IN THE GAUHATI HIGH COURT
(THE HIGH COURT OF ASSAM, NAGALAND,MEGHALAYA, MANIPUR, TRIPURA, MIZORAM AND ARUNACHAL PRADESH)
AIZAWL BENCH

CRL. PET. NO. 3 of 2012(J)

Sh. Lalchharmawia
S/o R. Rinzuala
District Jail, Kolasib ..... **Petitioner.**

- Vs –

State of Mizoram ..... **Respondent.**

BEFORE
THE HON'BLE MR. JUSTICE S.R. SEN

For the petitioner : Mr. Lalfakawma, Amicus Curiae

For the respondent : Mr. A.K. Rokhum, P.P., Mizoram

Date of hearing : **31.07.2012**

Date of delivery of Judgment & order : **31.07.2012**

JUDGMENT & ORDER (Oral)

The instant appeal is from jail by convict directed against the impugned judgment and order dated 9.2.2011 passed by the Chief Judicial Magistrate, Kolasib, Mizoram as well as the against the order of revision dated 26.8.2011

passed by the Addl. District & Sessions Judge-2, Aizawl District, Aizawl.

2. The brief fact of the prosecution in nutshell is that on 25.12.2010 an FIR was received from Mr. Saihnuna to the effect that in between 1st December to 23rd December, 2010, 6 nos. of wooden planks, 3 nos. of window frame were removed from his house by the convict. Accordingly, the case was registered as Kolasib PS Case No. 98 of 2010 on 25.12.2010 under section 380 and 427 IPC. After investigation found a prima facie case and charge-sheeted. A case was registered to the court of Chief Judicial Magistrate, Kolasib as Crl. Tr. No. 928/2010. From record it appears that thereafter, Chief Judicial Magistrate, Kolasib passed the impugned judgment and order on 9.2.2011 and further appears that against the said impugned judgment a revision was moved before the Addl. District & Sessions Judge-2, Aizawl and by a judgment and order dated 26.8.2011 Addl. District & Sessions Judge upheld the judgment passed by the Chief Judicial Magistrate, Kolasib.

3. Being aggrieved by the impugned judgment dated 9.2.2011 as well as 26.8.2011, convict approached this court by way of an application addressed to the Registrar, Gauhati

High Court, Aizawl Bench, Aizawl on 23rd January, 2012 and the same was registered as Crl. Pet. No. 3 of 2012 (J). As none appeared for and behalf of the convict this court appointed Mr. Lalfakawma as Amicus Curiae to act and to defend the case of the convict and for and behalf of the State appeared Mr. A.K. Rokhum, Public Prosecutor.

4. Today, the matter came up for final hearing. At the outset, learned Amicus Curiae, Mr. Lalfakawma contended that the judgment dated 9.2.2011 is not a judgment at all. Rather, accused has been sentenced without trial and also further pointed out that from judgment it appear that no legal aid was granted to the accused during trial. Similarly, while considering the revision petition also no legal aid counsel was appointed by the Sessions court. On the other hand, learned Public Prosecutor, Mr. A.K. Rokhum while defending the impugned judgments submitted that the convict in his application has not challenged the conviction but only pleaded to set him free. Besides that court has given an option to the convict to engage a lawyer. But since he did not do so court has no responsibility further, but to proceed with the case. So, the petition may be dismissed.

5. I have carefully gone through the judgment and order dated 9.2.2011 passed by learned Chief Judicial Magistrate, Kolasib, Mizoram. While going through the judgment I am really shocked and surprised how a Chief Judicial Magistrate can pass such irregular and illegal judgment. Judgment itself reflects that no legal aid has been provided to the convict which is one of the fundamental rights of every accused to get a legal aid during trial. No man can be condemn unheard. That is what law says and that is the criminal jurisprudence. Article 14 of the Indian Constitution makes it clear that every citizen has equal protection before law. It is a settled principle of law that no man be tried until and unless he is defended by a counsel appointed by him or a legal aid counsel is appointed. Section 303 and 304 Cr.P.C.

6. Secondly, in the judgment I find that no witness was examined and Magistrate had just considered the statement of the witnesses to police as evidence and come to conclusion that convict is guilty of offence under section 427 and 380 IPC and awarded sentence under section 427 IPC a period of 1 (one) year and fine of Rs. 5000/- in default of payment of fine another 5 (five) months. And, further

sentenced under section 380 IPC for 4 (four) years and fine of Rs. 5000/- in default of payment of fine another 5(five) months. It is settled principle of law that statement under section 161 Cr.P.C. is not accepted during trial as evidence.

Para ***23 of AIR 2004 SC 2943*** in ***Ram Swaroop and others –Vs- State of Rajasthan*** says :

"23. We have also noticed that the High Court has attached undue importance to the statements made in the course of investigation and recorded under S. 161 of the Code of Criminal Procedure. It is well settled that a statement recorded under S. 161 of the Code of Criminal Procedure cannot be treated as evidence in the criminal trial but may be used for the limited purpose of impeaching the credibility of a witness."

7. Besides that I have also noticed that no formal charge has been framed by the court against the accused and proceed with the trial .

8. It is a settled law in criminal case that the case is based on the charge and in the civil case the case is based on issues. These are basic knowledge of law. Procedure for trial of warrant cases by a Magistrate has been described under

Chapter XIX of the Cr.P.C. which commence from section 238 and ends with 250. In warrant triable cases (in G.R. cases), it is the duty of the Magistrate to furnish the copies to the accused as required under section 207 IPC and section 239 describes when the accused shall be discharged, in that stage court to consider whether there are sufficient materials available on record to frame charge against the accused. If prima facie evidence is available then court shall further proceed to frame charge under section 240 or to discharge in the absence of prima facie material under section 239 Cr.P.C. After formally framing the charge it is the duty of the court to explain the charge framed to the accused and to give him opportunity either to accept the charge or to deny the charge. If, during framing of charge, accused pleaded guilty he may be convicted on his pleadings u/s 241 Cr.P.C. If not court may proceed with prosecution evidence (by way of examination-in-chief and cross-examination by defence counsel) under section 242 Cr.P.C. giving an opportunity to the prosecution to establish the charge. After completion of prosecution evidence the statement of the accused need to be recorded under section 313 Cr.P.C. and to give him an opportunity to clarify against the prosecution evidence. Thereafter, accused is to be given a chance to adduce his

defence witness under section 243. After completion of the evidence of the defence or if defence deny to adduce any evidence then the court will proceed to hear the matter from the learned counsel of both the parties.

9. After hearing carefully the submission forwarded by the learned counsel for prosecution as well as the defence and going through the evidence on record, if court find prosecution succeeded to establish the charge against the accused then only court will proceed and pronounce the judgment for conviction. If not, court will grant acquittal. After pronouncement of the judgment in case of conviction, then the matter shall be taken up for consideration of the sentence and while deciding the sentence court will have to consider the pros and cons and comparative study of the offence and the circumstances as well as magnitude of the offence and then only will pass necessary sentence which should meet the ends of justice.

10. But, in this instant case I am sorry to say that none of the above provision laid down in the Cr.P.C. has been followed. Rather, I find the learned court below has framed its own Cr.P.C. which is unacceptable, undesirable. Therefore, I find the entire trial is vextious and without any

sanction of law. Hence, this court set aside both the impugned judgment and orders dated 9.2.2011 as well as 26.8.2011 and direct the Superintendent, District Jail to release the convict forthwith in case if he is not required in other case or cases.

11. Before I part with the case record I warn both the judicial officers to be cautious in near future. And also observe further that the Government should pay the fee of the Amicus Curiae as per rule or in absence of any rule the fee payable to Public Prosecutor.

12. Send the lower court case record to the concerned court, along with this judgment.

13. CJM is directed further to take immediate step to get release the convict in the light of this judgment.

14. Registry may circulate this judgment and order among all the judicial officers in the State of Mizoram.

15. With these observations and directions, the instant criminal petition is allowed and stands disposed of.

JUDGE

Sushil