

GAHC030000542018



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : CrI.A./5/2018

Lalmalsawma
Ratu Hall Veng, Darlawn

VERSUS

State of Mizoram
Aizawl, Mizoram

Advocate for the Petitioner : Mr Lalfakawma (Amicus Curiae)

Advocate for the Respondent : Ms Linda L Fambawl (PP/Addl. PP, Mizoram)

BEFORE
HONOURABLE MRS. JUSTICE MARLI VANKUNG

JUDGEMENT

Date : 12-06-2023

Heard Mr. Lalfakawma, learned Amicus Curiae along with Mrs. Linda L. Fambawl, learned Additional Public Prosecutor for the respondent.

[2.] This is a criminal appeal filed from jail against the judgment and order passed in Session Case No. 129/2014 by the learned Additional Sessions Judge, Aizawl Judicial District, wherein the appellant was convicted under 376 (2)(I) IPC and sentenced to

undergo Rigorous Imprisonment for a period of 10 years and pay a fine of Rs. 1000/-,
i.d. Simple Imprisonment for another 10 days.

[3.] Facts of the case in brief is that on 27.06.2014, a written FIR was received from Vanlaldiki, D/o Rochungnunga of Ratu Hall veng to the effect that on 27.06.2014 at around 2:30 PM, the accused had raped 'X' at C Hall, who was mentally handicapped. On receipt of the FIR, Darlawn PS Case No. 18/2014 dated 27.06.2014 under Section 376 (2)(f) IPC was registered and investigated into by S.I. C. Zonunmawia of Darlawn Police Station. During the course of investigation, the informant was examined. The P.O was visited and sketch map was drawn. The victim was forwarded to the Medical Officer, PHC Darlawn for medical examination, wherein the report of the medical examination stated that the victim's hymen has been ruptured. The case I.O then confirmed the mental and physical disability of the victim and as the victim could not be sent to the Judicial Magistrate in Aizawl, the Executive Magistrate, Dawlawn recorded the statement given by the victim's elder sister K. Lalnunpuui, which was affirmed by the victim girl. Thereafter, the accused was arrested and a *prima facie* case under 376(2)(I) IPC was found and charge sheet submitted accordingly. The prosecution examined as many as 6 (six) prosecution witnesses, after which the appellant was examined under Section 313 Cr.P.C. and 2 (two) defence witnesses were examined. One of them being the appellant himself as DW-2. The learned Trial Court after hearing the submissions of both the parties convicted and sentenced the accused to undergo Rigorous Imprisonment for a period of 10 years and pay a fine of Rs.

1000/-, i.d. Simple Imprisonment for another 10 days. Aggrieved by the above, the instant criminal appeal has been filed.

[4.] Mr. Lalfakawma, learned Amicus Curiae submits that the FIR was registered on 27.06.2014 at around 9:30 PM and the incident was said to occur on 26.06.2014 at around 2:30 PM. On perusal of the evidence of PW-1, who is the informant, it is seen that he got to know about the incident from K. Lalnunpuii. However, K. Lalnunpuii, who was the first person to know about the incident has not been made a prosecution witness, there is no explanation as to why her name was not been included in the list of prosecution witness when it appears that she was the first person to whom the victim had informed about the incident. PW-2 and PW-3 were informed about the incident, PW-2 was informed of the incident by the victim's father. However, the victim's father has also not been made a prosecution witness. Both PW-2 and PW-3 mentioned that blood was oozing out from the private parts of the victim. However, as per the evidence of the Doctor, PW-4, though it says that hymen was not intact, the medical report shows that there was no bruising of the vagina of the victim hymen and no semen was found on her private parts. PW-6 is the case I.O, while DW-1 is the mother of the convict appellant and DW-2 is the convict appellant himself. From the statements made by the prosecution witnesses, there is no contradiction as to whether the incident occurred on 26.06.2014 or 27.06.2014. If the incident had occurred on 26.06.2014, there is a delay of 24 hours in filing the FIR, which is not explained and if the incident had occurred on 27.06.2014, then it is contradictory with

the medical report, wherein the victim was examined at around 10:00 PM in the night and the incident had occurred at around 2:00 PM. However, there is no bruise found in the private part of the victim wherein PW-2 & PW-3 mentioned that they saw blood oozing out from her private parts.

[5.] Due to the above contradictions and inconsistencies, the accused should be given the benefit of doubt, since the accused has been kept in jail for almost 8 (eight) years.

[6.] Mrs. Linda L. Fambawl, learned Additional Public Prosecutor, on the other hand submits that the contradiction in the date is due to some clerical mistake and the incident occurred on 26.06.2014. She further submits that besides the mentioned K. Lalnunpuui, PW-3 was also one of the first person to see the victim as per her deposition. She had seen the victim girl come out from the Community Hall with blood oozing out from her private parts. She also submits that the medical report confirms that the hymen of the victim girl was not intact and also mentions that it is not expected to find semen in her private parts since it has been mentioned that blood was oozing out from her private parts.

[7.] The learned Additional Public Prosecutor also submits that non-examination of K. Lalnunpuui, who has been mentioned by PW-1 will not vitiate the case and in support of her submission, she has cited the Apex Court decision in the case of ***State of Himachal Pradesh Vs. Gian Chand***, reported in ***AIR 2001 SC 2075***. She also

submits that the statement of DW-1, who is the mother of the accused contradicts the confessional statement of the appellant made before the Police. The learned Additional Public Prosecutor also cited the case of ***State of Maharashtra Vs. Bandu alias Daulat***, reported in ***(2018) 11 SCC 163***, which is a similar case wherein the victim was also physically handicapped.

[8.] The learned Additional Public Prosecutor also mentions that there is no delay in filing the FIR when the incident happened on 26.06.2014, they had to travel down to Darlawn village and file the FIR only the next day i.e., on 27.06.2014 and therefore, there is no ground to interfere with the judgment and order of the learned Trial Court.

[9.] Having heard the submissions made by both the parties, the prosecution evidence adduced by the witnesses before the learned Trial Court is scrutinized and analyses herein.

[10.] PW-1, Vanlaldiki is the informant who deposed before the Court that on the afternoon of 26.06.2014 at around 2:30 PM her elder sister K. Lalnunpuui had called her over the mobile phone informing her that the younger sister 'X' was sexually molested by the accused. On hearing the news, she immediately rush home and the victim told her that the accused Lalmalsawma/appellant had committed rape upon her at this time Lalmalsawma had come to the resident and in their presence the sister 'X' pointed her finger at Lalmalsawma/appellant saying that she was raped by the Lalmalsawma/appellant that 'X' was mentally and physically disabled. On the same night, they went to Dawlawn for filing the FIR and the next morning they lodge the

FIR at the Dawlawn Police Station. The victim was also sent to PHC Dawlawn for medical examination. During cross examination, no substantial question was asked except the denial that she was deposing in the Court.

[11.] PW-2, Zolianthuami deposed that on 26.06.2014 the accused Lalmalsawma/appellant committed rape upon the victim. He deposed that both the accused Lalmalsawma/appellant and the victim were his close neighbours that when the accused Lalmalsawma/appellant committed rape upon the victim, some blood flow out from her vagina and she had convulsions, as a result of which she died on 08.07.2014. In his opinion, a cause of death of the victim was due to the commission of rape upon her by the accused. He deposed that the victim was mentally abnormal and physically disabled and the victim could not walk. He was informed by the father of the victim that the accused has committed rape upon their daughter. Thereafter, he had gone to the residence and asked the victim wherein she replied that Lalmaltoma (accused Lalmalsawma) penetrated her vagina which she felt pain. During cross examination, he stated that he was told by the victim's father as well as the victim that the victim was sexually assaulted by the accused Lalmalsawma/appellant. He admitted that he did not know the exact cause of the death of the victim but in his opinion she died because she was sexually assaulted by the accused Lalmalsawma/appellant.

[12.] PW-3, K. Lalhmachhuana deposed that on 27.06.2014 at around 2:30 PM, she saw the victim moved in a sitting posture to the Community Hall near the residence as

she was physically disabled and could not walk. She saw that her pant got wet and some blood was oozing from her vagina. When they asked her she had replied that Lalmaltoma (accused Lalmalsawma) penetrated her vagina for which she felt pain. She noticed that the victim had fear of the accused and a week later, the victim died. During cross examination, she admitted that she was not present in the Community Hall when the accused committed rape upon the victim.

[13.] PW-4, Dr. Laldinpuii is the Medical Officer, who examined the victim 'X' aged about 24 years on 27.06.2014 at around 10:10 PM. The findings of her examination was that the victim 'X' was mentally retarded and physically handicapped and could not walk since birth. On examination of her hymen, she found the hymen was not intact. On cross examination, she admitted that by that time the hymen was not intact but means that there was injury in the private parts of the victim. She also admitted that the hymen cannot be intact if caused by taking physical exercise. She exhibited the medical examination report as Exhibit P-2.

[14.] PW-5, ASI, Zasangi of Darlawn PS, who stated that the FIR was received on 27.06.2014 at around 9:30 PM, by one Vanlaldiki to the effect that the day before 26.06.2014 at around 2:30 PM, the accused Lalmalsawma/appellant had committed rape upon her younger sister 'X', who was mentally abnormal and physically handicapped and could not walk. Hence, Darlawn PS Case No. 18/2014 dated 27.06.2014 under Section 376(2)(I) IPC. The witness deposed that she examined the complainant visited the PO and forwarded it to the victim for medical examination. She

also deposed that since the victim was mentally abnormal, her statement was recorded by the Executive Magistrate, Darlawn instead of sending her to the CJM, Aizawl. Her statement was recorded with the help of her sister, K. Lalnunpuii. She arrested the accused and interrogated him wherein he admitted that he inserted his four fingers and middle finger inside the vagina of the victim and later inserted his penis and had ejaculating his semen. Hence, she has submitted the charge sheet finding *prima facie* case against the accused. She exhibited the FIR, medical report, arrest memo and statement of the victim before the Executive Magistrate, Darlawn. During the cross examination, she stated that though the victim could not speak properly, she could be understood from her gesture and with the help of her relatives.

[15.] PW-6, S.I. C. Zonunmawia deposed that he supervise the investigation done by ASI Zasangi and since she was not competent to submit the charge sheet she handed over the charge of investigation as well as the Case Diary to him on 29.06.2014. Before submitting the charge sheet, the Death Certificate of the victim girl was produced by her relatives. He found *prima facie* case against the accused under Section 376 (2)(I) IPC and submitted the charge sheet. During her examination, he stated that ASI Zasangi almost completed the investigation except the submission of the charge sheet.

[16.] DW-1, Lalhunthari is the mother of the accused Lalmalsawma/appellant and she stated that the accused had been sleeping the whole day (but she retracted). That the accused went to the victim's residence for pardon at about 6:00 PM, but the accused

had told her that he had reported to the victim's family about his non-involvement in the rape case. On Cross examination, she stated that her son the accused had a murder case earlier. She also stated that she does not know whether the accused had gone out or not as she was sleeping. That she does not know whether the accused has consumed liquor or not on that day or whether he took drugs or not on that day. She did not know whether the accused is a drug addict or not.

[17.] DW-2 is the accused himself who deposed as a witness. He stated that he was sleeping in their house when the father of the victim had come and asked his mother whether he had committed rape on the victim or not. He woke at around 2:00 PM and his mother told him about the father of the victim who had come and meet the said enquiries. He then rush to the house of the victim and told the father of the victim if he suspected him of doing such an offence, he should go to Darlawn hospital to get their daughter check medically. They immediately took her to the hospital and examined her. He does not know the medical report. However, after the doctor had examined the victim, he has come to know that the hymen of the victim/prosecutrix was intact. He denied committing rape on her. However, when he was arrested by the police, he was beaten up by the police and for the safety of his body, he told the police a lie stating that he committed rape upon the victim. He deposed that if he had raped her there would be sign of rape on her body and she would not have been a virgin. During cross examination, he denied that he was drunk or under the influence of drugs on that day and denied that he had gone to the Community Hall on that day. He

also denied all the other suggestions made by the learned Public Prosecutor towards the commission of the offence. On the examination of the accused under 313 Cr.P.C., he denied committing rape on the victim on 27.06.2014 at 2:30 PM but stated that the main reason of accusing him as committing rape upon the victim was due to enmity between him and the family of the victim. He also stated that he had admitted his guilt before the case I.O since the case I.O assaulted him.

[18.] Having heard the submissions of both the parties, this court finds that the FIR was submitted on 27.06.2014 and it can be accepted that the incident occurred on 26.06.2014 since the informant has deposed that on the same night, they went to Dawlawn for filing the FIR and the next morning they lodge the FIR at the Dawlawn Police Station. The mention that the incident occurred on 27.06.2014 in the FIR and by PW 3 is accepted to be clerical mistakes. This court finds that the delay in filing the FIR has been sufficiently explained since the informant had to travel from their village Ratu to Darlawn to submit the FIR.

[19.] The victim was physically disabled and mentally retarded. The informant PW1/Vanlaldiki is the sister of the victim who stated that she was informed by their sister elder sister K. Lalnunpuui of the incident. This court finds that the non examination of K. Lalnunpuui as prosecution witness does not prejudice the prosecution case since the informant Vanlaldiki on receiving the information had immediately rush home and the victim herself told her that the accused Lalmalsawma/appellant had committed rape upon her. The appellant Lalmalsawma

had then come to the resident and in their presence the sister 'X' pointed her finger at Lalmalsawma/appellant saying that she was raped by the Lalmalsawma/appellant. Their neighbour, who testified as PW2 also deposed that on hearing of the news of the sexual assault of the victim she had gone to their house and had asked the victim of the incident, who replied that the appellant had committed the offence and she felt pain. PW3 K. Lalmachhuani is the younger sister of the victim, who has deposed that she saw her sister move out from the community hall and her pant was wet and blood was oozing from her vagina. The victim told her that the appellant had penetrated her vagina and she felt pain. PW4 is the medical doctor who examined her the next day at 10:10 pm at Darlawn PHC, and she found that her hymen was not intact which corroborates the deposition of the other prosecution witnesses. The initial case I.O deposed that the judicial statement of the said victim was also recorded through their sister K. Lalnunpuii by an Executive Magistrate since she could not be sent to Aizawl due to her physical handicap.

[20.] The appellant has denied sexually assaulting the victim in his examination under section 313 Cr.P.C and has produced his defence witness, however this court finds that the deposition of the Defense witnesses is the denial of the commission of the offence by the appellant.

[21.] The Apex court in **State of Maharashtra Vs. Bandu** (*supra*) held in the case where the victim was deaf and dumb and mentally challenged to some extent, that:

“7. The evidence of the mother of the victim clearly shows that it was the respondent-accused who took away the victim. The victim and the accused were seen together by PW 2, Gajanan Marutrao Sonule on the date of commission of offence. The victim immediately after the occurrence narrated the same to her mother as to what happened as reflected in the FIR and the version of PW 1. Rape has been confirmed by medical evidence. Identity of the accused is not in dispute. In these circumstances, the trial court having convicted the respondent, the High Court was not justified in setting aside the conviction.”

The appeal was accordingly allowed.

[22.] In view of the above discussions, I am of the considered opinion that the prosecution have proved their case against the appellant under section 376 (2)(I) IPC and find that no grounds have been made out that warrants interference with the judgment and order passed in Session Case No. 129/2014 by the learned Additional Sessions Judge, Aizawl Judicial District, wherein the appellant was convicted under 376 (2)(I) IPC and sentenced to undergo Rigorous Imprisonment for a period of 10 years and pay a fine of Rs. 1000/-, i.d. Simple Imprisonment for another 10 days.

[23.] Crl A no.5/2018(J) is thus dismissed and stands disposed of.

[24.] In appreciation of the assistance rendered by Mr. Lalfakawma, learned Amicus Curiae, he shall be paid the nominal fee of Rs. 7500/- (Rupees seven thousand five hundred) only by the Mizoram State Legal Services Authority.

JUDGE

Comparing Assistant