
(2016) 6 GauLJ 96 : (2016) 6 GauLR 20
GAUHATI HIGH COURT (AIZAWL BENCH)

Case No: Criminal Appeal No. 29 of 2015

Shri Vanlalnghaka

APPELLANT

Vs

State of Mizoram

RESPONDENT

Date of Decision: June 22, 2016

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) - Section 211#Penal Code, 1860 (IPC) - Section 376(1)

Citation: (2016) 6 GauLJ 96 : (2016) 6 GauLR 20

Hon'ble Judges: Michael Zothankhuma, J.

Bench: Single Bench

Advocate: Mrs. Linda L. Fambawl, Addl. Public Prosecutor, for the Respondent; Mr. J.C. Lalnunsanga, Ms. P. Lalremruati, Ms. C. Lalthanpuui and Mr. Jonathan Lalrintluanga, Advocates, for the Appellant

Final Decision: Disposed Off

Judgement

Michael Zothankhuma, J.(Oral) - Heard Mr. J.C. Lalnunsanga, counsel for the appellant as well as Mrs. Linda L. Fambawl, learned Addl.

Public Prosecutor.

2. The present appeal has been filed against the Judgment & Order dated 12.6.2015 passed by the Additional Sessions Judge, Aizawl in Session

Case No. 17 of 2014 under Section 376(1) IPC, by which the appellant has been convicted and sentenced to undergo R.I for 7 (seven) years and

to pay a fine of Rs. 1,000/-, in default, S.I for another 10 (ten) days.

3. The prosecution case in brief is that on 12.11.2013, the prosecutrix lodged an FIR to the effect that on the night of 11.11.2013 at around 8:00

p.m., the appellant had taken her to Mualvum Champhai and forcibly raped her in his vehicle.

4. The appellant's counsel submits that the appellant could not have been convicted under section 376(1) IPC in view of the fact that at the time of

framing of charge, the appellant had been charged with sexually assaulting the prosecutrix. The appellant's counsel thus submits that section 376(1)

IPC is not the applicable provision for punishing a person for committing sexual assault.

5. The appellant's counsel also submits that there is contradiction in the colour of the under pant worn by the prosecutrix at the time of the incident.

He submits that while the prosecutrix and the seizure witnesses have mentioned that the underpant worn by the prosecutrix was red in colour, the

Doctor's report is to the effect that the underpant was black in colour. The appellant's counsel also submits that as per the evidence of the Doctor,

there was no injury on the body of prosecutrix and no spermatozoa was seen during the examination of the prosecutrix. The appellant's counsel

also submits that the prosecutrix being a divorcee, was habituated to sex. He therefore, submits that the appellant could not have been convicted

for rape, as no rape was committed by the appellant.

6. Mrs. Linda L. Fambawl, learned Addl. Public Prosecutor submits that there has been typographical error in the charge framed against the

appellant, as the words ""sexually assaulted"" appearing in the charge framed against the appellant should be read as ""rape"". The Addl. Public

Prosecutor submits that a perusal of the evidence and the records of the case shows that the appellant had raped the prosecutrix and the mistake

committed by the Trial Courts in not recording the word ""rape"" does not mean that rape was not committed. The Addl. Public Prosecutor submits

that unintentional discrepancies and errors made by the Trial Court cannot be constituted to mean that rape was not committed by the appellant.

7. I have heard the learned counsels for the parties.

8. There is no eye witness to the incident. The evidence of the prosecutrix has been made the basis of the conviction of the appellant. The evidence

of the prosecutrix is reproduced below :-

I do not know the accused Vanlalngkhaka prior to the incident. I engaged myself in the business of herbal cosmetics and medicine and travelled to

different places such as Chawngte, Tlabung, Khawzawl etc. I do not a specific time for such travel. I was born on 9.8.1992.

I do not remember the exact date but it was around the general State Assembly Election I have gone to Champhai from Khawzawl in connection

with my business. One friend namely Labawihi was with me but she was travelling for election campaign. I had gone to Champhai to return back at

night (Langin). Myself and my said friend were both making plans to return together by the same vehicle in the evening but we missed the said

vehicle which was also engaged in election campaign. The said vehicle left at around 3:00 P.M. whereas they told us that they leave by 4:00 P.M.

that is why we missed the vehicle. My said friend then asked me to go with her to meet her boyfriend. So we made her boyfriend around 7:00

P.M. the boyfriend of my said friend told me that I should give sometime to them alone. As I did not know where to go I thought of living behind

my friend and waited for vehicle to go back to my village. At that time I stood infront of a Sumo counter at Champhai. After I stood there for quite

sometime the accused drove passed in his Taxi. While I stood infront of the Sumo Counter no other vehicle passed by no other vehicles were

parked nearby. When the accused drove passed, he stopped his Taxi and asked where I was going by saying ""Mami khawiahnge I kal dawn"" to

which I stated that I am waiting for a Sumo to go to Khawzawl to which he stated that at such time I would not find the Sumo and he suggested me

a place from where I could find transportation back home. So I asked him to take me to the said place for Rs. 100/- as Taxi fare as he accepted I

boarded his Taxi. However, as he began to drive in a direction different from where he described earlier I asked him where he was heading to

which he stated that he was taking a short cut route. So the accused drove his Taxi towards Mualbuhvum. He stopped his vehicle below

Muallbuhvum on the road side and inside the taxi and tried to sexually assault me and said ""Tlan chhuah I tum chuan ka that ang che"" meaning if

you try to escape I will kill you. I saw one vehicle passing by. At that time I made an excuse to the accused that I wanted to pass urine and went

outside the vehicle. I shouted but the persons in the vehicle which passed by did not hear me. By that time the vehicle had already moved towards

the hill top whereas the taxi was below the hill (Tlang pawng thlang). At that time the accused came out and pull me inside the taxi, he reversed his

taxi and took me at a farther distance which is not known to me. At that time he once again said he was going to have sexual intercourse with me. I

cannot recollect everything what was said by the accused but at that time I was very scared and I was severing. Ultimately the accused sexually

assaulted me inside the taxi by reclining the seat. While he committed the act upon me I did not should but I was crying. Au vak vak mah ila tumah

an awm chuang lo a, ka hlau lutuk a ka dawh tawp (meaning even if I shouted there was no one around and I simple submitted myself as I was

very scared) Thereafter the accused took me inside Champhai town and I saw some three or four autorickshaw and I got down at the said place. I

also asked the accused for his mobile phone number and he gave it to me. I asked the auto driver how to go to Kahrawt veng Champhai and I

also asked them to use their mobile phone. At that time I made a phone call to my friend Labawihi but I could not tell her the place where I was so

the auto driver spoke to my said friend I waited my friend at the said place and I was picked up by Labawihi's brother in law. Mapuia (brother in

law of Labawihi) is the first person I informed about the incident. I told him that I wanted to lodge FIR. I spent the night in the house of Mapuia

with Labawihi. On the next day, after morning meal I lodged FIR to Champhai P.S. My verbal information reduced into writing. I was taken to the

Hospital after I lodged the FIR. The doctor who examined me did not ask me many question. The Police recorded my statement. The Police

seized my underpant and a small piece of cloth which I had used to wipe my private part. After the incident, the accused made me wash myself

and it was thereafter that I wiped my private part with the said cloth.

9. Section 211 Cr.P.C. requires that every charge under the Cr.P.C shall state the offence with which the accused is charged and if the law which

creates the offence gives it any specific name, the offence may be described under the charge by that name only. In the present case, the

punishment mentioned in the charge is Section 376 (1) IPC. The same is punishment for rape and not for sexual assault. The charge framed against

the appellant does not show that he has violated any provisions regarding rape. The error in mentioning "sexual assault" instead of "rape" does not

amount to giving sufficient notice to the appellant to the manner in which he has been charged, as required under Section 213 Cr.P.C. However,

the records of the case do not show that the appellant has been misled by the error or omission in not mentioning the word "rape" and by instead

mentioning the word "sexual assault" in the charge framed against the appellant. The evidence of the prosecutrix is also to the effect that she was

sexually assaulted. However, a reading of the entire evidence indicates that the prosecutrix wanted to state that rape was committed. However,

recording the words "sexually assaulted" seems to suggest an error has occurred at the time of recording the prosecutrix evidence.

10. On perusal of the charge framed against the accused appellant, I find that the appellant has been charged with sexual assault and not rape. In

view of the above, I am of the view that the appellant could not have been convicted of rape as no charge for rape has been made out against the

accused at the time of framing of charge. However, error made in the charge framed against the accused and the other evidences adduced implies

that rape has been committed by the appellant.

11. At this stage, Mr. J.C. Lalnunsanga, counsel for the appellant and Mrs. Linda L. Fambawl, Addl. Public Prosecutor submits that the case may

be remanded back for denovo trial after a fresh charge is framed against the appellant as permissible in law.

12. In view of the consent of the parties, this appeal is remanded back to the Trial Court for framing charge afresh against the appellant and having

a denovo trial which would also enable the appellant to produce any defence witnesses, if any. Consequently, the judgment and order dated

12.06.2015 passed in Session Case No. 17/2014 under Section 376 (1) IPC is hereby set aside. Any observations made by this Court should not

influence the Trial Court proceedings.

13. Appeal is accordingly disposed of.

14. Send back the LCRs.