

(2011) 08 GAU CK 0030

Gauhati High Court (Aizawl Bench)**Case No:** Criminal Appeal No. 1 of 2011

Sultan Ahmed (Md.)

APPELLANT

Vs

State of Mizoram

RESPONDENT

Date of Decision: Aug. 4, 2011**Acts Referred:**

- Penal Code, 1860 - Section 302, 376, 384
- Penal Code, 1860 (IPC) - Section 302, 376, 384

Citation: (2012) 1 GLT 203**Hon'ble Judges:** Amitava Roy, J and B.D.Agarwal, J**Bench:** Division Bench**Advocate:** Mr. A.R. Malhotra, Amicus Curie., Advocate appeared for the Respondent. Mr. S.N. Meitei., Advocates appearing for Parties

Judgement

Amitava Roy, J.

The present appeal witnesses a challenge to the judgment and order dated 29.12.08 passed by the learned Addl. District and Sessions Judge, Aizawl Judicial District, Aizawl convicting the accused appellant under Sections 302/376/384 of the Indian Penal Code (hereinafter referred to as "IPC") and sentencing him to suffer imprisonment for life and also rigorous imprisonment for 7 years and 2 years respectively for these offences. The sentences, however, have been ordered to run concurrently.

2. We have heard Mr. AR Malhotra, learned Amicus Curiae for the appellant and Mr. N. Sailo, learned Addl. Advocate General, Mizoram for the State.

3. On an FIR lodged by one Lalthanzauva on 21.12.2004 with the Officer in Charge, Aizawl Police Station informing that in the evening of that day, he along with her elder sister Dr Lalthanpuui having found the door of the house of their grandmother, Rothangkhum, aged about 76 years, ajar went inside and found her lying dead on her bed. Having noticed some injuries on her body they sensed some foul

play and therefore, solicited action,

4. On the basis of the FIR, Aizawl Police Station Case No. 764/04 under Sections 302/376/384/449 was registered and on completion of the investigation, charge sheet was laid against the accused appellant. He thereafter was charged by the learned trial court under Sections 302/376/384/449 IPC. The accused appellant having denied the charge, trial followed. At the trial, the prosecution examined as many as 15 witnesses including the Doctor who had performed the post mortem examination of the deceased and the Investigating Officer. The witnesses, who proved reports on pathological and forensic tests, were also examined in support of the charge. On the completion of the evidence of the prosecution witnesses, the accused appellant was examined under Section 313 Cr.P.C. In course of investigation, according to the prosecution, his confessional statement had been recorded. The accused appellant, while denying the charge as well as the incriminating materials laid before him, also retracted from the confession contending that he had been tortured to make the same. The accused appellant also examined himself along with other four witnesses in his defence. The learned trial court, however, on the basis of the evidence on record, convicted and sentenced the accused appellant as above.

5. The learned Amicus Curiae has argued that the purported confessional statement is visibly not in compliance with the mandatory requirements of Section 164 Cr.P.C. and in absence of any eye witnesses of any alleged incident, the conviction of the accused appellant is unsustainable in law. He pleaded in particular that not only the accused appellant had not been accorded sufficient time to reflect, no memorandum, as compulsorily required under Section 164(4) of the Cr.P.C. having been recorded, the so called confessional statement is nonest in the eye of law. Drawing the attention to the impugned judgment, Mr. Malhotra, has urged that though the learned trial court convicted the accused appellant by relying on the confessional statement the oral testimony of PW1, PW 2, PW 10, PW 11, PW 12, PW 13, PW 15 and PW 16 as well as the documents proved by them, it omitted to confront him with all incriminating materials appearing against him but acted upon the same. On this aspect of the failure of the learned trial court to put all the incriminating circumstances to the accused appellant, the learned Amicus Curiae has urged that such lapse has vitiated the impugned judgment and order more particularly in the background of the earlier decision rendered in the Criminal Reference No.2/2006, rendered by this court on 27.2.2007. As in spite of the clear direction contained in this order passed by this court, the learned trial court failed to act in compliance with the requirement under Section 313 of the Cr.P.C. the impugned judgment and order is liable to be set aside on that count alone, he contended. The learned Amicus Curiae emphasised that not only there subsists a confusion with regard to the actual date of death of the deceased there being no evidence whatsoever in support of the charge of rape and extortion, the conviction of the accused appellant on these counts also is clearly illegal. Mr. Malhotra, to

buttress his argument, has placed a decision of this court in 2009 (3) GIT 899 : Sarjan Bora Vs. State of Assam.

The learned Addl, Advocate General has sought to save the confessional statement by pleading that the memorandum as contemplated under Section 164 (4) Cr.PC. had, in fact, been recorded by the learned Magistrate, and thus the mere omission on his part to sign the same, does not render the whole exercise null and void. As the learned Magistrate has otherwise complied with the provision of Section 164 (4) of the Cr.P.C. with perfection, the confessional statement, in the facts and circumstances of the case, ought not to be ignored, he insisted. While fairly admitting that the learned trial Court ought to have laid before the accused appellant all the incriminating circumstances appearing against him in evidence, Mr. Sailo, has urged upon this court, if deemed fit and proper, to remand the matter for a fresh examination of the accused appellant under Section 313 Cr.P.C. He however, submitted in the alternative that even if the other materials on record are excluded from consideration, his conviction can be based on his confessional statement alone.

6. Before analyzing the arguments advanced, it would be apt to very briefly sum up the evidence on record.

7. Admittedly, there is no eye witness to the incident. P W 1, Lalthanzuala, is the author of the FIR which he proved as Ext. P1 with his signature as Ext. P2. He proved the seizure certain articles from the place of occurrence as well as the collection of the vaginal smear of the deceased.

8. PW 2, R. Rosiama, is also a witness of the seizure of an apple and a plastic cup from the place of occurrence. PW 3, Lalthakima, is the witness to the inquest made on the dead body. PW 4, Sanglura, is also a witness of the seizure as well as the inquest. He also stated about the collection of the vaginal smear by the investigating agency as well as the blood sample and the teeth impression of the accused appellant.

The evidence of PW 5 is K Lalremruati, PW 6 is C. Zosangliana, PW 7 is Upa Hmingthangsanga Pachuau and PW 8 Thangkimi is of no significance visavis the charge.

9. PW 9 is Dr. Lalthanpuui who described the details of the injuries noticed by her on the dead body. The evidence of Doctor, Lalhlupuii PW10 is also in identical lines.

10. P W11, Dr Lalrozama, who had performed the post mortem examination of the dead body, opined that the cause of death was due to asphyxia as a result of smothering.

11. Dr. Zohmingthanga, PW 12, deposed that the vaginal smear collected from the dead body on examination was found to contain spermatozoa. He proved the report as ExtP4 and his signature, Ext. P4(a).

12. PW 13 V. Lalduhzuala is the learned Magistrate who had recorded the confessional statement. He proved the forms as Ext.5 and 6, and Ext.6(a), his signature. He also proved the statements of the accusedappellant, Ext. P7,8 & 9 with Ext.P9(b) as his signature. He stated that he complied with all the requirements necessary under Section 164 Cr.P.C while recording the confessional statement of the accusedappellant.

13. PW 14,T. Lalropuia, Asstt. Director, FSL deposed that the chance finger print collected from the place of occurrence had matched with that of the accused appellant.

14. PW15 Lalchia, LO. narrated the steps taken by him in course of the investigation resulting in the submission of the charge sheet against the accused appellant.

15. The accused appellant examined himself as well as four witnesses. The common feature of their testimony is that on the date of occurrence i.e., on 21.12.04, the accused appellant was along with DW 1, Abdul Kalam, DW2, Islam Uddin and D W 3, Altab Singh, The father of the accused appellant, DW4, Abdul Goni certified him to be a person of impeccable character. The accused appellant in his testimony denied the charge and deposed that he had confessed for being tortured by the police. In his deposition, he stated that in the month of December, 2004, he had done painting and cement works in the house of the deceased for about 15 days.

16. To start with, we do not feel persuaded to accept the confessional statement as recorded by PW 13, V. Lalduhzuala. It is no longer res integra that the provisions of Section 164 Cr.P.C. are mandatory in nature so much so that any departure there from would vitiate the process of recording of confessional statement Admittedly, though the statements of the accused appellant have been recorded in the form prescribed and the memorandum modelled by Section 164 (4) Cr.P.C. has been written by the learned recording Magistrate in his hand, he did not sign beneath the same as statutorily required. Though the entries in the form interalia mentioned that the accused appellant was arrested on 21.12.04 and was lodged in Aizawl Police Station and had been produced from the central jail on 1.3.05 for offering his confessional statement, no discernable effort has been made by the recording learned Magistrate to ascertain from the accused appellant as to whether he was out to make the statement due to any force, coercion or any undue influence exerted by the police.

17. On a scrutiny of the trial court's record, it appears that the accused appellant was arrested on 21.12.04 and was sent to judicial custody on 28.12.04. On the prayer of the investigating agency, he was remanded to police custody for 48 hours from 25.2.05 and was thereafter sent to judicial custody on 28.2.05, before being produced before the learned Magistrate for recording his confessional statement on the next day i.e., on 1.3.05. In our assessment on a reading of the confessional statement, the learned Judicial Magistrate had failed to appreciate, in letter and

spirit, the requirements of law to be adhered to for the purpose of recording such statement. There is a catena of decisions to the effect that the requirements prescribed under Section 164 of the Cr.P.C. should be stringently adhered to and any infraction thereof would be at the pain of invalidation of the exercise undertaken.

18. In view of above, we are of the considered opinion that the statement of the accused appellant recorded as a confessional statement is inadmissible in law and ought to be excluded completely for determining as to whether the charge levelled against him had been proved or not.

19. Admittedly, none of the other test reports relating to finger print as well as teeth impression of the accused appellant has been put to him in course of examination under Section 313 Cr.P.C. so as to enable him to submit an explanation thereto. This omission, more particularly, in the teeth of decision of this court in Criminal Reference No.2/06 referred to hereinabove is fatal for the prosecution. This, in any view of the matter, has seriously prejudiced the accused appellant and, thus, cannot be taken note of as evidence in support of the charge against him.

20. In the totality of the circumstances narrated hereinabove, we are constrained to conclude that the prosecution has failed to prove the charge against the accused appellant. Having regard the fact that the accused appellant is in jail for over last six years as on date, we are not inclined to remand the matter to the learned trial court as suggested. Accordingly, the impugned judgment and order is set aside and the accused appellant is set at liberty forthwith. Registry would take necessary steps for his release at the earliest.

21. Before, we part, we wish to record our deep appreciation for the assistance rendered by Mr. AR Malhotra., learned Amicus Curiae, who at a very short notice, magnanimously responded to the task assigned to him. As a token of appreciation for me assistance rendered, we hereby order payment of an amount of Rs. 5,000/ (Rupees five thousand) only to him. The payment would be made early by the State of Mizoram.

22. The appeal is allowed.