

GAHC030002712023



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

Case No. : CRL.A(J)/12/2023

Sh. Lianthuama @ Hrangthanthuama
Zokhawthar, Champhai District, Mizoram

VERSUS

State of Mizoram and Anr.
Aizawl:Sh. C.Laltlangpel

Advocate for the Petitioner : Mr. Joseph Lalchhanhima Renthlei (Amicus Curiae)

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

B E F O R E

HON'BLE MRS. JUSTICE MALASRI NANDI
HON'BLE MRS. JUSTICE MARLI VANKUNG

Date of hearing : 19.06.2024.

Date of Judgment : 21.06.2024.

J U D G M E N T & O R D E R (CAV)

(Malasri Nandi, Judge)

1. Heard Mr. Joseph L. Renthlei, learned Amicus Curiae for the appellant. Also heard Mrs. Linda L. Fambawl, learned Public Prosecutor, Mizoram for the State

respondent.

2. This appeal is directed against the Judgment and Order dated 09.08.2018 passed by the learned Addl. District & Sessions Judge, Aizawl Judicial District, Champhai, Mizoram in Sessions Case No. 126/2017 whereby the accused appellant was convicted under Section 376(2)(I) of IPC and sentenced to undergo Rigorous Imprisonment for 20 years and to pay fine of Rs. 5000/- in default, Simple Imprisonment for one month.

3. The brief facts of the case is that the informant who is the brother of the victim lodged an FIR before the Officer-in-Charge of Champhai Police Station stating inter alia that the accused appellant on 02.09.2016 at around 11:00 pm, threatened the victim and committed rape on her in the residence of Mrs. Pari. As the victim is mentally unsound, she did not initially inform them about the issue and thereafter, knowing about the alleged incident, he lodged the FIR. On receipt of the complaint, a case was registered as Champhai PS Case No. 133/2016 u/s 376(2)(I) of IPC and the investigation was initiated.

4. During investigation, the Investigating Officer visited the place of occurrence, recorded the statement of the witnesses and the victim was

forwarded for medical examination. After completion of the investigation charge sheet has been submitted against the accused appellant u/s 376 (2)(I) of IPC before the learned CJM, Champhai. As the offence is exclusively triable by the Court of Sessions, the case was committed accordingly.

5. During trial, charge was framed u/s 376 (2)(I) of IPC which was read over and explained to the accused appellant to which he pleaded not guilty and claimed to be tried.

6. In the course of trial, 6 prosecution witnesses were examined and the victim was examined as court witness. After completion of trial, statement of the appellant was recorded u/s 313 CrPC, wherein the incriminating materials found in the statement of the witnesses were put to him to which he first denied the same. But subsequently, the appellant admitted that he committed rape on the victim. But he wanted to mention that the time of rape alleged was wrong. After hearing the arguments advanced by the learned counsels for the parties, the appellant was convicted as aforesaid. Hence, this appeal.

7. It was urged by learned Amicus Curiae for the appellant that there are lots of contradiction in the evidence of the victim and other witnesses regarding the

alleged incident. There is no eye witness to the incident. PW-3 did not support the case of the prosecution that the victim was sexually abused by the appellant. In a cross examination, PW-3 specifically stated that when he came to the spot, he found both the victim and the appellant were fully dressed. He saw no act of rape. There was subsequent improvement in the evidence of the victim and there is no cogent and consistent evidence to connect the appellant in the case.

8. It is also the submission of learned Amicus Curiae for the appellant that as per FIR, immediately after the incident, the matter has not been informed to the informant and the victim has belatedly implicated the accused and the case is only based on presumption, assumption and conjectures and not based on eye witness or any other material evidence to show that the appellant was involved in the case. The appellant was incorporated as an accused based on the statement recorded under Sections 161 CrPC and 164 CrPC which are contradictory to the complaint.

9. It is further submitted that the victim is mentally retarded as per evidence of the Medical Officer. Though the victim has implicated the accused that he had committed such offence but the other witnesses examined by the prosecution

did not support the evidence of the victim. The Medical Officer who examined the victim was not examined in the case. The Medical Report is totally silent regarding sign of recent sexual intercourse found in the private parts of the victim. As there is no injury in the private parts of the victim, and in the absence of the same, the Trial Court has wrongly convicted appellant and the prosecution has failed to prove its case beyond reasonable doubt which warrants interference in the case by this Court.

10. By referring the judgment of ***Raj Kumar Singh @ Raju @ Batya Vs. State of Rajasthan*** reported in ***(2013) 5 SCC 722***, the learned counsel for the appellant has pointed out that the Hon'ble Supreme Court has held that-

“The law on the issue can be summarized to the effect that statement u/s 313 CrPC is recorded to meet the requirement of the principle of natural justice as it requires that an accused may be given an opportunity to furnish explanation of the incriminating materials which had come against him in the trial. However, his statement cannot be made a basis for his conviction. His answers to the questions put to him u/s 313 CrPC cannot be used to fill up the gaps led by the prosecution witnesses in their depositions. Thus, the statement of the accused is not a substantive piece of evidence and therefore it can be used only for appreciating evidence led by the prosecution. Though it cannot be a substitute for the evidence

of the prosecution An adverse inference can be taken against the accused only if the incriminating materials stood fully established and the accused is not able to furnish any explanation for the same"

11. Another point raised by learned Amicus Curiae for the appellant is that as the victim is mentally retarded, before recording her evidence by the Trial Court some questions should have been put to her to understand whether she was able to give rational answers. In the instant case, that was not done. As such, it cannot be said that the evidence of the victim has been recorded after proper evaluation by the Trial Court. According to learned Amicus Curiae for the appellant, under such score alone, the accused appellant may be acquitted on benefit of doubt.

In support of his submission, the learned Amicus Curiae for the appellant has placed reliance on the following case laws:-

- a) ***(2012) 8 SCC 21 (Rai Sandeep @ Deepu Vs. State (NCT of Delhi).***
- b) ***(2012) 8 SCC 73 (K.Venkateshwarlu Vs. State of Andhra Pradesh).***
- c) ***(2014) 5 SCC 353 (Raj Kumar Vs. State of Madhya Pradesh).***

d) (2019) 13 SCC 289 (Reena Hazarika Vs. State of Assam).

12. Alternatively, learned Amicus Curiae for the appellant has submitted that if this Court does not appreciate his submission on the point of contradictory statement given by the victim and the prosecution witnesses, the accused appellant may be convicted under Section 354 IPC and prayed to reduce the sentence already undergone.

13. Per contra, the learned Public Prosecutor would submit that PW-1, who is the brother of the victim has stated in his evidence that though the victim is a mentally retarded person, but she could understand as to what is good things and what is bad things. It is also submitted that the victim has clearly stated in her evidence recorded before the Trial Court that the accused had committed nuisance by inserting his fingers to the private parts of the victim which falls under Section 375(b) IPC. As such, the Trial Court has rightly convicted the accused appellant under Section 376(2)(I) of IPC which needs no interference by this Court.

14. We have considered the submissions of learned counsels for the parties. We have also perused the Trial Court records and the judgment of the Trial

Court.

15. Before further proceeding with the case, it is apt to consider the evidence of the witnesses.

16. PW-1, who is the informant and brother of the victim. He deposed in his evidence that on 02.09.2016 at around 11:00 pm, his younger sister i.e the victim, who is mentally challenged person, was sexually assaulted by the accused appellant inside the residence of one Lalneihpari at Zokhawthar village. Having heard screaming and shouting for help, Mr. Ngunthanga and his wife who used to stay upstairs of an Assam Type building, intervened in the incident while the accused was sexually assaulted the victim inside the residence of Lalneihpari at downstairs of the said Assam Type Building. Accordingly, he lodged the FIR vide Exhibit P-1. This witness also stated in the FIR that the accused committed rape on her younger sister inside the residence of Lalneihpari. At that time, Lalneihpari was not present in her residence. Accused and the victim were alone in the said house.

In his cross examination, PW-1 replied that though his sister was mentally retarded but the victim has mental capability to differentiate between what is

wrong and right.

17. PW-2 is the person in whose residence the incident occurred. According to her, the accused used to live with her prior to one week of the incident. On the night of 02.09.2016, her younger sister and one of her friends visited her house. At that time, the accused was sleeping on a long chair and was intoxicated. After they had usual conversation with her visitors, it was around 10:00 pm, one of his visitors Lalhmingmawii and her friend decided to go home. As Lalhmingmawii was physically handicapped, she decided to go along with her leaving the present accused and her three years old son in her residence. When he returned back home, it was around 11:00 pm, he saw the accused and Ngungthanga having heated arguments. When she asked the reasons, Ngungthanga told him that he and his wife heard a sound of screaming and cried for help inside her residence. When he tried to enter into her residence, the main door was found bolted from inside. However, he entered her house from another main door and found the victim was lying on the floor and the accused was found sitting nearby. The victim was crying and he took out the victim and gave a lift up to her residence. On the next day, the victim told him what had happened the previous night. As per her statement, the accused caught hold of her, pulled down her pants and committed rape on her.

Thereafter, he informed the matter to the informant, who subsequently lodged the FIR.

In her cross examination, PW-2 replied that when he enquired the matter, whether the accused committed rape on her and then she replied that the accused had committed rape on her.

18. PW-3 is the neighbor of PW-2, who deposed in his evidence that on the date of incident on hearing the sound of a woman crying, he came out from his house and opened the main door of the said house which was kept unlock. He saw the accused holding the victim from behind with his arms and she was weeping and asked him to release her.

In his cross examination PW-3 replied that when he entered into the house of PW-2, he found both of them were fully dressed. He saw no act of rape. He rescued the victim from the clutches of the accused and took her out but he did not enquire as to whether she was sexually abused by the victim.

19. PW-4 and PW-5 are the Clinical Psychologists, who examined the victim to assess the level of her intellectual function. According to PW-5, the test was administered by Gesell drawing test of intelligence and his findings was that the

victim was mentally retarded with the mental age of 6 years with I.Q - 40. As per his investigation, the victim is in the category of moderate retardation.

In his cross examination, PW-5 replied that as the victim is mentally retarded, she would not fully understand the repercussion of her conscience. The victim would understand intercourse to some level. And the victim would not intentionally put herself at the risk of physical harm.

20. PW-6 is the Investigating Officer. He deposed in his evidence that the incident took place on the night of 02.09.2016 and the FIR was lodged on the following day. During investigation, he visited the place of occurrence and examined the complainant, the victim and other witnesses. While examining the victim, he did not state about sexual intercourse on her by the accused. He sent her for recording her statement by the judicial Magistrate. The victim was also forwarded for medical examination and psychological assessment. He collected the medical report and psychological report of the victim. After completion of investigation, he submitted the charge sheet against the accused appellant under Section 376(2)(I) IPC, vide Exhibit P-2.

In the cross examination, he admitted that he did not seize anything from

the accused or the victim.

21. Coming to the evidence of victim, it reveals that she was examined by the Trial Court as court witness. The victim stated in her deposition that on the date of incident she went to the house of her aunt Partei and the appellant was also there and he was drunk on that night. While her aunt Partei went out to drop the children, the appellant switch off the light and made her lie down on the ground. He squeezed both of her breast and took off his pant. He took off her pant also and he inserted his fingers inside her private parts but the appellant did not actually insert his private parts.

The victim was not cross examined by the accused appellant and her cross was declined. There is no reason given in the order sheet of the Trial Court record why the victim was not cross examined by the defence counsel.

22. After going through the evidence of the witnesses, it reveals that there is practically no eye witness to the incident. However, the presence of the appellant in the house of Partei (which is the place of occurrence) is not in dispute. Though there is no Medical Report regarding mental condition of the

victim, however, from the report of PW-4 and PW-5, it reveals that the victim has moderate retardation. PW-5 also stated that the victim understands intercourse in some level and she would not intentionally put herself at risk of physical harm.

23. The case of the appellant is that there is no direct evidence to prove that the appellant had committed rape on the victim. The conviction was solely based on the deposition of the victim herself who was mentally challenged at the relevant time as such, the conviction against the appellant is unsustainable.

24. It has been held that if the statements of other witnesses are ignored, the statement of victim cannot be ignored. In a rape case, the victim is the best witness. In the case of ***State of Maharashtra Vs. Chandra Prakash Kewal Chand Jain*** reported in ***(1990) 1 SCC 550***, it was held as follows:-

“A prosecutrix of a sex offence cannot be put on par with an accomplice. She is in fact a victim of the crime. The Evidence Act nowhere says that her evidence cannot be accepted unless it is corroborated in material particulars. She is undoubtedly a competent witness under Section 118

and her evidence must receive the same weight as is attached to an injured in cases of physical violence. The same degree of care and caution must attach in the evaluation of her evidence and in the case of an injured complainant or witness and no more. What is necessary is that the Court must be alive to and conscious of the fact that it is dealing with the evidence of a person who is interested in the outcome of the charge levelled by her. If the Court keeps this in mind and feels satisfied that it can act on the evidence of the prosecutrix, there is no rule of law or practice incorporated in the Evidence Act similar to illustration (b) of Section 114 which requires it to look for corroboration. If for some reason the court is hesitant to place implicit reliance on the testimony of the prosecutrix it may look for evidence which may lend assurance to her testimony short of corroboration required in the case of an accomplice. The nature of evidence required to lend assurance to the testimony of the prosecutrix must necessarily depend on the facts and circumstances of each case. But if a prosecutrix is an adult and of full understanding, the court is entitled to base a conviction on her evidence unless the same is shown to be infirm and not trustworthy. If the totality of the circumstances appearing on the record of the case disclose that the prosecutrix does not have a strong motive to falsely implicate the person charged, the Court should ordinarily have no hesitation in accepting her evidence. We have, therefore, no doubt in our minds that ordinarily the evidence of a prosecutrix though mentally challenged but does not lack understanding must be accepted. The degree of proof required must not be higher than is expected of an injured witness."

25. Dealing with a somewhat similar case, the Hon'ble Supreme Court in the case of ***State of Maharashtra Vs. Bandu @ Daulat*** reported in **(2018) 11 SCC 163** restored the conviction of the accused under Section 376 IPC and sentenced him to undergo Rigorous Imprisonment for seven years and thereby reverse the judgment of the High Court acquitting the accused.

26. In ***State of Punjab Vs. Gurmit Singh & Others*** reported in **(1996) 2 SCC 384**, the Hon'ble Supreme Court held that –

“The Courts, must while evaluating evidence, remain alive to the fact that in a case of rape, no self-respecting woman would come forward in a court just to make a humiliating statement against her honour such as is involved in the commission of rape on her. In cases involving sexual molestation, supposed considerations which have no material effect on the veracity of the prosecution case or even discrepancies in the statement of the prosecutrix should not, unless the discrepancies are such which are of fatal in nature, be allowed to throw out an otherwise reliable prosecution case. The inherent bashfulness of the females and the tendency to conceal outrage of sexual aggression are factors which the court should not overlook. The testimony of the victim in such cases is vital and unless there are compelling reasons which necessitate looking for corroboration of her statement, the courts should find no difficulty to act on the testimony of a victim of a sexual assault alone to convict an

accused where her testimony inspires confidence and is found to be reliable. Seeking corroboration of a statement before relying upon the same, as a rule, in such cases amounts to adding insult to injury. Why should the evidence of a girl or a woman who complains of rape or sexual molestation, be viewed with doubt, disbelief or suspicion? The Court while appreciating the evidence of a prosecutrix may look for some assurance of her statement to satisfy its judicial conscience, since she is a witness who is interested in the outcome of the charge levelled by her, but there is no requirement of law to insist upon corroboration of her statement to base conviction of an accused....."

27. The objective facts that comes out from the narration of the facts of the case is that the victim was subjected to sexual assault. Considering the fact that the victim was mentally challenge person with low I.Q, question of giving consent by the victim for sex does not arise. The fact that the victim has moderate retardation with low I.Q makes it clear that she could not have consented for a casual sex which confirms that the victim had been sexually abused.

28. Under Section 118 of the Indian Evidence Act, 1872 even a lunatic person is competent to testify. Further, under Section 119 of the Evidence Act, 1872, a

witness who is unable to speak, may give evidence in any other manner in which he/she can make it intelligible as by writing or by sign provided such writing must be written and the sign must be made in the Court and such evidence if given is to be deemed oral evidence.

29. In the case in hand, the evidence of the victim was recorded by the Trial Court. There is no indication by the Trial Court that she did not understand the questions which put to her regarding the incident. Further, in this case, PW-5, the Clinical Psychologist has stated that the victim would understand intercourse in some level and she would not intentionally put herself at risk of physical harm.

30. The victim in this case is a vulnerable person who fell prey to the lust of the appellant who overpowered the victim by taking advantage of the fact that she was alone in the residence of PW-2. Though the Medical Officer, who examined the victim regarding his physical violence was not examined by the Trial Court but the report of the Medical Officer is available in the record which reveals that she was examined by the Medical Officer on the next date i.e.

03.09.2016 and she had given before the Medical Officer about the history of the incident wherein she stated that she was allegedly raped by the appellant at Pari's residence on 02.09.2016. On examination of the victim, the Doctor found that the hymen of the victim was ruptured.

31. The Court is also entitled to presume existence of facts in the course of natural events, human conduct in relation to the facts of this case. The fact that the victim's hymen was ruptured shows that she had been subjected to sexual assault. It is to be noted that the victim had alleged that the appellant had inserted his fingers on her private parts which amounts to commission of rape as per Section 375 (b) IPC which reads as follows:-

“375(b). A man is said to commit “rape” if he inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person....”

32. It is interesting to note that the victim was not cross examined by the defence counsel. The cross examination is a matter of substance not a

procedure. One is required to put one's own version in cross examination of opponent. The effect of non cross examination is that the statement of witness has not been disputed. The effect of not cross examining the witness has been considered by the Hon'ble Supreme Court in ***Bhoju Mandal & Others Vs. Debnath Bhagat & Others*** reported in ***AIR 1963 SC 1906***. The Court repelled a submission on the ground that the same was not put either to the witnesses or suggested before the Trial Court. Party is required to put his version to the witness. If no such questions are put, the Court would presume that the witness account has been accepted as held in ***M/s Chuni Lal Dwarka Nath Vs. Hartford Fire Insurance Company Limited & Others***, reported in ***AIR 1958 Punjab 440***.

33. In the case of ***Bharwada Bhoginbhai Hirjibhai Vs. State of Gujarat*** reported in ***(1983) 3 SCC 217***, wherein atleast twelve reasons were narrated by the Hon'ble Apex Court as to why generally there is no chances of false implication in the case of rape. They are as follows:-

“1) A girl or woman in the tradition-bound non-permissive society of India would be extremely reluctant even to admit that any incident which is likely to reflect on her chastity had ever occurred.

2) *She would be conscious of the danger of being ostracized by the society or being looked down by the society including by her own family members, relatives, friends and neighbours.*

3) *She would have to brave the whole world.*

4) *She would face the risk of losing the love and respect of her own husband and near relatives, and of matrimonial home and happiness being shattered.*

5) *If she is unmarried, she would apprehend that it would be difficult to secure an alliance with a suitable match from a respectable or an acceptable family.*

6) *It would almost inevitably and almost invariably result in mental torture and suffering to herself.*

7) *The fear of being taunted by others will always haunt her.*

8) *She would feel extremely embarrassed in relating the incident to others being overpowered by a feeling of shame on account of the upbringing in a tradition-bound society where by and large sex is taboo.*

9) *The natural inclination would be to avoid giving publicity to the incident*

lest the family name and family honour is brought into controversy.

10) The parents of an unmarried girl as also the husband and members of the husband's family of a married woman, would also more often than not, want to avoid publicity on account of the fear of social stigma on the family name and family honour.

11) The fear of the victim herself being considered to be promiscuous or in some way responsible for the incident regardless of her innocence.

12) The reluctance to face interrogation by the investigating agency, to face the court, to face the cross-examination by counsel for the culprit, and the risk of being disbelieved, acts as a deterrent."

34. In the present case, if the evidence of the prosecution is tested on the touchstone of these contingencies enumerated by the Hon'ble Apex Court, then it becomes clear that the PW-1, the informant is neither concerned with the trial of the rape case against the accused appellant nor he is interested to reflect on her chastity before the public at large.

35. Though in this case, there is no eye witness, the cases of this nature, one cannot expect eye witness. The accused is known person and his presence on

the spot is not in dispute at the relevant time as the appellant used to stay in the house of the PW-2. Since the appellant is a known person, PW-2 was not hesitant to keep the victim in her house alongwith the appellant believing that he has taken care of the victim who is a mentally retarded person. Taking advantage of the loneliness of the victim and the circumstances, the appellant committed the alleged offence. The victim was not cross examined as such, the evidence of the victim was not challenged. Further, the Medical Report clearly proves that the victim was subjected to sexual assault. PW-5 the Clinical Psychologist has stated that the victim was suffering from moderate mental retardation. However, she could speak well but her IQ level is not up to the standard but she is in a position to understand the good and bad thing.

36. This Court independently re-appreciated the entire evidence and found that the appellant has committed the alleged offence. The evidence of the victim elicited during trial inspires confidence. The victim was subjected to sexual assault by the appellant amounting to rape. It is true that there are some irregularities found in the trial of the case, however, which does not go into the root of the case.

37. As the learned Amicus Curiae for the appellant has prayed that some leniency may be shown on the appellant considering the background of the case and the fact that the victim is a mentally retarded person, we are of the view that the sentence of twenty years may be reduced to 10 years. Accordingly, the appellant is sentenced to undergo Rigorous Imprisonment for ten years. The fine imposed by the Trial Court will remain as same. The sentence to undergo Rigorous Imprisonment for twenty years is set aside.

The appeal is disposed of accordingly. The Trial Court Record be sent back.

38. In appreciation of the assistance rendered by Mr. Joseph L. Renthlei, learned Amicus Curiae, he shall be entitled to a remuneration of Rs. 9000/- (Rupees Nine thousand) only which shall be paid by the Mizoram State Legal Services Authority on production of a copy of this order.

JUDGE

JUDGE

Comparing Assistant