. She arrived at the finding of old hymenal tear from medical experience and physical examination of X and not on the basis of the statement made by X. She cannot form any opinion as to whether X was actually subjected to sexual intercourse in the month of May as stated by her

PW No.5/ SI H.Lalhmingthangi is the Investigating Officer. She stated that written FIR was received from Gintumthanga on 9.9.2012 @ 10:00pm. Bawngkawn PS Case No. 224/12 dt.9.9.12 u/s 376(2)(f) IPC was registered. The case was endorsed to her by Officer-in-Charge of Bawngkawn Police Station for investigation. During investigation, she visited the place of occurrence which is Dry Canteen (a floor below the canteen) at CTI Sesawng. She arrested the accused on 9.9.12 itself. Recorded the statements of the complainant, victim and witnesses. The prosecutrix was forwarded for medical examination on the night of 9.9.12 itself. The statement of accused was recorded. She obtained the original Birth Certificate of X from her family and after making a photocopy, she returned the original to her family. The accused was forwarded for medical examination on 10.9.2012. She exhibited the charge sheet as Ext.P-4 and her signature as Ext.P-4(a). In her cross-examination, she denied that the name appearing in Ext.P-2 is not X. She presumed that in Ext.P-2 Mr.Gintumthanga who is the father of X wrote his name as Lalrinthanga as his Mizo name since they are not originally from Mizoram. The incident complaint off occurred in May, 2012. She believe that the statement of X before her was true. She denied the suggestion that X did not state u/s 161 Cr.P.C that the accused penetrated his male organ. She further stated that she came to know X from the present case and later learnt that X has been sexually assaulted subsequent to the instant case.

7. In the instant case, charge is framed u/s 376(2)(f) IPC. As such, it is first necessary to record a finding on the age of X.

7.A. PW No.1/Gintumthanga is the informant. He stated that he has six children, X is the eldest and that X was born on 18.11.2001. During the academic session 2012-2013 X was reading in Class-IV.

PW No.1 also exhibited a copy of the Birth Certificate of X which was objected by the Ld. Defence Counsel on the ground that the original was not produced. In this regard, a perusal of the said document would show that it is not in conformity with the provision of sec.63 of the Evidence Act so as to consider the same as Secondary evidence. The exhibition of the said document which is not a secondary evidence does not by itself prove the contents of the document. PW No.5/SI H.Lalhmingthangi also stated that she obtained the original birth certificate of X from her family and after making a photocopy, she returned the original to her family. Accordingly, the document has been allowed to be exhibited as the exhibition by itself will not make its content a secondary evidence.

Apart from raising objection to exhibiting the photocopy of the Birth Certificate, the witness have not been cross-examined on the age/date of birth of X.

7B. PW No.4/Dr.Catherine Ngurbiakveli examined X on 10.9.2012. She stated that she had filled up Sl. No. 10 of Ext.P-3 as per information from X. Against Sl. No. 10 is the question "Menstrual History" which is answered as not yet attained menarchy. The Medical Examination Report at ext.P-3 as well as the oral evidence of PW No.4 shows that the pubic hair of X have not developed. The witness further stated in her cross examination stated that she concluded that the age of X was 11 years based on clinical judgment though she did not conduct any test to determine the age of X.

PW No.5/SI H. Lalhmingthangi who is the Investigating officer stated in her cross-examination that Ext. P-2 (Birth Certificate of X) was made from the original. With regard to Ext.P-2, the Ld. Defence Counsel argued that the name of the prosecutrix appearing in the said exhibit and the name of the prosecutrix in the FIR and evidence are not the same. They also argued that the name of the father of X in Ext.P-2 is Lalrinthanga whereas in the FIR it is Gintumthanga. In this regard, it is noticed that in the evidence the name of X is with an English and her father's name is Gintumthanga. On the contrary, in Ext.P-2 the name of the prosecutrix is without an English name and father's name is written as Lalrinthanga. With regard to the name of the prosecutrix, in our society many people add/change their names while choosing to retain their original names in official documents. In the instant case it is not the stand of the defence that X who appeared in the Court is different from the one who made the allegation. The date of birth of X entered in Ext.P-2 have not been disputed. As such, inspite of some error and

inconsistencies in Ext.P-2 with the evidence on record, I do not find that Ext.P-2 belongs to an entirely different person.

8. Therefore considering the evidence of PW No.1, father of X alongwith the medical evidence I do not find any reason to doubt that X was below 12 years at the time of the incident. Ext. P-2 which is a photocopy of the Birth certificate of X, per se, may not be secondary evidence U/s 63 of the Evidence Act. But its content led support to the statement of PW No.1 regarding the date of birth of X. Further, PW No.5, Investigating Officer stated she obtained the original Birth Certificate of X and after making a photocopy, returned the original to her family. In her cross-examination, she reiterated that Ext. P-2 was made from the original.

9. The accused is facing trial for the offence punishable u/s 376(2)(f) IPC. The essential ingredient of rape is penetration of the male organ into the vulva or pudendum of the woman.

10. It is by now 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.

In this regard, it has been decided by the hon'ble Apex Court in the case of *Bharwada Bhoginbhai Hirijbhai versus State of Gujarat* reported in (1983)3 SCC 217

“9. In the Indian setting, refusal to act on the testimony of a victim of sexual assault in the absence of corroboration as a rule is adding insult to injury. Why should the evidence of the girl or woman who complains of rape or sexual molestation be viewed with the aid of spectacles fitted with lenses tinged with doubt, disbelief or suspicion? To do so is to justify the charge of male chauvinism in a male dominated society..... Corroboration may be considered essential to establish a sexual offence in the back drop of the social ecology of the western world. It is wholly unnecessary to import the said concept on a turnkey basis and to transplant it on the Indian soil regardless of the altogether different atmosphere, attitudes, mores, responses of the Indian society and its profile.....”

The credibility of the prosecutrix have to be examined in the light of the other evidence and materials on record.

11. PW No.2/X stated – *“He made me sit at one place and told me that he will get Dal and he put oil on his hands. Then he pulled down my skirt and underpant and put oil on my private part. He opened the zipper of his pant and took out his male organ and rubbed it around my private part. He did not introduce his male organ inside my private part”*.

Accordingly, even if the statement of X is accepted as it is, it is clear from her statement that there was no penetration.

12. PW No.2/X also stated in clear terms that the incident complained off is the only incident when the accused violated her person. She also clearly stated that the accused did not introduce his male organ. PW No.4/Dr. Catherine Ngurbiakveli stated that she was informed by X that she 'has had previous sexual intercourse'. Accordingly, the medical finding of old partial rupture of the hymen could not have been caused by penile vaginal penetration of the accused within the meaning of sexual intercourse u/s 375 IPC.

13. Starting with PW No.1/Gintumthanga who is the father of X, he stated – *“Before lodging the FIR, I personally asked my daughter and she told me that she was sexually assaulted by the accused on 4 occasions. When I confronted my daughter and when she made a disclosure she appeared to be very scared”*.

A. A reading of the FIR at Ext. P-1 which was submitted by PW No.1 shows that the accused have been sexually assaulting X since the month of May and due to the threat made by the accused, X remained quiet and disclosed only on 9.9.2012.

B. On the other hand, PW No.2/X stated – *“However the incident came to light on the same day as I was teased by my friend Tleipuii and Nu Thansangi asked me about the incident”*. *“I did not tell anything earlier to my parents as I was threatened by the accused by saying ‘I sawi chuan I chak lovang’, this was the only incident where the accused violated my person”*.

C. Upon appreciation of the evidence of X, it is clear that the incident came to light on the same day and that the accused violated her person only in this incident. As such, there appears to be some discrepancy between the testimony of X and the evidence of PW no.1 particularly with regard to the prosecutrix being repeatedly raped by the accused and the time of disclosure.

14. PW No.3/Lalthansangi stated – *“The prosecutrix and her friends were in the house of Tawii and her friends were teasing her. They tease her like ‘Sazu pn’ and ‘chhu pan’*. *Finding it a bit strange, I asked them why they tease her like that with sex colour. Then they told me that she had sore (pan) on her private part due to swimming. At that time, Tawii said she suspected that the prosecutrix was subjected to sexual intercourse but despite making several attempts she has failed to make her talk about it. At that time, the prosecutrix was embarrassed. Then I invited her to come to my house and offered to cook Wai Wai for her. After the rain stopped, I and the prosecutrix left the house for my Quarter. In my Quarter, we cooked Wai Wai and I began to talk to her regarding the*

suspicion of Tawii”. In her cross-examination, she stated that she met and spoke to the prosecutrix only once regarding the present incident. She also stated that she did not see the sore (pan) on the private part of the prosecutrix.

A. From a reading of the evidenc of PW No.3 it gives an impression that the prosecutrix spoke up only when she told her that she will bring medicine from Aizawl for the sore and after assuring her that she will keep the secret. Accordingly, it means that the sore on the genital organ of X was still there when PW No.3 spoke to X.

15. Medical examination of X was done on 10.9.2012 at Civil Hospital, Aizawl. It appears from the materials on record that 10.9.2012 was the next day from the time the matter was disclosed. Keeping in mind the statement of PW No.3, it is expected that the sore in the private part of X should have been there even on 10.9.2012. However, PW No.4/Dr. Catherine Ngurbiakveli who examined X on 10.9.2012 stated that on genital examinaiton, she did not find any seminal stain, bruising or laceration of external genetalia, hymen was partially present but it was not a fresh tear. Ext. P-3 which is the medical examination report of X also shows that on genital examination, there was no obvious sign of infection.

The inconsistency, as pointed out, between the medical evidence and the statement of PW No/3 has created doubt on the credibility of X and her evidence have to be evaluated with circumspection.

16. The Ld. Defence Counsel argued that delay in lodging the FIR have not been explained. In this regard, PW No.2/X stated that the incident came to light on the same day as she was teased by her friend Tleipuii. PW No.1/Gintumthanga stated that he heard about the incident for the first time on 9.9.2012 from Pi Thansangi. PW No.3/Lalthansangi could not recollect the date, month and year when she received information from X but from her evidence it is seen that on the same day the matter was made known to the family of X. PW No.4/Dr. Catherine Ngurbiakveli stated that she did not collect the vaginal smear for examination since the incident occurred sometime in the month of May, 2012 and examination was done in the month of September, 2012. PW No.5/SI H. Lalhmingthangi, Investigating Officer, stated that FIR was lodged on 9.9.2012 and in her cross-examination, she stated that the incident complained off occurred in the month of May, 2012.

Therefore there is inconsistency between the evidence of X and other prosecution evidence with regard to the time of the incident and the time when the incident was made known. The prosecutrix due to tender age and by lapse of time may not be able to recollect the date, month and year of the incident complained off against the accused. But

in the instant case, she did not make any mention about the time of the incident instead she simply stated that the incident against the accused came to light on the same day as she was teased by her friend Tleipuii. As such, considering the other statements of X and the rationality of her deposition, I do not find that the prosecutrix, by tender age could have mistaken the series of events on the day of the incident complained off.

This inconsistency between the prosecution witnesses and the prosecutrix has also created doubt on the credibility of X.

17. Even if the statement of the prosecutrix is believed as it is, she has clearly stated that the accused did not introduce his male organ to her private part. The essential ingredient of rape being penetration of the male organ into the vulva or pudendum of the woman, in the absence of any evidence of penetration, the accused cannot be convicted for the offence punishable u/s 376(2)(f) IPC.

18. It may be noted that X was below 12 years old at the time of the incident. She has not attained the age to nurture hatred towards anyone. Her parents are not the ones to whom she confided about the incident. From the materials on record, it is clear that her parents learnt about the matter only after she told to PW No.3/Lalthansangi. Accordingly, the argument of the defence that the story have been cooked up as the family of the prosecutrix were in heavy debts in the Dry Canteen where the accused was working appears to be unlikely.

19. The question therefore is whether due to certain inconsistencies in the prosecution case, the evidence adduced by X is liable to be totally thrown overboard? In order to find the accused guilty of attempt with an intent to commit rape, court has to be satisfied that the accused, when he laid hold of the prosecutrix, not only desired to gratify his passion upon her person, but that he intended to do so at all events, and notwithstanding any resistance on her part. The difference between preparation and attempt to commit an offence often consists chiefly in the greater degree of determination.

20. Turning to the present case, upon appreciation of the evidence adduced by X, she stated that the accused rubbed his male organ around her private part. She also stated that she resisted the accused and when she could free herself she ran outside and went home. In her cross examination she stated that she did not shout for help and that she did not call out for Durga (who was upstairs) when the accused rubbed his male organ against her private part. Surprisingly, though she stated that she ran home, she did not tell anything to her parents and PW No.1/Gintumthanga who is her father did not state that he observed abnormal behaviour on his daughter.

At the time of the incident complained off, X was 11 years old. She was not of such a tender age not to be able to understand the conduct of the accused on her person. Her act of not shouting and/or not calling for Durga, another shopkeeper, who was in the floor above creates doubt on the credibility of X. The prosecutrix stated that she resisted. If there was resistance on her part, she was barely 11 years, she is expected to sustain some injuries or atleast some redness/inflammation around her external genitalia. But the medical evidence show that X did not sustain any bruising/laceration on her external genitalia, no marks of violence on her body and no seminal stain.

Presuming that the statement of the prosecutrix is true, she has not made any statement that the accused attempted to introduce his male organ to her private part but failed to do so as he was interrupted by something which he did not foresee. There is no material to suggest that as because the prosecutrix resisted so much the accused failed to penetrate. There is also no evidence from which an inference can be drawn of the accused changing his mind or any interruption from outside which cannot be foreseen by the accused resulting in the failure of the accused to complete the offence. The medical evidence of absence of seminal stain suggests that there was no ejaculation or in other words, it is not the case of the accused failing to consummate because he ejaculated. In the instant case the medical evidence would be of value because X depose that the incident came to light on the same day as she was teased by her friend Tleipuii though before the medical officer it was stated that the incident occurred in May, 2012. Therefore, the intent to have sexual intercourse despite resistance which is an essential ingredient u/s 511 IPC appears to be missing in the instant case. Keeping in mind the entire facts and circumstances of the case, the contradictions in the prosecution evidence as highlighted above, the evidence of X has to be appreciated with more circumspection. I am of the view that it would not be proper to convict the accused for the offence of attempt to rape.

21. Having concluded thus, upon appreciation of the entire record, it is noticed that the prosecutrix is making the same statement about the conduct of the accused on her person from the time of investigation to the time she deposed in the court. Whether the conduct of the accused would fall within the offence u/s 354 IPC? The conduct of the accused, as highlighted above, can by no means be regarded as decent. A person is guilty of an indecent assault if he intentionally assaults the victim and intends to commit not just an assault but an indecent assault i.e. an assault which right minded persons would think is indecent. In the instant case, the evidence explaining the conduct of the accused upon the body of the victim, cannot be regarded as decent. 'Woman' as defined in section 10 IPC denotes a female human being of any age. The honble Apex Court in the case of

State of Punjab versus major Singh reported in AIR 1967 SC 63 has held that 'A female child of tender age stands on a somewhat different footing. Her body is immature, and her sexual powers are dormant. In this case, the victim is a baby, seven-and-half months old. She has not yet developed a sense of shame and has no awareness of sex. Nevertheless from her very birth she possesses the modesty which is the attribute of her sex'. Further, the honbl'e Apex Court in the case of Aman Kumar versus state of Haryana reported in (2004) 4SCC 379 it has been held that what constitutes an outrage of female modesty is nowhere defined. The essence of a woman's modesty is her sex. The culpable intention is the crux of the matter. The reaction of the woman is very relevant, but its absence is not always decisive. Modesty in this section is an attribute associated with female human being as a class. It is a virtue which attaches to a female owing to her sex. The act of pulling a woman, removing her dress coupled with a request for sexual intercourse, is such as would be an outrage to the modesty of a woman, and knowledge that modesty is likely to be outraged, is sufficient to constitute the offence without any deliberate intention having such outrage alone for its object.

ORDER

22. Accordingly, accused Radha Mohan Das is convicted of the offence punishable u/s 354 IPC though charge was framed u/s 376(2)(f) IPC the same can be done as persec.222(2) Cr.P.C.

23. Heard the parties on the question of sentence.

Accused Radha Mohan Das submitted that he is the sole bread earner of his family consisting of his wife and small children, that he has no previous criminal antecedents, that he is now 25 years old.

Mr.James Lalrintluanga, Ld. Defence Counsel adopted the submission of the accused and prays that leniency may be shown by reducing the sentence to the period of detention already undergone by the accused during investigation and trial.

On the other hand, Mrs. Rose Mary the Ld. Addl.PP submitted that enough leniency has already been shown by convicting the accused u/s 354 IPC whereas charge was framed u/s 376(2)(f) IPC. The Ld. Counsel argued that no reasonable ground has been shown to show leniency to the accused and in sexual offence it is not proper to show leniency in sentencing the accused. The Ld. Counsel therefore prays to award maximum sentence with fine to the accused.

24. Sentencing no doubt involve an element of guess work. In the case at hand, while considering the right of the accused it is seen that he is barely 25 years old, no criminal antecedents, he did not use weapon, and as the prosecutrix could go out and mix with her

friends even after the incident complained off it appears that X was not injured, there is no evidence to the effect that X and her family could not lead a normal life as they used to lead.

On the other hand, the prosecutrix is a girl of barely 11 years, though no physical injury is visible the mental scar would remain for the rest of her life and the incident would effect her reputation and dignity.

25. Upon balancing the right of the accused as well as the suffering of the accused, the nature of the crime, the gravity of the offence and the stage of the sexually assaulted victim, I am of the considered view that a deterrent method of sentencing should not be imposed upon the accused. Sentencing of the accused who has no other criminal antecedents should be with a view to reform the accused. The record shows that the accused suffered detention for a period of 6 months and 3 days during investigation and trial.

In the given facts and circumstances of the case, without further sentencing the accused Radha Mohan Das, the sentence shall be reduced to the period already undergone by the accused during investigation and trial.

26. Bail bond stands cancelled and surety is discharged from the bond.

27. Give copy of the judgment & order free of cost to the accused.

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

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

Memo No: AD&SJ/(A) 2014 : Dated Aizawl, the 14th March, 2014

Copy to:-

1. Accused Radha Mohan Das through Counsel Mr. James Lalrintluanga, Advocate.
2. PP/Addl. PP, Aizawl District, Aizawl.
3. District & Sessions Judge, Aizawl.
4. District Magistrate, Aizawl District, Aizawl.
5. DSP (Prosecution), District Court, Aizawl.
6. i/c G.R.Branch.
7. Registration Section.
8. Guard File.
9. 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 Copy of Birth Certificate of the prosecutrix

Ext. - P-3 Medical examination report of the victim

 P-3 (a) Signature of PW.No-4

Ext. - P-4 Charge Sheet

 P-4 (a) Signature of PW.No-5

(B) **DEFENCE EXHIBITS- None**

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

(D) **COURT EXHIBITS- None**

(E) **PROSECUTION WITNESSES:**

PW.-1 – Gintumthanga

PW.-2 – Lalmuanpuii

PW.-3 – Lalthansangi

PW.-4 – Dr. Catherine Ngurbiakveli

PW.-5 – SI H. Lalhmingthangi

(F) **DEFENCE WITNESSES - : None**

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