

(2013) 05 GAU CK 0005

Gauhati High Court (Aizawl Bench)

Case No: Criminal Appeal No. 13 of 2012

State of Mizoram

APPELLANT

Vs

David Lalthuammawia (Sh.) and
Others

RESPONDENT

Date of Decision: May 24, 2013

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 313
- Penal Code, 1860 (IPC) - Section 376(2)(g)

Citation: (2013) CriLJ 3531 : (2013) 3 GLD 945 : (2013) 3 GLT 420

Hon'ble Judges: C.R. Sharma, J

Bench: Single Bench

Advocate: Lalsawirema, Addl. P.P, for the Appellant; N. Sailo, Amicus Curiae and Ms. Vanhming Liani, for the Respondent

Final Decision: Dismissed

Judgement

C.R. Sarma, J.

This appeal is directed against the judgment and order, dated 1.1.2011, passed by the learned Addl. Sessions Judge, Aizawl Judicial District, Aizawl (Mizoram) in CrI. Tr. Case No. 957/2008. By the impugned judgment and order, the learned Sessions Judge acquitted the respondents, who faced trial for the offence u/s 376(2)(g) IPC. Aggrieved by the said judgment and order of acquittal, the State of Mizoram has preferred this appeal.

2. I have heard Mr. Lalsawirema, learned Addl. Public Prosecutor, Mizoram, appearing for the State/appellant and Mr. N. Sailo, learned senior counsel, appearing as amicus curiae, assisted by Ms. Vanhming Liani learned counsel, appearing for the respondents.

3. The prosecution case, in brief, as may be required for disposal of this appeal, is as follows:

The accused Sh. David Lalthuammawia was a good friend of the victim girl. On 10.7.2008, at about 7.00/8.00 p.m., the victim girl, who was aged about 14 (fourteen) years met one of the accused persons, Sh. B. Lalruatfela (Totoa), while she was going to buy Tiranga from a shop. Another accused, namely Sh. Ramnghin-glova, who was also present there, asked her to follow them to the nearby jungle. Accordingly, she followed them and when they arrived near the house of Sh. David Lalthuammawia, the said two accused persons pull her down from the steps and they reached near the house of the brother of accused, Sh. Micky Zohmingliana and found Sh. Micky Zohmingliana and her friend Sh. David Lalthuammawia there. The said accused persons drank liquor and Sh. David Lalthuammawia left the place after having sexual intercourse with her. Thereafter, the other accused persons raped her, one after another and warned her not to tell anyone. While warning her in the said way, accused Sh. Micky Zohmingliana slapped her. As it was late night she did not dare to go home alone and, followed the accused persons to the house of the brother of one of the accused persons and they spent the night therein. On the next day, on being asked by her aunt, Ms. Pi Lai about the incident, she had disclosed the same to her. Accordingly, other members of the family came to know about the incident. The mother of the victim (P.W.-1), on the next day i.e. on 11.7.2008, lodged an FIR with the police. The police registered a case u/s 376(2)(g) IPC and got the victim examined by Medical Officers (P.Ws. 5 and 7).

4. During the course of investigation, police arrested the accused persons, examined the witnesses and submitted charge sheet u/s 376(2)(g) IPC. The learned Sessions Judge framed charges against the accused persons, u/s 376(2)(g) IPC. The charge was read over and explained to the accused persons, to which they pleaded not guilty and claimed to be tried.

5. The prosecution examined as many as 7 (seven) witnesses including the Medical Officers (P.Ws. 5 and 7) and the Investigating Officer (P.W. 6). At the close of the evidence for the prosecution, the accused persons were examined u/s 313 Cr.P.C. They denied the allegations, brought against them and adduced 4 (four) defence witnesses. The accused persons examined themselves as defence witnesses. Considering the evidence on record, the learned Sessions Judge came to the findings that the prosecution failed to prove the guilt of the accused persons, beyond all reasonable doubt. Therefore, the learned Sessions Judge, granting benefit of doubt to the accused persons, acquitted them. Hence, this appeal.

6. Mr. Lalsawirema, learned Addl. Public Prosecutor, Mizoram, taking this Court through the evidence, on record, and the findings arrived at by the learned Sessions Judge, has submitted that the learned Sessions Judge failed to appreciate the evidence, on record, and committed error by recording the acquittal of the accused persons. The learned Addl. Public Prosecutor, referring to the evidence of the prosecutrix as well as the medical evidence, has submitted that the prosecutrix clearly stated that she was raped by the appellants, who warned her not to disclose

the matter. The learned Addl. Public Prosecutor also submitted that hearing cry of the victim the neighbouring persons i.e. P.W. 3 and others arrived at the place of occurrence and found her with some boys. Pointing to the evidence of P.W. 4, in whose house the victim girl had spent the night with one of the accused persons, after the incident, the learned Addl. Public Prosecutor has submitted that the evidence of P.Ws. 3 and 4 supports the prosecution version that she was in the company of the accused persons and that they had committed rape on her. With reference to the evidence given by P.W. 7, who examined the victim girl, the learned Addl. Public Prosecutor has submitted that the Medical Officer found rupture in the hymen and laceration around the vaginal opening of the victim. In view of the said medical evidence, it is submitted that the injuries found in the private part of the victim sufficiently suggest that she was subjected to sexual assault. It is also submitted that the learned trial Judge failed to appreciate the evidence regarding the date of birth of the prosecutrix and committed error by refusing to rely on the birth certificate (Ext. P-2).

7. In view of the above submission, the learned Addl. Public Prosecutor has argued that, considering the entire facts and circumstances of the case, and the birth certificate (Ext. P-2), there is no room for doubt that the victim was a minor at the relevant time and that the appellants, had committed the offence of rape. Therefore, the learned Addl. Public Prosecutor has prayed for reversing the judgment of acquittal and pass necessary order as may be deemed fit and proper.

8. In support of his contention, the learned Addl. Public Prosecutor has relied on the case of Lilu @ Rajesh & Amp & Anr. Vs. State of Haryana: Crl. Appeal No. 1226/2011, disposed of on 11.4.2013 by the Supreme Court.

9. Controverting the said argument, advanced by the learned Addl. Public Prosecutor, Mr. N. Sailo, learned amicus curiae, referring to the evidence, on record, has submitted that there is no convincing and substantial evidence, in support of the solitary statement, made by the prosecutrix that the appellants had committed sexual intercourse with her. Referring to medical evidence, relied on by the prosecution, the learned senior counsel has submitted that as per the medical evidence, the rupture in the hymen of the victim was an old one and the age of the laceration could not be determined. As the victim was medically examined on the following day of the occurrence i.e. on 11.7.2008, in view of the said medical evidence, it is argued by the learned senior counsel that the said old tear found in the hymen and the laceration found in the vaginal area, do not lead to the conclusion that those injuries were caused on the previous day, i.e. on the date of the alleged incident. Therefore, it is submitted that the said injuries, found in the private part of the victim, do not indicate that she was sexually assaulted on 10.7.2008. The learned senior counsel, referring to the evidence of P.Ws. 3 and 4, has also submitted that though P.W.-3 had met the victim in the place of occurrence in the company of some boys, she did not tell P.W. 3 anything about the incident.

That apart, it is submitted, as the victim girl, along with one of the accused persons, after the alleged incident, had spent the night in the house of P.W. 4, she got sufficient opportunity to disclose about the incident and lodge complaint against the accused person, but she did not utilize the said opportunities. The learned senior counsel has submitted that the said conduct of the victim raises doubt about the veracity of her testimony.

10. Referring to the birth certificate (Ext. P-2), the learned senior counsel has submitted that in the said birth certificate, the name of the mother of the victim girl is found to be different and that, the said birth certificate, being issued on 21.7.2008, i.e. after the incident, is not reliable. Therefore, it is submitted that the learned trial Judge rightly suspected the genuineness of the said certificate and refused to rely on it. The learned senior counsel, supporting the impugned judgment and order of acquittal, has submitted that the learned trial Judge, after properly appreciating the evidence, on record, has rightly come to the conclusion that the prosecution failed to prove the charge, beyond all reasonable doubt and as such there is no scope to interfere with the said order of acquittal. It is also submitted that the view taken by the trial Judge being a possible one need not be disturbed, in as much as the same is in favour of the accused persons.

In support of his contention, the learned senior counsel has relied on the following decisions:--

- (1) [Vimal Suresh Kamble Vs. Chaluverapinake Apal S.P. and Another](#) ,
- (2) [Chandrappa and Others Vs. State of Karnataka](#) ,
- (3) [Narbada Devi Gupta Vs. Birendra Kumar Jaiswal and Another](#), and
- (4) [Alamelu and Another Vs. State represented by Inspector of Police](#) ,

11. Having heard the learned counsel, appearing for both the parties, I have carefully perused the evidence on record. Considering the prosecution story as well as the defence version, it is found that the victim girl was in the company of the appellant. The appellants had taken liquor and drugs. According to the victim girl (P.W. 2) her boy friend Sh. David Lalthuammawia had left the place- of occurrence after having sex with her. From her evidence, it appears that she had no objection in having sex with her said boy friend. According to the victim, after her said boy friend had left, the other accused persons i.e. the appellants wanted to have sex with her and on being refused by her, they committed rape on her, one after another. She stated that Sh. Micky Zohmingliana slapped and warned her not to disclose the matter to anybody. She further stated that, as it was already late at night, out of fear, she had followed them to the house of the brother of one of the accused persons and stayed there till the next morning. She further stated that her uncle Sh Pu Chuanga came to know about the incident from the persons, who had assembled in the place of occurrence, after hearing her cry and that, on being asked by her

aunt, Pi Lai, she had disclosed everything on the next day, on which date the FIR was lodged against the accused persons. In her cross-examination, the victim stated that she had love affairs with Sh. David Lalthuammawia and that she did not see accused namely Sh. B. Lalruatfela. She also stated that Sh. Micky Zohmingliana had pull her down from the steps. She clearly stated that she had followed the accused persons towards the jungle and that she did not tell anything to Micky's elder brother, his wife and other members of the house, whom she met in front of the house, while going with the accused persons. She further stated that all of them had taken liquor and after taking liquor, she had sex with David. She further stated that on being forced by the accused persons she had cried, and, hearing her cry, some persons had arrived there, but she did not remember those persons. She also stated that she had not made any complaint against any persons regarding the rape.

12. From her said evidence, it appears that after David had left the place of occurrence, the other accused persons committed rape on her and even after the said incident she had followed the accused persons towards the house of brother of one of the accused persons, where she spent the night there. P.W. 3 stated that, hearing cry of a female person, she, along with Mr. Dawngtea and two other persons, rushed to the place of occurrence and found some boys and one girl and, on their arrival, though the girl had requested Mr. Dawngtea to give her a lift to her residence, Mr. Dawngtea had declined to do so. From her evidence, it is found that though the victim girl had met the P.W.-3 and other persons, in the place of occurrence, immediately after the incident, she did not disclose anything against the accused persons.

13. Though, the victim girl stated that she was warned by one of the accused persons, asking her not to disclose anything, considering the entire facts and circumstances, and in view of arrival of P.W. 3 and 3 (three) other persons, there was, no sufficient reason for the victim not to disclose about the incident, if any, to P.W. 3 and other persons. From the evidence of P.W. 3 it is found that, even after her arrival along with three other persons at the said place, the victim stayed back. She also stated that she remained in the company of the accused persons and spent the night in the house of one brother of one of the accused persons. In the house of the brother of one of the accused persons, where she spent the night, she got sufficient opportunity to disclose about the incident, but she remained silent. Rather, she slept on the floor with one of the accused persons. This conduct on her part also raises sufficient doubt about the veracity of her evidence.

14. P.W. 4, in whose house the victim girl had spent the night alongwith one of the accused persons, stated that both were sleeping on the floor peacefully and that they left for their home on the next morning. This witness also stated that the victim did not make any complaint against the accused persons.

15. The mother of the victim girl (P.W.-1), who lodged FIR, stated that she came to know about the incident on the next day P.Ws. 5, 6 and 7 being the Investigating

Officer and the Medical Officers are official witnesses. The said witnesses had no personal knowledge about the incident.

16. In the case of Lilu @ Rajesh (supra), the Supreme Court observed that even if, the victim is found to be habituated to sexual intercourse, she cannot be held to be a woman of "easy virtue" or a woman of "loose moral character". The Supreme Court also "observed that such a woman has right to protect her dignity and cannot be subjected to rape only for the reason that she is a woman of "easy virtue" or "loose moral character" and her evidence cannot be discarded on that ground alone rather the evidence is to be cautiously appreciated. It has also been observed by the Supreme Court that sole statement of the prosecutrix is enough to record a conviction, if a reading of her evidence in its totality is found to be worth reliance.

17. In the case of Vimal Suresh Kamble (supra), the Supreme Court observed that if the conduct of the prosecutrix, after the incident does not inspire confidence, it is not safe to rely on her evidence.

18. In the case of Chandrappa and others (supra) the Supreme Court laid down the scope and power of the appellate court to re-appreciate, review, re consider of the evidence. In the said case, the Supreme Court, referring to the observation made in the case of [Bhagwan Singh and Others Vs. State of Madhya Pradesh](#), observed that the golden thread which runs through the web of administration of justice in a criminal case is that if two view are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. It is settled position of law that the paramount consideration of the court is to ensure that no miscarriage of justice is done. It has also been observed by the Supreme Court that an order of acquittal should not be interfered with, by the appellate court, where the judgment of the trial court is based on evidence and the view taken is reasonable and plausible.

19. In the case of Alamelu and another (supra), the Supreme Court observed that admissibility of a document would be of not much evidentiary value to prove the age of the girl in absence of material on the basis of which the age was recorded and that the date of birth mentioned in the transfer certificate would have no evidentiary value unless the person, who made the entry or who gave the date is examined.

20. In the case of Narbada Devi Gupta (supra), the Supreme Court observed that mere production and marking of a document, as exhibit by the court, cannot be held to be a due proof of its contents. Its execution has to be proved by admissible evidence, i.e. by the evidence of those persons, who can vouchsafe for the truth of the facts in issue.

21. Law is well settled that the evidence of prosecutrix, if found to be reliable and trustworthy, can be basis for recording a conviction. In view of the above principles

laid down by the Supreme Court and the evidence on record it is to be examined, if the testimony of the prosecutrix i.e. P.W. 2 is reliable.

22. From the evidence of Medical Officers, it appears that the vaginal swab of the victim was taken, but no report in respect of the vaginal swab was received. As the prosecution has claimed that victim was raped by 4 (four) persons and the FIR was also lodged on the next day, the Investigating Agency could have collected the under-garments of the victim and the accused persons and send those for FSL for examination, to unearth the truth. In the present case, no evidence regarding presence of spermatozoon or any foreign object in the undergarments or private parts of the victim has been adduced. Failure to adduce such material evidence raises doubt about the veracity of the prosecution case.

23. From the above discussed evidence, it is found that the victim had spent the night in the company of one of the accused persons and she, despite getting sufficient opportunity, did not disclose about the incident to the persons, who appeared in the place of occurrence, immediately after the alleged incident. Even she did not disclose the matter to the members of the family in whose house she had spent the night, after the incident.

24. As the victim was minor, aged about 14 years, in the event of rape by 4 (four) persons, some marks of violence or injury would have existed in her body, garments and private part, but no such injury or mark of violence was noticed by the Medical Officer. The old tear found in the hymen and the laceration, the age of which could not be determined, do not lead to the conclusion that the victim was subjected to sexual assault by four persons. Therefore, absence of any mark or sign of violence creates doubt about the truth of her evidence.

25. With regard to the birth certificate (Ext. P-2), it is found that though the victim girl was born on 19.3.1994, the said certificate was issued only on 21.7.2008, i.e. after the occurrence. In the said certificate, the name of the mother of the victim has not been mentioned. The person, whose name was mentioned, in the said birth certificate, as the mother of the victim, is not her actual mother. That apart, the source i.e. the information, on the basis of which the said entry was made, has not been proved. In view of the above, I am of the considered opinion that the learned trial Judge committed no error by refusing to rely on the said birth certificate, which was issued after the alleged occurrence.

26. In view of what has been discussed above, considering the facts and circumstances of the case as well as the conduct of the victim girl as indicated above, in the absence of any supporting evidence or corroboration, it appears that the statement of the victim is not trustworthy. Therefore I do not find it safe to rely on her evidence to base the conviction.

27. In view of the above principles laid down by the Supreme Court and considering the entire evidence, on record, as well as the attending facts and circumstances of

the case, I am not inclined to hold that that the view taken by the learned trial Judge is illegal, improper and contrary to law. The view taken by the learned Sessions Judge is found to be possible and plausible. In my considered opinion, the view taken by the learned Sessions Judge cannot be held to be impossible and perverse one. Therefore, I am not inclined to hold that the learned Sessions Judge committed any illegality or error by passing the impugned judgment and order of acquittal. Therefore, I have no hesitation in concluding that the prosecution failed to establish the charge, brought against the appellants, beyond all reasonable doubt.

28. In view of the above discussion, I find no merit in this appeal. Accordingly the appeal is dismissed and the impugned judgment and order are upheld and affirmed.

29. Before I part with record, I acknowledge, with appreciation, the assistance rendered by Mr. N. Sailo, learned senior counsel as Amicus Curiae. It is ordered that an amount of Rs. 10,000/- (Rupees ten thousand) be paid to the learned Amicus Curiae as his remuneration from the fund of the State Legal Services Authority. Return the LCR.