

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

PRESENT

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

SR No.171/2012
In CrI.Tr. No.2436/2011
U/s 376(1) IPC

Ref :- Kulikawn P.S Case No.133/20112 dt.29.10.2011 u/s 376(1) IPC

State of Mizoram

Versus

Rochungnunga Accused

Date of hearing 03.02.14, 17.2.2014 & 21.02.2014

Date of Judgment 11.03.2014

APPEARANCE

For the Prosecution Mrs. Rose Mary, Addl. PP

For the Accused Mr. W. Sam Joseph, Advocate

JUDGMENT & ORDER

1. The prosecution story of the case in brief is that on 29.10.2011 Remliani Chawngthu lodged a written FIR to the Kulikawn PS by submitting that on the said date X was raped by Rochungnunga (Rca) S/o Zabuanga of Thakthing Veng and that the offence was committed at Thakthing.

On the basis of the said information, Kulikawn P.S. Case No. 133/2011 dt.29.10.2011 u/s 376(1) IPC was registered and investigated into. Upon completion of investigation, having found prima facie case against the accused Rochungnunga for the offence punishable u/s 376(1) IPC Charge sheet was laid against him and committed for trial.

The name of the prosecutrix is withheld in the Judgment and she is referred with the letter 'X'.

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

3. Charge u/s 376(1) IPC was framed against the accused. The charge was read over and explained to the accused in the Mizo language which is known to him to which he pleaded not guilty and claims for trial.

4. POINT(S) FOR CONSIDERATION:-

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

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

Mrs. Rose Mary, the Ld. Addl. PP submitted that the conduct of X soon after the incident shows that she was not a consenting party to the sexual intercourse. The Ld. Counsel argued that though they could not examine the prosecutrix despite best effort to produce her, from the materials on record, it is seen that the matter came to light soon after the incident. Though the prosecutrix was more or less in a position of a domestic helper, she disclosed the incident soon after and on the very same day FIR was lodged and medical examination of both the accused and X were conducted. The Ld. Counsel argued that as the incident occurred inside the house of the accused and since X herself was already 17 years at the time of the incident, it is not necessary that either of them must sustain some injuries. The Ld. Counsel submitted that sufficient evidence have been adduced to prove the guilt of the accused and prays to convict him.

On the other hand, Mr. W. Sam Joseph, Ld. Defence Counsel submitted that the cardinal principle of criminal jurisprudence is that the accused is presumed to be innocent unless his guilt is proved and that the burden of proving the guilt never shifts from the prosecution. In the instant case, the prosecutrix have not been examined and the honb'le Apex court has observed that even when the prosecutrix states that she was raped, Court should look for corroboration. In the instant case as the prosecutrix have not been examined, there cannot be any prove. The Ld. Counsel further submitted that from the medical evidence it is clear that the prosecutrix did not sustain marks of violence on her body and there was no bruising or laceration on her external genitalia. Though the hymen has ruptured, it was an old tear. Further, the Medical Officer admitted in her cross-examination that from the findings in Ext.P-3 there was no sign of forceful sexual intercourse. The Ld. Counsel submits that there is no evidence to prove beyond reasonable doubt that the victim was subjected to sexual intercourse on 29.10.2011 and from the rupture of hymen which was 2 weeks old, it is clear that the prosecution failed to prove that sexual intercourse took place on 29.10.2011. The Ld. Counsel therefore prays to acquit the accused. In support of his submission, the Ld. Counsel has placed reliance on the following decisions:-

- i) Rabindra Kumar Dey versus State of Orissa (1976) 4SCC 233.
- ii) Dilip versus State of MP (2001)9 SCC 452

- iii) State of H.P versus Gian Chand (2001) 6 SCC 71
- iv) Tukaram versus State of Maharashtra (1979) 2SCC 143
- v) Razik Ram versus Jaswant Singh (1975)4 SCC 769
- vi) Sharad Birdhi Chand Sarda versus State of Maharashtra (1984) 4SCC 116

6. DISCUSSION, DECISION AND REASONS THEREOF:-

The evidence adduced by the prosecution may be briefly highlighted:

PW No.1/Remliani is the informant. She stated that X was living with them as domestic helper and at the same time learnt tailoring. On the date of the incident, which probably was a Saturday, while she was in the kitchen and X was washing utensils, the accused paid them a casual visit as the accused often visited her brother who was living next door. The accused spoke to X and when he asked her if she had seen him before, she replied in the negative. Thereafter X left for her tailoring school. Then she returned home crying and said she was raped by the accused. When she asked X why she went to the house of the accused she stated that the accused invited her and since the accused often visited her younger brother, she thought that he was their relative. She lodged the FIR at Kulikawn PS. After the incident, the prosecutrix lived with them for a short while and thereafter she left after informing them that her grandfather was ill. She exhibited the FIR as Ext. P-1 and her signature as Ext. P-1(a). In her cross-examination, she stated that she heard X got married after she left her family. She admitted the suggestion that she stated before the Police that on 29.10.2011 while she was in Thakthing Bazar the accused came and helped her carry the basket and followed her and on the way they met her husband who was looking for her. She also admit to have stated before the Police that when she met her husband he told her about the incident and after they reached their house she told the accused to leave and thereafter she made a phone call to Kulikawn PS, when the Police personnel arrived, she lodged the FIR. She admitted that she was not at home when the prosecutrix came home crying.

PW No.2/ R. Lalhmingliana stated that the prosecutrix was living with his family and helped them in the domestic chores and at the same time, she was learning tailoring. On one Saturday while X was washing utensils in the kitchen and he was in the common room, the accused came and was seated in the kitchen. His wife was leaving for the market. X left for her tailoring class and the accused also left. After about half an hour, while he was standing in the verandah, X came back and he could make out that she was annoyed. When he asked her what had happened X stated “sex min hmanpui” meaning she was subject to sexual intercourse. She also said “helaia mipa awm kha” meaning that man who was here. The prosecutrix had lived with them for about one month. Not

knowing what to do, he went to the nearby vegetable market to look for his wife. He returned home with his wife. The accused also came to the market and his wife made him carry the basket. In his cross-examination, he stated that the accused did not have any reluctance in coming back to their house, he does not know if the prosecutrix had a love affair. He also stated that after the incident the prosecutrix lived with them for about 1 month. He did not ask any detailed question to the prosecutrix, he did not ask the prosecutrix why she went to the house of the accused, he also stated that presently the prosecutrix have got married and is living at Baktawng and that is the last information he received from her. He does not know if the prosecutrix wanted to approach the Police or not because he left the matter to his wife. He heard from others that when the accused was detained in custody, the prosecutrix felt sorry for him.

PW No.3/Dr. Zosangpuii examined X at Civil Hospital, Aizawl on 29.10.2011. Upon examination, the victim was found physically and mentally normal. She was not under the influence of alcohol or drugs at the time of examination and no seminal stain or other stains were found on her clothes. No marks of violence was found on her body. On genital examination, her secondary sexual organs have developed normally. There was no bruising/laceration on her external genitalia. Her hymen has ruptured but it was an old rupture. 3 slides of vaginal smear was taken from the vaginal pool and sent for laboratory examination. In her cross-examination, she stated that the rupture of hymen was an old rupture of more than two weeks, She did not receive back the laboratory report of the vaginal smear.

PW No.4/Dr. Jeremy V. Pachuau examined the accused at Civil Hospital, Aizawl on 29.10.2011 @ 2:30 PM. He was found physically and mentally normal. The accused stated to him that he was under the influence of alcohol and also that he had sexual intercourse. He filled up Sl. No. 9 of the Medical Examination Report on the basis of the statement made by the accused. Examination of genital organ shows that his secondary sexual characters were fully developed. He exhibited the Medical Examination Report as Ext. P-3 and his signature as Ext. P-3(a). In his cross-examination, he admitted that from his findings in Ext. P-3 there are no signs of forceful sexual intercourse. He denied that if the accused had forceful sexual intercourse with a girl of 17 years he will suffer some bodily injury. He did not find trace of resistance on examining the body of the accused. He filled up Sl. 9 on the basis of information given by the accused, the accused did not say that X did not want to have sex with him. He did not conduct any separate test to see if the accused can have erection or not. He admitted that he cannot give a concrete opinion on rape. He stated that smegma around corona gland will be absent for a person who maintains hygiene and takes bath daily.

PW No.4/ASI Rothangliani stated the FIR was received at Kulikawn PS from Lalremliani Chawngthu R/o Mission Veng on 29.10.2011. She was endorsed to investigate the case. During investigation, she visited the place of occurrence which is at Thakthing, while recording the statement of the informant she learnt that X was their domestic helper, she also recorded the statement of X and husband of complainant. She forwarded X for medical examination, arrested the accused and interrogated him. She did not make any seizure. As the offence falls within Special Report Case, she was not competent in the capacity as ASI to submit Charge Sheet. So, she handed over the investigation report to the O/C of CAW Cell. She exhibited the Arrest Memo as Ext. P-4 and her signature as Ext. P-4(a). In her cross-examination, she stated that she does not know the present whereabouts of X. She stated that she wrote the brief facts of the case in the final report on the dictation of SI H. Lalhmingthangi. She denied the suggestion that the accused did not state before her that “min hlau a a tang ngam lo” meaning she was scared of me and did not dare resist.

PW No.5/SI H. Lalhmingthangi stated that as the offence falls under the Special Report Case, ASI Rothangliani who conducted the investigation was not competent to lay the Charge Sheet in her capacity as ASI. The Investigation Report was submitted to her and being satisfied with the investigation, she laid Charge Sheet for the offence u/s 376(1) IPC. She exhibited the Charge Sheet as Ext. P-5 and her signature as Ext. P-5(a). In her cross-examination, she stated that she did not examine anyone in connection with the investigation of this case, she admitted that she did not include the prosecutrix as prosecution witness in the Charge Sheet. She stated that the prosecutrix was above 17 years at the time of the incident, she admitted the suggestion that from the medical report it can be seen that X gave affirmative reply on the question of previous sexual intercourse. She also admitted the suggestion that from the medical examination report of X there is nothing to suggest recent forceful sexual intercourse such as laceration, bruises, mark of violence etc.

7. The accused is facing trial for the offence punishable u/s 376(1) IPC. The essential ingredient of rape (as it stood at the time of the incident) is penetration of the male organ into the vulva or pudenda of the woman.

8. In the case at hand, X, the prosecutrix have not been examined. In this regard, the Id. Addl.PP on 19.10.2013 submitted that despite best effort, they could not contact the prosecutrix and under the given circumstance they have no other option but to dispense with her evidence.

9. In the instant case, it is not in dispute that X was above 16 years at the time of the incident. The accused at the time of framing of charge stated that he had sexual intercourse with X but it was consensual. However, at the time of his examination u/s 313 CrPC he stated that he did to have sexual intercourse with X. PW No.4/Dr. Jeremy V. Pachuau stated that he had filled up Sl. No.9 of Ext. P-3 i.e. Medical Examination Report of the accused on the basis of the statement made by the accused. Sl. No. 9 of Ext. P-3 is regarding short history of the incident which is filled up as “*According to accused, the victim asked for Top up for her mobile phone then they had sex at the residence of the accused*”. In his cross-examination, PW No.4 further stated that the accused did not say that the prosecutrix did not want to have sex with him.

PW No.2/R. Lalhmingliana stated that when he asked about what happened to her she said “sex min hmanpuia” meaning he had sex with me/there was sexual intercourse. The witness further stated that though X did not take any name, he knew it was the accused because X said “helaia mipa awm kha” meaning that man who was here.

Ext. P-3 also shows absence of smigma around the corona gland.

PW No. 2&4 have not been discredited during cross-examination, PW No.2 is an expert witness and on appreciation of the evidence of PW No.4 as a whole it can be inferred that he had cordial relation with the accused and that the accused also felt free to pay them a visit anytime. Accordingly, these two witnesses does not have any reason to falsely cook up a story against the accused. Hence, I do not find any reason to doubt their testimony.

As stated before, the accused at the time of framing of charge stated he had consensual sexual intercourse with X but subsequently denied in his examination u/s 313 CrPC. Upon appreciation of the prosecution evidence as well as the materials on record, I am of the view that probability factor leans in favour of the accused having sexual intercourse with X on the date of the incident.

10. Having concluded that the accused and X had sexual intercourse on the date of the incident, it is now necessary to see whether the sexual intercourse amount to rape as defined u/s 375 IPC? As already highlighted, in the case at hand, the prosecutrix have not been examined. Accordingly, the genuineness or otherwise of the prosecution story has to be examined from the other evidence.

11. PW No.1/Remliani, the informant, she stated- “ *On that day while I was in the kitchen and the prosecutrix was washing the utensils, the accused came inside my house*

and started talking to the prosecutrix and he was asking her name and where she was from. The accused that(then) ask the prosecutrix if she had seen heim(him) earlier to which she replied in the negative but the accused said he had seen her earlier". The witness further deposed- "When I asked her why she went to the house of the accused she said since the accused often visited my younger brother and as the accused invited her to see his house she thought he was our relative and followed him".

Upon a close scrutiny of the said statements of X as narrated by PW No.1, there appears to be some contradiction. The contradiction being that, in the conversation between the accused and X which was overheard by the witness, X denied to have ever seen the accused earlier. On the contrary, after the incident, when PW No.1 asked X why she went to the house of X, her reply indicates that she has seen the accused earlier because she thought he was their relative as he often visited her (PW No.1) younger brother. Had she not seen the accused often going to the house of the younger brother of her employer PW No.1, who was their next door neighbour, she could not have presumed that they were relative. It therefore appears that X lied when she told the accused that she had never seen him earlier. The two statements of X has created doubt on the credibility of X.

This witness in her cross examination stated that she does not know whether the sexual intercourse between the accused and X was consensual but stood by her statement that the prosecutrix came back home crying. She also admitted that she was not at home when X came back crying. She also stated that her statement before the Police that the accused came to the market and carried her basket and that her husband too came to the market and told her what happened, so she told the accused to leave their house are true. She has no knowledge if X is habituated to sex but stated that after the incident X continued to live with them for about 1month and she also heard that X got married.

12. Coming to PW No.2/R.Lalhmingliana. He is the husband of PW No.1. Noticing a grim look of X he asked her what happened to which X said "sex min hman pui" meaning that she has been subjected to sexual intercourse. He presumed that it was the accused because she also said "helaia mipa awm kha" meaning that man who was here. All that this witness did was to go and call his wife (PW No.1) from the market and inform the matter to her.

From the statement of this witness, it is clear that X did not tell him that she was subjected to rape by the accused. It is not in dispute that she was 17 years old at the time of the incident. Legally, she has attained the age to exercise her discretion. A bare reading of the statement of PW No.2 would show that he questioned the prosecutrix because he could make out from her look that she was sad. This witness never stated that when X

came home she was crying. On the contrary, PW No.1 said that her husband told her X came home crying and that she also saw X crying.

Whether the prosecutrix cried or whether she looked sad after the incident would involve the mental status of X which can only be explained by her but at the same time it can be exhibited from her conduct. Her conduct and behavior soon after the incident can in one hand mean that she was not a willing partner to the coitus but on the other hand it can also be interpreted as an act only to save her face as she “*thought*” that the accused was related to her employer. Since X have not been examined, this doubt have not been cleared and the benefit must go to the accused.

13. In the given situation, medical evidence becomes all the more important. It is seen that FIR was lodged on the same day of the incident and medical examination of X and accused were also done on the same day. PW No.3/Dr. Zosangpuii who examined X on 29.10.2011 stated that she had filled up Sl. No. 10 & 11 of the Medical Examination Report on the basis of information from the prosecutrix. Ext.P-2 is the said Medical Examination Report. As per Ext.P-3, X gave an affirmative reply for history of previous sexual intercourse (Sl.No.10) and a negative reply for change of clothing or bathing after the incident (Sl.No.11). The Medical officer did not find bruising/laceration on her external genetalia with a finding of an old hymenal rupture. No marks of violence was found on her body.

PW No.3/Dr. Jeremy V. Pachuau who examined the accused on 29.10.2011 admitted in his cross-examination that from his findings there are no signs of forceful sexual intercourse. He also stated that he did not find any trace of resistance on examining the body of the accused. He admitted that he cannot give opinion of rape.

14. The Hon’ble Apex Court 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.

In the case of *Deelip Singh @ Dilip Kumar versus State of Bihar* reported in (2005) 1 SCC 88 the honb’le Apex court has 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 the honb'le Apex Court has been held :-

“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”.

15. Upon appreciation of the medical evidence, both oral and documentary, there is no finding which would clearly suggest use of force or resistance either on the body of X or the accused.

16. PW No.4/ASI Rothangliani stated that during interrogation the accused admitted to have sexually assaulted X and stated “min hlau a a tang ngam lo” meaning she was scared of me and did not dare resist.

In this regard, it may be reiterated that statement of witness /accused before the u/s 161 Cr.P.C cannot be used for anything else but to contradict the witness. Be that as it may, while reading through the statement of accused recorded u/s 161 Cr.P.C he did not make such a statement. A reading of his statement would show that he only presumed that the prosecutrix must have been scared of him as he was drunk and denied threatening the victim.

17. Another point which may be noted from the trial of this case is that though X was above 16 years, it has never been stated by the prosecution that she was consulted before lodging the FIR. PW No.1/Remliani stated that she lodged the FIR. She did not make any statement that she did so with the consent of X. This issue has become disturbing only because X left the house of her employer not long after the incident. Neither her employer nor the Police knew of her whereabouts after she left the house of PW No.1 & 2. Only PW No.2/R.Lahmingliana stated that when she once came to visit them she said she got married and settled at Baktawng. But the record revealed that attempt to locate her in the said village has failed. Accordingly, the conduct of the prosecutrix in not keeping touch with her employer and failing to even tell them her address or whereabouts has also created doubt on her veracity and credibility.

18. In the case of *Tukaram versus State of Maharashtra* (Supra) it was held by the honb'le Apex Court that “*The onus is always on the prosecution to prove affirmatively each ingredients of the offence it seeks to establish and such onus never shifts. It was, therefore, incumbent on it to make out that all the ingredients of sec.375 IPC were present in the case*”.

19. Considering the evidence in its entirety, the facts and circumstances of the case and the materials available on record, there are certain reasonable doubts in order to come to a finding of guilt against the accused. In the instant case, the most vital witness i.e the prosecutrix have not been examined. Nonetheless, the burden of the prosecution to prove atleast the essential ingredients of the offence never shifts.

20. For the reasons indicated above, I am of the considered view that it is a fit case where the benefit of doubt should be extended to the accused.

ORDER

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

22. In terms of section 437-A Cr.P.C, accused Rochungnunga shall continue to be on bail for another period of Six months.

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

24. Pronounced in open Court and given under my hand and the seal of this court on this the 11th day of March, 2014.

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

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

Copy to:-

1. Accused Rochungnunga through Counsel Mr. W. Sam Joseph, 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 Medical examination report of the victim

 P-2 (a) Signature of PW.No-3

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

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

Ext. - P-4 Arrest Memo

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

Ext. - P-5 Charge Sheet

 P-5 (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 – Remliani

PW.-2 – R. Lalhmingliana

PW.-3 – Dr. Zosangpuii

PW.-4 – Dr. Jeremy V. Pachuau

PW.-4 – ASI Rothangliani

PW.-6 – SI H. Lalhmingthangi

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

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