
(2017) 07 GAU CK 0002
In the Gauhati High Court
Case No : 15 of 2016

L. C. KAPTHANGA S/O NIDULA

APPELLANT

Vs

STATE OF MIZORAM

RESPONDENT

Date of Decision : 03-07-2017

Acts Referred:

[Code of Criminal Procedure, 1973](#), [Section 313](#), [Section 164](#) - Power to examine the accused - Recording of confessions and statements
[Indian Penal Code, 1860](#), [Section 176](#)

Citation : (2017) 07 GAU CK 0002

Hon'ble Judges : Michael Zothankhuma

Bench : SINGLE BENCH

Advocate : C Lalfakzuala, Linda L Fambawl

Final Decision : Dismissed

Judgement

1. Heard Mr. C. Lalfakzuala, Amicus Curiae and Mrs. Linda L. Fambawl, Addl. Public Prosecutor.

2. This jail appeal has been filed against the Judgment dated 20.01.2016 and Sentence Order dated 22.04.2016 passed by the Sessions Court, Lunglei in Criminal Trial No. 12/2014 under Section 376(1) IPC (before the 2013 amendment).

3. The prosecution story in brief is that the victim's aunt lodged an FIR dated 16.04.2014 before the Officer-in-charge of Saiha Police Station. The FIR states that Josephine, 17 years, was molested by her step-father since the age of 3 years. On the basis of the FIR submitted by the victim's aunt, P.S Case No. 11/2014 under Section 376(2)(f)(k)(n) IPC r/w Section 4 of POCSO Act was registered. After investigation by the I.O and after the confessional statement of the appellant was recorded under Section 164 Cr.P.C, charge sheet was filed.

4. Charge under Section 376(2)(f)(n) IPC r/w Section 6 of POCSO Act was

framed against the appellant, though the appellant claimed that he was not guilty of the charges. Evidence of 6 prosecution witnesses and 5 defense witnesses were recorded by the Trial Court. Examination of the appellant under Section 313 Cr.P.C was taken by the Trial Court on 19.02.2015 and 23.07.2015. Thereafter, the Trial Court came to a finding that the appellant had committed rape upon the victim girl. However, charge against the appellant from Section 376(2)(f)(n) IPC and Section 4 of POCSO Act was altered to Section 376(1) IPC (before the 2013 amendment).

5. The Trial Court thereafter convicted the appellant under Section 376(1) IPC. During the sentence hearing held on 22.04.2016, the victim girl pleaded on behalf of the appellant for ignoring the offences committed by the appellant, in view of the fact that no one would be there to look after the four minor daughters of the appellant. The Trial Court taking into consideration, the various arguments put-forth during the sentence hearing sentenced the appellant to imprisonment for a term of less than 7 years, i.e., 5 years RI and to pay a fine of Rs. 5000/-, i.d. SI for three months as per the proviso to Section 376(1) IPC (before the 2013 amendment).

6. The learned Amicus Curiae submits that the accused is innocent of the charge. He also submits that the confession given by the appellant was not a voluntary confession and that he was tutored by the police. He also submits that the voluntary confession made by the appellant was retracted during examination of the appellant under Section 313 Cr.P.C. The learned Amicus Curiae also submits that the contents of the FIR and the evidence adduced goes to show that the allegation of rape had been going on for many years. However, the delay in filing the FIR gives rise to a suspicion that the appellant had been falsely implicated in the above case.

7. The Addl. Public Prosecutor submits that the victim is the step-daughter of the accused. She also submits that the evidence of the victim girl is to the effect that she had been raped many times by her step-father. The Addl. Public Prosecutor also submits that the statement of the victim inspires confidence and conviction can be based on the sole evidence of the victim girl. The Addl. Public Prosecutor also submits that the evidence of the Medical Officer having clearly stated that the hymen of the victim girl was absent implies that the victim girl had been raped. The Addl. Public Prosecutor also submits that the evidence of the victim, mother of the victim and aunt of the victim corroborate each other and shows that the appellant used to rape the victim girl.

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

9. The victim girl in her evidence has clearly stated that the appellant used to have sexual intercourse with her since she was very small. The birth certificate of the victim girl shows that she was born on 13.08.1996. The evidence of the victim shows that the appellant used to have sex with her even when she was in school. The victim girl then left the house of her mother and her step-father and

went to live with her aunt as she could not bear what the accused was continuously doing to her. The extract of the victim girl's evidence is reproduced below:- "After I finished school in 2013 November I stayed with my mother at Rawlbuk. The accused was also staying with us. I could not tell my mother of what the accused had done to me because the accused was always nearby. Since I could no longer tolerated what the accused was doing to me I told my aunt who was staying at Saiha when I went to visit her during the month of February, 2014. I did not tell my aunt about the incident immediately but I finally told my aunt about the incident since my father was beating my mother because I had not return home to them. I cannot remember the full details of what the accused did to me when I was a small but I remember that during 2006 or 2007 we had gone to spent Christmas at Cheural and the accused had taken me to collect gooseberry in the Forest. The accused had sex with me again by removing my pants and panties and I remember that I felt much pain when he inserted his penis into my private part and I could not urinate properly since I felt pain for about three to four days. I continue to feel pain on about three occasions while he was having sex with me but there after the pain also subsided. I cannot recollect how may time the accused had sex with me since he had sex with me repeatedly whenever he found the opportunity."

10. The extract of the evidence of the victim's aunt (PW 1) is as follows:- "I do not remember the date and it was in the month of April, 2014, the victim visited her aunt at Chawnhu and on returning home, she visited me at our residence. She stated to me that she did not want to go home at Rawlbuk and did not want to live with her step father any longer. The accused used to call the victim to come home but she refused. I received a report from Rawlbuk village that the accused urged the mother of the victim to call the victim to come home and used to threaten to kill her if she could not call her daughter to come home. One day while we have prayer, the victim was weeping. After the prayer was over, I asked her the reason. She told me that the accused many times committed rape on her. Since she was 5 years of age, the accused began sexually abused her when they lived at Zero Point. At that time, she was young age and did not understand what the accused had done to her. When she was growing old, the accused continued sexual intercourse with her. If she refused, the accused threatened to kill her mother and younger sisters and she would live alone. She was afraid to tell her mother and relatives. She further stated that in order to escape from the bondage of her step father, she learned her lesson very hard. We approached Child Protection Office and they took necessary action."

11. The extract of the evidence of the victim's mother (PW 4) is as follows:- "My daughter stayed in the Hostel at Saiha and Aizawl from Class-IX. The accused used to visit daughter/victim when she stayed in the Hostel. What I noticed about the behavior was that my daughter used to be very moody and unhappy and I had even said that why was she always moody when she was in the house. During the beginning of this year my daughter/victim had gone to visit her aunt at Saiha and the accused was with me at Rawlbuk. The accused used to tell me

that I should asked our daughter/victim to come home almost every night and he used to beat me and tried to strangle me because of the absence of my daughter/victim while he used to me he used to say that my daughter/victim was also his wife and that I should call her home immediately. After about two weeks since my daughter went to Saiha the Police arrived in our house to arrest my husband/accused only from the arrival of the Police I got to know that the accused used to sexually abuse my daughter."

12. The evidence of the Medical Officer is to the effect that the hymen was absent from the victim girl and that he was informed by the victim girl that her step-father used to rape her since she was three years old.

13. The evidence of the I.O (PW 5) is to the effect that she sent the accused to the Magistrate for recording his confessional statement under Section 164 Cr.P.C. The I.O also states that from the investigation conducted by her, she found a prima facie case of rape made out against the appellant.

14. The evidence of the Judicial Magistrate First Class (PW 6) is to the effect that the appellant who was already been remanded to judicial custody was brought before him and three hours of reflection time was given to him. Thereafter, the confessional statement of the appellant was recorded without the presence of any Police Officer and after being satisfied that the confession was made without any inducement, coercion or threat. The evidence of PW 6 is also to the effect that the recorded confessional statement of the appellant was read out by the appellant and after admitting to the correctness of the same, the appellant put his signature in the confessional statement.

15. The examination of the appellant under Section 313 Cr.P.C shows that the appellant has denied having any sexual intercourse with the victim girl at any time. The appellant has in fact stated that the mother of the victim girl and the victim girl have made a false case against him as he had tried to discipline the alleged victim girl for using her mobile phone when she was supposed to study. The appellant has also stated that he had hurt the thumb of the victim's mother on one occasion. Further, he had disapproved of the victim girl trying to marry an unknown person overseas, whom she had contacted over the internet and for which they had to borrow money to prepare for the marriage.

16. In the examination of the appellant under Section 313 Cr.P.C, taken on 23.07.2015, the appellant has stated that before being taken to the Court from judicial custody, he was taken to the Thana where he was informed to confess his guilt as that would be better for him. He also states that he was tutored with regard to what he should say in the Court. The appellant also states as follows:- "I was asked about the incident by the Magistrate who did not threatened me or used any force only two of us were present in his chamber there was no police person in the room. I first asked him for permission to say a prayer since I was very hesitant to say what the Police had asked me to say before the Magistrate. The Police however said that it was not required for me to pray and I then made

a confession which was recorded by the Magistrate I must have spent about one hour with the magistrate and he said that I should chat with him comfortably. I was however still fearful inside while I made the confession."

17. Thus, the appellant in his examination under Section 313 Cr.P.C held on 23.07.2015 appears to have retracted his confessional statement made before the Magistrate First Class. The appellant in his confessional statement made before the Magistrate First Class had admitted to having consensual sexual intercourse with the victim. The extract of the confessional statement dated 30.04.2014 is reproduced below:- "One day, towards the latter part of the year 2007, Josephine complained of pain in her buttock saying that there was an inflammation. I looked at it however did not find any injury and upon inquiry, she revealed that her aunt Roseline's husband R. Lalmalsawma had sexual intercourse with her before and that could be the reason.

The first time I had sexual intercourse with Josephine was in the year 2008, towards the beginning of the year while we rented the house of Mr. Dokulha at New Saiha. It was around 2:00 pm while Tino was cleaning up the bag of rice at our balcony. I had sex with her on my bed and during this time, I did not force her, it was consensual. As our daughter Malsawmsangi saw us in the act, she informed my wife Tino about it. My wife rebuked me but we denied it and kept it a secret back then. After this incident, we got used to it and we continued having sex as and when the opportunity arises. We made Josephine stay in a Hostel at Saiha while she was in her Xth Standard. On passing Class-X, she studied Class XI at Faith Academy, Zonuam and she joined Don Bosco, Bawngkawn to study Class XII. As she failed her Class XII exam, she repeated studying in the same class. While she stayed in the hostel at Aizawl, I often travel to visit her. During these times, we would have sexual intercourse at a room in Circuit House and MLA Hostel, near Tennis Court. During the year 2013, before MLA Election, I stayed at Mara House, Zotlang. She too came out from her Hostel and we slept together there. Before coming out from the hostel, she would also visit me in the afternoon and I would then drop her back to the hostel. Even after her exam, she would join me at Mara House and we would sleep on the same bed. As she is sexually active, she would often force and nag me for sex.

At the month end of February 2014, Josephine stated "I am pregnant" I asked her to undergo urine test. We had plenty of test kit with us and as she performed the test twice, the results were both positive. Her mother Tino sent her to a hospital at Lawngtlai for check-up. I believe this was on the 13th March, 2014 and before she went to the hospital, while her mother went out for Morning Prayer at the Church, we again had sexual intercourse on the sofa where I slept. This time too, we had sex as suggested and insisted by her. Josephine and I had sexual intercourse on numerous occasions however I have not even force her for once to have sex with me. It was always done on both our consent. In fact, there were many occasions where I did not actually ejaculate inside her."

18. In the case before me, the appellant did not retract his confessional

statement at any time prior to his examination under Section 313 Cr.P.C. There is nothing to show that the confessional statement made by the appellant cannot be taken into account on the ground that it was not voluntary. I find that the procedural requirements laid down in Sub Section 2 to 4 of Section 164 Cr.P.C has been complied with by the Magistrate before recording the appellant's confessional statement. However, what has queered the pitch is the statement given by the appellant in his examination under Section 313 Cr.P.C, that his confessional statement was tutored. In the case of *Parmananda Pegu Vs. State of Assam*, 2004 7 SCC 779, the Apex Court has held that before coming to a finding on the basis of a retracted confession, the Court must be satisfied that all the procedural requirements laid down in Sub Section 2 to 4 of section 164 Cr.P.C have been complied with. Thereafter, the Court will have to see whether there are any circumstances appearing from the record which may cast a doubt on the voluntary nature of the confession. If there are circumstances to indicate the confession was not voluntary or wholly true, it loses much of its evidentiary value. The Apex Court in para-20 of the above case has held as follows:-

"20. In *Pyare Lal* the same principle in regard to the evidentiary value of retracted confession has been reiterated. Subba Rao, J. speaking for a four-Judge Bench, stated the legal position thus: A retracted confession may form the legal basis of a conviction if the court is satisfied that it was true and was voluntarily made. But it has been held that a court shall not base a conviction on such a confession without corroboration. It is not a rule of law, but is only rule of prudence. It cannot even be laid down as an inflexible rule of practice or prudence that under no circumstances such a conviction can be made without corroboration, for a court may, in a particular case, be convinced of the absolute truth of a confession and prepared to act upon it without corroboration; but it may be laid down as a general rule of practice that it is unsafe to rely upon a confession, much less on a retracted confession, unless the court is satisfied that the retracted confession is true and voluntarily made and has been corroborated in material particulars.

By the use of the expression "corroboration of material particulars", the Court has not laid down any proposition contrary to what has been clarified in *Subramania Goundan* case as regards the extent of corroboration required. The above expression does not imply that there should be meticulous examination of the entire material particulars. It is enough that there is broad corroboration in conformity with the general trend of the confession, as pointed out in *Subramania Goundan* case." In the case of *Chandrakant Chimanlal Desai Vs. State of Gujarat*, 1992 1 SCC 473, the Apex Court has held that confession can only be an aid to the available evidence, but confession cannot be treated as the base document around which the rest of the evidence would circle.

19. In the case of *Krishnan Kumar Malik Vs. State of Haryana*, 2011 7 SCC 130, the Apex Court has held at para 31 as follows:- "No doubt, it is true that to hold an accused guilty for commission of an offence of rape, the solitary evidence of

the prosecutrix is sufficient provided the same inspires confidence and appears to be absolutely trustworthy, unblemished and should be of sterling quality. But, in the case in hand, the evidence of the prosecutrix, showing several lacunae, which have already been projected hereinabove, would go to show that her evidence does not fall in that category and cannot be relied upon to hold the appellant guilty of the said offences."

20. In view of the fact that the statement of the victim girl inspires confidence and the statement is corroborated by the confessional statement of the appellant, though the appellant has taken a stand that the sexual intercourse was consensual, the consent of the victim girl would have no meaning as she was only 12 years old in the year 2008. This Court is thus of the view that the evidence of the victim, coupled with the medical evidence and the retracted confession of the appellant points to the guilt of the appellant.

21. In *Narendar Kumar Vs. State (NCT of Delhi)*, 2012 7 SCC 171, the apex Court has held at para 20 as follows:- "20. It is a settled legal proposition that once the statement of the prosecutrix inspires confidence and is accepted by the court as such, conviction can be based only on the solitary evidence of the prosecutrix and no corroboration would be required unless there are compelling reasons which necessitate the court for corroboration of her statement. Corroboration of testimony of the prosecutrix as a condition for judicial reliance is not a requirement of law but a guidance of prudence under the given facts and circumstances. Minor contradictions or insignificant discrepancies should not be a ground for throwing out an otherwise reliable prosecution case."

22. The evidence of the defense witnesses is basically to the effect that the present case is a fabricated case, though there is nothing to support the statements made by the defense witnesses. With regard to the alleged inconsistent statements made by the prosecution witnesses, I find the same to be minor contradictions and as held by the Apex Court in *Narendra Kumar*, minor contradictions or insignificant discrepancies cannot be a ground for throwing out an otherwise reliable prosecution case.

23. With regard to the delay in filing the FIR, though the incidents had occurred for a long period of time, the evidence shows that the victim girl had been threatened by the appellant, who was her step-father. The victim girl was also living with her step-father and the victim girl was a young girl at the time the incident of rape had occurred. In the case of *Ramdas & Ors. Vs. State of Maharashtra*, 2007 2 SCC 170, the Apex Court has held that in the case of sexual offences, there is another consideration which may weigh in the mind of the Court regarding delay in lodging the FIR, i.e., the initial hesitation of the victim to report the matter to the police which may affect her family life and family's reputation. The Apex Court has given several examples as to why there could be delay in filing of the FIR in sexual offences. The Apex Court has thus held that in the ultimate analysis, what is the effect of delay in lodging the report with the police is a matter of appreciation of evidence, and the Court must consider the

delay in the background of the facts and circumstances of each case. No straitjacket formula can be evolved in such matters, and each case must rest on its own facts. In the case of State of Himachal Pradesh Vs. Sanjay Kumar alias sunny, 2017 2 SCC 51, the Apex Court has held that the delay of 3 years in filing the FIR, after eliciting information from the victim girl, was inconsequential due to the facts of the case. The case in brief in Himachal Pradesh Vs. Sanjay Kumar was that the victim girl, 9 years old was raped and it was only after 3 years that the victim girl told her mother about the rape. The evidence in the present case shows that the sexual offence committed upon the victim girl by her step father had been going for a number of years since her childhood. There is also evidence to the fact that the victim girl was threatened by the appellant not to speak of the incidents. The delay in lodging the FIR by the complainant is due to the fact that the victim girl had spoken about her ordeal only in February, 2014. It has also to be kept in mind that the perpetrator of the crime was none other than her step-father, who was also feeding her. In such a situation, the honour of a family may be at stake and also the well being of the marriage between the victim's mother and step-father. The victim girl has been allegedly made to have sexual intercourse, despite being a minor and of impressionable age. Keeping the above facts in view, this Court is of the view that the prosecution case cannot be doubted only on the ground of delay in lodging the FIR. The above is a very plausible explanation for the delay in filing the FIR. Accordingly, this Court does not find the delay to be fatal to the case of the prosecution.

24. In view of the reasons stated above, this Court does not find any infirmity with the conviction of the appellant by the learned trial Court passed vide Judgment dated 20.01.2016. The Sentence Order dated 22.04.2016 is also upheld. Accordingly, the appeal is dismissed.

25. Send back the LCR.

26. In appreciation of the Assistance rendered by the learned Amicus Curiae, his fee is fixed at Rs. 7,500/- (Seven thousand five hundred only), to be paid by the Mizoram State Legal Services Authority.