

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

AIZAWL BENCH

CRIMINAL APPEAL NO. 23/2012 (J)

Sh. Lalruatpuia,
R/o Bungmun: Lunglei.

... Appellant

-Versus-

State of Mizoram

... Respondent

**BEFORE
THE HON'BLE MR. JUSTICE P.K. SAIKIA**

For the Appellant ... **Mr.Lalfakawma**
Amicus Curiae

For the Respondent ... **Mr.Aldrin Lallamzuala**
Addl. A.G. Mizoram.

Date of hearing ... **14.12.2012**

Date of Judgment ... **31.01.2013**

JUDGMENT AND ORDER (CAV)

This appeal is directed against the judgment and order dated 04.05.2009, passed by the learned District & Sessions Judge, Lunglei in CrI.Tr.Case No.83/2008 arising out of Bunghmun P.S. Case No.2/2008 convicting the accused/appellant Sh. Lalruatpuia under Section 376 IPC and sentencing him to 7 years of R.I. for the offence aforesaid. Being aggrieved by and dissatisfied with the judgment above, he preferred this appeal citing several infirmities in the judgment, impugned.

2. The facts necessary for disposal of the present appeal ,in short,are that on 30th March, 2008, Sh. Lalruatpuia, hereinafter referred to as the accused person, told one (X), a girl of about 20 years of age, referred to hereinafter as the prosecutrix that he was a palmist and he could read the lines in the hands of man. On being so told, the prosecutrix told the accused to examine the lines in her hands. The accused could not complete the same and asked the prosecutrix to come to his house in the night so that he could read her hands well.

3. In the evening when she went to the residence of the accused person, the accused asked her to follow him to the nearby School on the pretext of performing some rites paving the way of one's becoming a palmist. However, when she arrived at the School, he performed some rituals preparatory to formally introducing someone to the club of palmist. Soon thereafter, he performed sex with her forcibly and then told her not to divulge such episode to anyone, otherwise she would have to face grave consequences.

4. However, the aforesaid episode was spilled over other family members in the course of time and accordingly an FIR was lodged with the Bunghmun P.S. on 7th April 2008 by the prosecutrix. On receipt of the FIR, police registered a case under Section 376 IPC vide Bunghmun P.S.Case No. 2/08 and ordered investigation. The Investigating Officer who was entrusted to investigate the case got the prosecutrix examined by Doctor.

5. During the course of investigation, he also examined the witnesses, acquainted with the facts and circumstances of the case, arrested the accused person and took step for sending him to judicial custody, did other needful and on completion of the investigation, he submitted charge sheet under Section 376 IPC against the accused person and forwarded him to the Court to stand his trial there.

6. The Magistrate before whom the charge sheet was so laid, committed the case to the Court of Sessions, Lunglei since the offence under Section

376 IPC is exclusively triable by the Court of Sessions. On receipt of the case on commitment and on going through the materials on record and on hearing the learned counsel for the parties, the learned Sessions Judge, Lunglei framed charge under Section 376 IPC and charge, so framed, on being read over and explained to the accused person, he pleaded not guilty and claimed for trial as per provisions of law.

7. During the course of trial, the prosecution side examined 4(four) PWs including the prosecutrix and I.O. The statement of the accused person under Section 313 Cr.P.C. was recorded. He did not deny having performed sex with the prosecutrix, but then, he claims that the prosecutrix, who is admittedly a major girl, consented to have sex with him on her own volition and as such, he did not commit any offence whatsoever.

8. However, on being required, he declined to adduce any evidence of his own. The learned trial court on the conclusion of trial and on hearing the parties convicted the accused of the offence under Section 376 IPC and sentenced him to punishment as aforesaid. It is that judgment which has been assailed in the present proceeding.

9. On behalf of the accused person, learned Amicus Curiae, has contended that the learned trial court overlooked some very fundamental infirmities in the prosecution case and came to the conclusion that the accused committed rape on the prosecutrix on the night of 30.3.2008. In that connection, it has been pointed out that the place of occurrence is situated at some distance from the house of the prosecutrix as well as the accused person. More importantly, it was situated in a lonely place.

10. Inspite of that the prosecutrix volunteer to come to such place and that too at a relatively late hours of the night when most of the people go to bed in that sleepy town of Bunghmun. These are very fluent testimony to the fact that on the night in question the prosecutrix had sex with the accused person on her own volition.

11. It has also been pointed out that the Doctor, who examined the prosecutrix in the Hospital on 10.04.2008, did not find any sign of injury or violence either over her private part or any of the body parts. These also speak loud and clear that the prosecutrix who is a major girl had sex with the accused person on her own volition. No other conclusion can be attached to the Doctor's not discovering injury on any of the body parts of the prosecutrix.

12. The learned Amicus Curiae further contends that though she was allegedly raped by the accused person, yet she did not disclose such episode to any body until she was threatened by her guardian and other family members. The story was revealed to them under the threat from her guardian and other family members and therefore one cannot attach any credibility to such a story divulged under threat/coercion.

13. It is also pointed out that as per her own evidence, the prosecutrix came to the residence of one of her friend on the night in question where she met the accused and there-from, both of them went to the place of occurrence and that too surreptitiously. These are to prolific testimony to the fact that the prosecutrix was a consenting party to all the episodes which occurred on the night of 30.3.08.

14. Learned Amicus Curiae also find fault with prosecutrix not reporting the matter in time to the authority concerned. What is important to note is that, argues learned Amicus Curiae, that the FIR was lodged after 8 days of incident in question. Equally important, prosecution makes no effort to show as to why there was delay in lodging the case under consideration. This in turn shows that the prosecution case cannot be accepted without a large grain of salt.

15. Another factor on which the learned Amicus Curiae banks upon in trying to overturn the judgment of the trial court was that the wearing apparels of the prosecutrix was not seized nor was there any explanation as

to why the investigating officer could not seize such articles of vital importance. This again requires the Court to view the prosecution case with enormous suspicion.

16. Yet another factor harps upon by the Amicus Curiae was that the recording of statement of the accused under Section 313 Cr.P.C. was perfunctory which requires the Court to set aside the entire judgment. In that connection, he has referred me to the decision rendered by the Hon'ble Supreme Court in the case of ***Ashok Kumar Vs. State of Haryana***, reported in **(2010) 12 SCC 350**. The learned Amicus curiae, therefore, urges this court to acquit the accused person of the offence which he was convicted of on setting aside the judgment of the learned trial court.

17. However, the learned public prosecutor appearing on behalf of the State respondent has contended that the accused person performed sexual intercourse with the prosecutrix after luring her the place of occurrence on promising her to teach her the science of palmistry and thereafter had sexual intercourse with her forcibly and against her will.

18. The claim of the accused that the prosecutrix had consented to have sex with him on the night in question at the place aforesaid is nothing but a travesty of truth since the accused did everything to lure the prosecutrix to a lonely place to make her an expert palmist and thereafter, he had sex with her forcibly taking the advantage of the situation and time.

19. The judgment of the learned trial court makes all these things abundantly clear. He, therefore, submits that the learned trial court committed no wrong whatsoever in convicting the accused of the offence under Section 376 IPC and sentenced him to punishment as aforesaid. The learned P.P, therefore, urges this court to uphold the judgment of the trial court and dismiss the appeal he preferred.

20. In order to support his case, he relied on the decisions of the Hon'ble Supreme Court in the case of:

- a). *Yusufalli Esmail Nagree vs State of Maharashtra, reported in AIR 1968 SC 147*
- b). *Surendra Paswan Vs State of Jharkhand, reported in (2003) 12 SCC 360.*
- c). *Deepak Panyang Vs State of Arunachal Pradesh, reported in 2011(4) GLT 266.*

21. I have given my anxious consideration to the arguments advanced by the learned counsel for the parties having an eye on the judgment impugned. However, before I could proceed further, I find it necessary to have a brief overview of the evidence on record and evidence of the prosecutrix, who was examined as PW 1, is first taken up for consideration.

22. According to the prosecutrix, the accused was one of her acquaintances. On 30.3.08, the accused told her and one of her friends, namely, Zodingliani that he is a palmist and he could read the lines on the hands. Saying so, he almost started reading the lines in the hands of the prosecutrix. However, as he could not complete the same, he promised to do the same at night. In the evening, as told by the accused, she came to the house of Zodingliani to take her to the house of the accused person.

23. But on the way, she saw the accused person, who met him near the residence of her friend. The accused then requested her to follow him to a nearby High school. Though she initially followed him to some distance, she thereafter declined to proceed further since it was quite dark and since the school was in a lonely place. The accused, however, forcibly dragged her to the nearby School where he told her that to become a member of satanic club, she was required to undergo some rituals.

24. He also promised her that once she became a member of the said club, she would know the science of palmist very well and would be able to read the lines in the hands of the people and could predict their future as well. According to her, she accompanied the accused person. Saying so, the accused drew a circle on the ground and asked her to sit inside the circle. Thereafter, he lit a candle and he shed a drop of her blood on a piece of paper by cutting the skin of her arm.

25. After shedding her blood on the piece of paper aforesaid, he burnt the same and asked her to test the ash. According to the accused, once she tested the ash of her blood, she would become the member of satanic club. As she tasted the ash, he pulled down her underwear and tried to pin her down against the bench in the School. Though she resisted him, she did not succeed for which the accused placed himself on her top and had sex with her against her will.

26. Having performed sex against her will, he threatened her not to divulge such episode to anyone. Since she was afraid of the accused, she promised him that she would not tell such episode to anyone. However, when she returned home, she felt very uneasy, particularly, for being a member of satanic band/club for which she told the matter to her friend, namely, Hminga. However, somehow such episode came to the knowledge of her uncle and from him matter spilled over to the public.

27. On learning the episode, every body of their family became very disappointed and as such, she lodged an FIR with Bunghmun Police Station on the 7th of April, 2008. She proved the aforesaid FIR as Ext.P.1. In her cross examination, she admitted that the sexual intercourse which the accused had with her on the night above did not cause any physical wound on her person.

28. In her cross examination, she further states that there are about 10 houses in the stretch between the house of Zodingliani and the High School aforesaid, that if someone cry loudly from the place of occurrence, it would be heard by the people dwelling nearby, that the accused is a palmist and that prosecutrix desired to become a palmist one day and that incident in question occurred at about 8 PM on the night in question.

29. One Mr. Z.D. Thanchungnunga was examined as PW 2. According to him, the prosecutrix is his daughter. Since his daughter behaved in a very abnormal manner after the incident in question, they suspected that

everything was not hunky-dory on the part of the prosecutrix. They, therefore, started scolding her for which she revealed that the accused had raped her. He also learnt that out of fear, his daughter did not divulge to such story to their family members.

30. However, on coming to know that the accused took her to a nearby School on the pretext of teaching her the art of palmistry on the night of 30.3.08 and then raped her there against her will, they became very angry and decided to report the matter before the police. In his cross examination, he states that he knew the accused since his childhood and that he became a boy of loose character once he attained adolescence.

31. Mr.K.Lalzirliana, was the Officer-in-charge of the Police Station where the prosecutrix lodged the FIR in the case under consideration. According to him, on 7th April, 2008, the prosecutrix lodged an FIR with the police at Bunghmun P.S. alleging that she was raped by the accused on the night of 30th March, 2008. On receipt of the FIR, a case was registered and the matter was enquired into.

32. During the course of investigation, he examined the prosecutrix, recorded her statement, arrested the accused person, examined the witnesses and on conclusion of investigation, he submitted the charge sheet against the accused person which he proved as Ext. P.3. In his cross examination, he admitted that on the date of incident, the prosecutrix was a major girl and that the place of occurrence is situated at a some distance from the human habitation.

33. Dr. K.Rothangpuia was examined as PW 3. According to him, he examined the prosecutrix on 10th April, 2008. On that day, he was on duty in the Casualty Department of the Civil Hospital at Lunglei. The prosecutrix was produced before him in connection with a police case. On being so produced, he examined her and detected no bruise / laceration / swollen in her vulva. However, he noticed a rupture on the hymen at 7 O'clock position. On

completion of his examination, he prepared a report which he proved as Ext.P.(II). In his cross examination, he admitted that the age of the rupture on the hymen of the prosecutrix was not recorded in his report.

34. Above being the evidence on record, let us see how far such evidence makes out the charge brought against the accused person. A very careful perusal of the evidence of the prosecutrix reveals that on the night of 30.3.08, the accused had sex with her in a nearby School. This evidence of PW 1 finds corroboration from PW 2, the father of the prosecutrix who came to know about the alleged incident from the victim herself.

35. The evidence of Doctor also reveals that there was a rupture in the hymen and according to him, such wound was about 10 days old when he examined the victim at Civil Hospital, Lunglei on 10th April, 2008. There is absolutely nothing on record to disbelieve the above claim made by PWs aforesaid which clearly reveals that on the night in question the accused had performed sexual intercourse with the prosecutrix. The fact that the accused in his statement under Section 313 Cr.P.C. had admitted having sex with the prosecutrix doubly affirmed that on the night in question, the accused performed sexual intercourse with the prosecutrix.

36. Now, the question is whether such sexual intercourse between the accused and the prosecutrix was a consensual one or whether consent was in a deceitful way or putting her under fear of injury/hurt etc. In his statement under Section 313 Cr.P.C., the accused claims that the prosecutrix had sex with him on her own volition and in that connection, it has been pointed out that the prosecutrix went to a school situated in a lonely place and that too on a dark night.

37. According to him going to a lonely place and that too at a time when all the people in that locality retired for the day coupled with the fact that she disclosed her having been subjected to sexual intercourse with him only

under threat from the side of the parents and her other family members only serve to show that the prosecutrix had sex with him on her own volition.

38. This proposition was totally denied by the prosecution side. In order to know his side of the story is true, I have once again very carefully perused the testimony of PWs, particularly, PW 1. A careful perusal of her evidence reveals that the prosecutrix seriously and sincerely desired to be a palmist one day so that she could predict immediate and distant future of the people on reading lines on their hands. There is also evidence on record to show that the accused pretended to be a palmist and well versed with the science of palmistry and promised the prosecutrix to teach the art of reading the lines on the palm of the people.

39. What is more, the evidence on record further reveals that he made the prosecutrix believe that to be a palmist, one must at first be a member of satanic band and one could be the member of satanic band only when he or she, as the case may be, went through certain ceremonies. I have also found that the prosecutrix was so burning with the desire to become a palmist one day that she even met the accused on the night aforesaid and on being requested by him, she prepared to follow him to a nearby school.

40. Though, she changed her mind little later, the accused then dragged her to the school above and started performing some rituals so that the prosecutrix became a member of satanic band. Worst still, he in fact caused the prosecutrix to taste her own blood is a symbol of her becoming the member of satanic band. I have found nothing on record to disbelieve the story, so projected by the prosecutrix. The stories, so told and retold, find corroboration from the narration made in the FIR Ext.P.-1

41. In view of above, I have no hesitation in coming to the conclusion that on the night in question, the accused took the prosecutrix to the nearby school playing tricks upon her. It is also found well apparent that she would not have gone to such place had the accused not practiced those tricks on

her. However, once he had taken her to the aforesaid place and once he had performed such false rituals to show that the prosecutrix became a member of the satanic band, he by forceful means had sexual intercourse with the prosecutrix.

42. The evidence on record further reveals that she tried to save herself from the lustful conduct of the accused person but her resistance could not save her from being raped by the accused person. Being so, the plea of the accused that the prosecutrix had sex with him on her own volition is found to be a huge lie since fact of forceful sexual intercourse with the prosecutrix looms large on each and every piece of evidence produced from the side of the prosecution.

43. Here, it is worth noting that the accused is found to be a well built person and he performed sex with the prosecutrix at a lonely place having put the prosecutrix under immediate threat of injury to her person as well. In that scenario, the prosecutrix not making any serious effort to resist the lustful conduct on the part of the accused person is quite understandable and as such, prosecutrix not having any wound either on her private part or any other body parts, in my considered opinion, is of no consequence.

44. The learned Amicus Curiae has also pointed out that the prosecutrix divulged the story only after she was put under threat by her parents and other family members. A story, so divulged, by no stretch of imagination can be said to be a truthful one. Rather, it is a story which the prosecutrix had projected just to save her skin for an episode in which she was a consensual party by putting all the blames on the hapless accused person.

45. On considering the materials on record, I have found that such a claim is too far fetched one. It is true that the prosecutrix divulged a story to her family members only after she was put under threat. But then, one must not be oblivious to the fact that it was the prosecutrix who herself revealed the

episode to her friend Hminga. It is also in her evidence that she felt extremely uncomfortable after being raped by the accused person and also after being member of satanic group.

46. These together with the facts that the incident in question spilled over to very many persons despite there being no witness to such incident doubly affirms that it is the prosecutrix who on her own divulged the episode under consideration to the public, particularly to her friend Hminga. In the face of such disclosures, it cannot be said that the prosecutrix revealed the matter under consideration to the public only under the threat from her parents and other family members.

47. The prosecution case also comes under fire also for the other reasons as well and this time, it comes in the form of allegation that there was enormous delay in lodging the case under consideration. It is true that there was some delay in lodging the case in question, but then one must not overlook the fact that the prosecutrix is a young girl living in a very conservative society in a far flung area of the country.

48. Such factors coupled with the fact that the woman folk generally do not want to disclose the fact of their being defiled by unscrupulous people for variety of reasons, the defiled woman being looked down by a society is one of such reasons. In my considered opinion, these serve to show that the prosecution case cannot be thrown away only for there being some days of delay in lodging the case, more so, when as discussed above, there are sufficient materials to show that the story, told and retold before the court by the witnesses has a strong and powerful ring of truth.

49. The prosecution has again been challenged on the count that the I.O. did not seize the wearing apparels of the prosecutrix which, according to the defence is fatal. I have found that there is evidence in the form of statement in the Ext P 2 to show that wearing apparels of the prosecutrix were washed soon after the alleged incident. This statement remains almost unchallenged.

Such statement only serves to show that non seizure of wearing apparels of the prosecutrix is not at all fatal to the prosecution case under consideration.

50. In that connection, we can strongly rely on the decision in the case of *Surendra Paswan (Supra)*. In the above noted case, the witnesses told that blood from the victim fell on the cot. But the I.O. did not see any blood on such cot. Since, the I.O. did not find any blood on the cot, Hon'ble Supreme Court did not find any fault for non-seizure of cot by the I.O. during the course of investigation. The above position squarely covered our case as in our instant case too.

51. So far improper recording of statement of accused person under Section 313 Cr.P.C. is concerned, I have found that such argument is without any basis since all the important facts and circumstances were brought to the notice of accused person seeking his explanation thereto and as such, I have no hesitation in coming to conclusion that attack, mounted in the prosecution case on this count, slips into oblivion without causing any harm to the later.

52. In view of what I have discussed herein before and what has emerged there-from, I am of the opinion that the prosecution could successfully prove the charge, levelled against the accused person and infirmities, pointed out by the learned Amicus Curiae are either non existent or far too insufficient to cause any damage in the prosecution case and as such, I find no reason to interfere with the judgment rendered by the trial court as far as conviction of the accused under Section 376 IPC is concerned.

53. Here it needs to be mentioned that once a Court convicted an accused of offence under Section 376 IPC, and unless the woman raped is his own wife and is not under 12 years of age, the Court is duty bound to impose jail term as well as fine upon the accused person, so convicted. However, in our instant case though the accused was sentenced to suffer imprisonment for seven years yet no fine, as required under the law, was imposed upon the accused person.

54. That being so, I have also ordered the accused to pay a fine of Rs.2000/- in default R.I. for another 3 months for the offence aforesaid in addition to jail term imposed upon him by the learned trial court. With the above, modification in the punishment imposed on the accused person, judgment of the trial court is affirmed.

55. Consequently, the appeal is dismissed.

56. Before I part with, I deeply appreciate the help rendered by the learned Amicus curiae. I, therefore, direct that he be paid his professional fee of Rs.10,000/- immediately.

57. Send down the LCRs to the learned court below with a judgment and order of this court.

JUDGE

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