

GAHC030001702022



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

Case No. : Crl.A./3/2022

Raldosanga
S/o Hmingsanga
R/o Suangpuilawn, Mizoram

VERSUS

State of Mizoram and Anr.
Aizawl, Mizoram

Advocate for the Petitioner : Mr Zoramchhana

Advocate for the Respondent : P.P./Addl.PP, Mizoram

Linked Case : I.A.(Crl.)/4/2022

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VERSUS

State of Mizoram and Anr.
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Advocate for the Petitioner : Mr Zoramchhana

Advocate for the Respondent : Mrs. Linda L. Fambawl, Addl. PP, Mizoram

BEFORE
HON'BLE MR. JUSTICE NELSON SAILO

Date of hearing : 10.05.2023.

Date of Judgment: 30.05.2023.

JUDGMENT & ORDER (CAV)

[1]. This is an appeal filed by the convict/appellant against the Judgment and Order dated 29.09.2020 passed by the Additional District & Sessions Judge-III, Aizawl in S.C No. 20/2017, arising out of Criminal Trial No. 189/2017 convicting the appellant under Section 376(2)(I) of the Indian Penal Code, 1860 (IPC) and thereafter, sentencing him to undergo Rigorous Imprisonment for a period of 10 years and to pay fine of Rs. 10,000/- and in default, to undergo Simple Imprisonment for a period of one month by Order dated 30.09.2020.

[2]. It is seen that notice was issued to the respondents on 11.05.2022 and the Lower Court Records were requisitioned. Pursuant thereto, the Lower Court Records were received, paper book prepared and the appeal directed to be listed for hearing, vide Order dated 22.06.2022. However, the appeal has not been admitted. As such, the appeal is admitted for hearing.

[3]. The case of the prosecution in brief is that an FIR was lodged by the complainant on 10.08.2016 stating that between 12:00 noon and 1:00 pm that day, the elder sister of the complainant, who is a mentally disabled person, was raped by the appellant. Therefore, it was requested that appropriate legal action be taken against the appellant. Pursuant to the filing of the FIR, the same was registered as DLN PS Case No. 19/2016 dated 11.08.2016 under Section 376 IPC and investigation conducted. Upon finding a prima facie case against the appellant under Section 376(2)(I) IPC, the Investigating Officer submitted the chargesheet. Charge was framed against the appellant and to which he pleaded not guilty. As such, trial commence against the appellant.

[4]. During the trial, the prosecution examined as many as 7 prosecution witnesses and they were cross examined by the defence. The defence did not produce any evidence and the learned Trial Court upon examining the appellant under Section 313 of the CrPC and after hearing the parties, convicted and sentenced the appellant in the manner as already stated herein above.

[5]. Mr. Zoramchhana, learned counsel for the appellant submits that the prosecution has failed to prove beyond reasonable doubt that the victim was a mentally disabled person since only one of the Medical Board Members, who issued the certificate (Exhibit-P-IV) was examined and importantly, the Psychiatrist, who conducted Psychological test of the victim was not cited, as one of the witness and was not examined during the trial. Since the learned Trial Court came to a conclusion that the victim was a mentally disabled person without any evidence to that effect, the impugned Judgment and Order of conviction and the Order of Sentence should be set aside. Alternately, the matter may be remanded back to the learned Trial Court for reconsideration and examination of the Psychiatrist concerned. The learned counsel submits that suspicion no matter how strong, cannot be the substitute for proof. As such, the impugned Judgment and Order of conviction and the Order of sentence may be set aside.

In support of his submission, the learned counsel relies upon the following authorities:-

- (1) *Paramjeet Singh Alias Pamma Vs. State of Uttarakhand*, (2010) 10 SCC 439.
- (2) *Khekh Ram Vs. State of Himachal Pradesh*, (2018) 1 SCC 202.

[6]. Mrs. Linda L. Fambawl, learned Addl. Public Prosecutor, on the other hand submits that the victim was examined as PW2 and in her examination-in-chief, she clearly stated that the appellant forcefully laid on top of her and raped her in the jhum hut. Her evidence was neither shaken nor falsified during her cross examination. The evidence of PW2 is also corroborated by the deposition of PW1, who is the complainant, PW3, who is the sister of the victim and the wife of the appellant and also the evidence of PW5, who is a Doctor and who had examined the victim on the day of the incident itself. The learned Addl. Public Prosecutor further submits that the Chairman of the Board of Medical Examination was examined as PW6 and in his examination-in-chief, he clearly stated that as per the requisition made by the Police, the Medical Board chaired by him sought for the psychiatric status of the victim from the Kulikawn Hospital and upon receiving the same, the Medical Examination Board prepared a report which was exhibited as Exhibit P-4. The report indicates that the victim appears to have moderate mental retardation and having an IQ of 41.35 and also a mild level of deficiency in socio-adaptive functioning SQ-58.67. The learned Addl. Public Prosecutor further submits that the appellant in his examination under Section 313 CrPC also clearly admitted of having committed sexual intercourse with the victim as he presumed that sexual intercourse was often committed with the victim under her willingness. The learned Addl. Public Prosecutor

therefore submits that under the facts and circumstances, the learned Trial Court rightly convicted the appellant by coming to a finding that the victim being a mentally disabled person, giving of consent was immaterial. As such, she submits that the appeal being without merit, the same should be dismissed. In support of her submission, Mrs. Linda L. Fambawl, learned Addl. Public Prosecutor relies upon the case of *Chaman Lal Vs. State of Himachal Pradesh*, reported in *(2020) 17 SCC 69*.

[7]. I have heard the submissions made by the learned counsels for the rival parties and I have perused the materials available on record.

[8]. From the evidence led by the prosecution witnesses, documents exhibited and the statements made by the appellant in his examination under Section 313 CrPC, there is no dispute to the fact that the appellant had sexual intercourse with the victim on 10.08.2016 while they were in the jhum hut. Charge was framed against the appellant under Section 376(2)(I) IPC and to which he pleaded not guilty. Section 376(2)(I) IPC provides for punishment for rape committed on a woman suffering from mental or physical disability. Section 375 (a) IPC provides that a man is said to commit rape if he penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person. The 5th Proviso of Section 375 IPC provides that a man is said to commit rape if such penetration is done with

her consent when at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent. Therefore, in the present case, the learned Trial Court in the given facts and circumstances and considering the evidence led during the trial, found the said provision to be attracted.

[9]. Let us now examine the evidence led by the prosecution. PW1 who is the complainant and brother of the victim in his examination-in-chief stated that on 10.08.2016, around 12:00 to 1:00 pm in the noontime, he was informed by the son of the appellant that the appellant had raped the victim, who is his sister in the jhum hut. He stated that his sister is physically handicapped and he submitted an FIR before the Police for taking action against the appellant. In his cross examination, he stated that the victim had speech problem and was mentally abnormal. He denied that there was any romantic affair between the appellant and the victim or that the appellant and the victim had sexual intercourse on earlier occasions.

[10]. PW2, who is the victim in her examination-in-chief could identify the appellant as well as the appellant's wife, who is her younger sister. On being asked, what the appellant did to her in the jhum hut, she stated that the appellant forcefully laid on top of her and raped her by inserting his penis on her private part. In her cross examination, she reiterated what she stated in her examination-in-chief.

[11]. PW3, who is the younger sister of the victim and the wife of the appellant in her examination-in-chief stated that on 10.08.2016, she and her husband alongwith the victim went to Chaklohzaui to collect some vegetables. At the Jhum while she was collecting the vegetables from the lower part of the paddy field, she on suspecting that her husband was up to something, quickly went back to the jhum hut and on reaching, she saw sperms lying on the floor. She then asked her husband whether he slept with her sister or not and to which he denied and left to collect some water. She then asked her sister whether the appellant had sex with her or not to which she replied in the affirmative. She stated that her sister is mentally retarded and she could not speak properly as she is deaf. She then telephoned her son and asked him to inform PW1, who lived with the victim about the incident. PW1 then submitted the FIR before the Officer-in-Charge, Darlawn Police Station against her husband. In her cross examination, she stated that she did not see her husband

and her sister having sexual intercourse and she did not know whether he used force upon her to have sexual intercourse. She also stated that she believed that her sister had no objection to have sexual intercourse with her husband when he tempted her.

[12]. PW5 is the Doctor, who examined the victim on 10.08.2016. She stated that around 5:15 pm on that day, the victim accompanied by the Police and her family members came to Suangpuilawn PHC. The victim was not able to speak properly and she was informed by the victim's brother that the brother-in-law of the victim had sexual intercourse with the victim without her consent. The victim could not answer any of her questions verbally except with body language and action, and therefore they took three vaginal swabs. PW5 further stated that on physical examination, there was abrasions present and as the victim had a hearing problem, she could not speak like a normal person. Seminal stains were present in her underwear and further, as the victim had a child, the hymen was not intact. On microscopic examination, sperms were found to be present on all the three vaginal swabs. PW5 exhibited the medical examination report of the victim comprising of two pages along with her signature, as Exhibit P-3 and Exhibit P-3 (a).

[13]. PW6 is the Chairman of the Board of Medical Examination and he, in his examination-in-chief, stated that as per the requisition made by the Police,

the Medical Board chaired by him referred the victim to Kulikawn Hospital to ascertain her psychiatric status. Thereafter, upon receiving the status report, the Board of Medical Examination prepared a report stating that the victim has hearing impairment in both ears and has difficulty to comprehend some instructions which may be due to hearing loss or poor comprehension. The result of the test conducted upon the victim revealed that she has Moderate Mental Retardation (IQ=41.35) and a Mild level of deficiency in Socio-Adaptive Functioning (SQ=58.67). The report was therefore submitted to the police. PW6 exhibited the report as P-4 and his signature as P-4(a). In his cross examination, PW6 stated that although the psychiatric examination of the victim revealed that she was below normal, she did not lose all her consciousness.

[14]. PW4 is the Medical Doctor, who examined the appellant while PW7 is the Investigating Officer, who conducted investigation. Both the prosecution witnesses have basically made general statements and therefore, they are not being referred to.

[15]. From a careful analysis of the evidence of the prosecution, it can be seen that the version of the victim about the commission of sexual intercourse upon her is corroborated by the evidence of the PW1, PW3 and PW5 besides others. The fact of the victim being mentally disabled can be appreciated from the evidence of PW1, PW3 and PW5. Therefore, their evidence supports the

certificate issued by the Board of Medical Examination which states that the psychological test conducted upon the victim revealed that she had moderate mental retardation (IQ=41.35) and mild level of deficiency in socio-adaptive functioning (SQ=51.67). This certificate has been exhibited by PW5 during the trial and the same was open for cross examination by the defence. However, the findings of the psychological test and the report of the Board of Medical Examination was neither disputed, shaken nor falsified during the cross examination of PW5 who had exhibited the same.

[16]. In the case of *Chaman Lal (Supra)*, the Apex Court in the given facts of that case, upon coming to a finding that the fact of the victim being mentally retarded with her IQ as 62 and therefore, not in a position to understand the good and bad aspect of sexual assault upheld the decision of the High Court in reversing the order of acquittal passed by the learned Trial Court to that of a conviction for offence under Sections 376 and 506 IPC. In the instant case, the psychological test conducted upon the victim revealed that she had moderate mental retardation with IQ at 41.35 and mild level of deficiency of socio-adaptive functioning at SQ=58.67. Although the learned counsel for the appellant has tried to dispute the same at this stage but the fact remains that there was no denial about the report when the same was exhibited during the trial. Having regard to the evidence led by PW1, PW3 and PW5 apart from

others, it only goes to establish that the victim is not mentally sound and that she is also hard of hearing. The Apex Court in *Paramjeet Singh @ Pamma* (Supra) held that the law does not permit the Court to punish the accused on the basis of a moral conviction or suspicion alone. Likewise, the Apex Court in *Khekh Ram* (Supra) also reiterated the fact that suspicion no matter how grave, cannot take the place of proof and the prosecution has to prove the case and establish the charge by adducing cogent and convincing evidence. In the present case, from the evidence led by the prosecution, it cannot be said that conviction was made by the learned Trial Court on the basis of suspicion alone. In fact, it has been established by the prosecution through the evidence of PW1, PW3 and PW5, apart from the evidence of the victim herself that the appellant indeed committed sexual intercourse with the victim, who in fact was a mentally disabled person and also having impaired hearing.

[17]. Thus, upon due consideration of the case in its entirety, I do not find merit in the appeal and accordingly, the same is dismissed.

JUDGE

Comparing Assistant