

(2010) 11 GAU CK 0043

In the Gauhati High Court

Case No : Criminal Appeal Nos. 08 & 10 of 2010

Lalramnghaka & Anr.

APPELLANT

Vs

State of Mizoram & Anr.

RESPONDENT

Date of Decision : 24-11-2010

Acts Referred:

Criminal Procedure Code, 1973 — Section 233, 313
Criminal Procedure Code, 1973 (CrPC) — Section 233, 313

Citation : (2010) 5 GLT 628

Hon'ble Judges : C.R.Sarma, J

Bench : Single Bench

Advocate : Advocate appeared for the Appellants: Mr.A.R.Malhotra, Advocate appeared for the Respondents: Mr.N.Sailo, P.P., Advocates appearing for Parties

Judgement

C. R. Sarma, J.—These appeals are directed against the judgment and order, dated 07.04.2010, passed by the learned Additional Sessions Judge, Aizawl, in CrI. Trl. No. 279 of 2008, arising out of Mamit P. S. Case No. 07/08, under Sections 376(1)/323 of the Indian Penal Code (hereinafter called "the IPC).

2. The prosecution case, in brief, as revealed at the trial, may be stated as follows:

On 03.03.2008, at about 10.30 p.m., the victim women was proceeding towards her house, after completing her singing practice in connection with YMA Conference at Suarhliap village. On her way back home, she met the accused person, namely, Shri Lalramnghaka, who called her back for telling her something important and pulled her towards the SDO (Highway) quarters. In spite of her resistance, the accused person committed rape on her. Though she tried to shout for help, she could not do so because of the force applied by the accused person. After the said incident, upon her arrival at her house, she informed her mother about the occurrence and, accordingly, an FIR was lodged with the police on the next day. On receipt of the said FIR, police registered a case being Mamit P. S. Case No.07/08, dated 04.03.2008, under Sections

376/323 IPC, and launched investigation into the matter. During the investigation, police got the victim woman as well as the accused person examined by Medical Officer and recorded the statement of the witnesses. At the close of the investigation, police submitted charge sheet against the accused person for the offence committed under Sections 376(1)/ 323 IPC and forwarded him to the Court to stand trial. As the offence under Section 376 IPC was exclusively triable by the Court of Sessions, the learned Sessions Judge, framed the charges under Sections 376(1)/323 IPC and explained the charge to the accused person, to which he pleaded not guilty and claimed to be tried.

3. In order to establish its case, prosecution examined as many as five witnesses including the Medical Officer and the Investigating Police Officer. At the close of the evidence for the prosecution, the accused person was examined under Section 313 CrPC. He denied the allegations brought against him and stated that he had a love affair with the victim woman and that he had sexual intercourse with her consent.

4. Considering the materials on record, the learned trial Judge found the accused person guilty of the offence under Section 376(1) IPC and accordingly, convicted him for the said offence.

5. The learned Addl. Sessions Judge, after hearing the accused person on the point of sentence and considering the age of the accused, sentenced him to suffer rigorous imprisonment for three years and pay fine of Rs. 500/, in default to undergo simple imprisonment for another 15 days for his conviction under Section 376(1) IPC.

6. Being aggrieved by the said conviction and sentence, the convictappellant has preferred the appeal, being Criminal Appeal No.08/2010, on the ground that the conviction and sentences were recorded without any substantive evidence on record. The Stateappellant has also preferred an appeal, being Criminal Appeal No. 10/2010, for enhancement of the sentence, imposed on the accused person, on the ground that, considering the nature and gravity of the offence committed by the accused person, the punishment of three years imprisonment and fine of Rs.500/ was inadequate.

7. As both the appeals aforesaid, have arisen out of the same judgement & order and the parties are represented by the same set of Lawyers, as agreed to by the learned counsel, appearing for both the parties, I have taken up both the appeals, together, for hearing and propose to dispose both the appeals by this common judgment and order.

8. I have heard Mr. A. R. Malhotra, learned counsel, appearing for the convictappellant in Criminal Appeal No.08/2010 and the respondent in Criminal Appeal No. 10/ 2010. Also heard Mr. N. Sailo, learned public prosecutor, appearing for the Stateappellant in Criminal Appeal No. 10/2010 and Staterespondent in Criminal Appeal No.08/2010.

9. Mr. A. R. Malhotra, learned counsel, appearing for the convictappellant, at the very outset, taking me through the statement of the accused person, recorded under Section 313 CrPC, and the order sheet, dated 19.01.2010, of CrI. Tri. No.297/08, has submitted that the learned trial Judge committed gross error by failing to comply with the statutory provisions prescribed by Sections 232 and 233 of Cr.P. C. by not calling upon the accused person to adduce his defence evidence. On behalf of the convictappellant, it is submitted, by the learned counsel, that though the convictappellant was all along willing and ready to adduce defence evidence in support of his plea, no opportunity was given to the accused person to adduce defence evidence and thus, much prejudice has been caused to the convictappellant. In view of the above noncompliance of the statutory provision of law and the grave prejudice caused to the accused, the learned defence counsel, has submitted that the impugned judgment and order, is liable to be set aside. In support of his contention, the learned counsel, has relied on the decisions of (1) Lal Behari Das & Ors. Vs. State of Tripura, reported in 1998 (4) GLT220 and (2) N. Pishak Singh Vs. State of Manipur, reported in 2005 (4) GLT 720.

10. Mr. N. Sailo, learned Public Prosecutor, appearing for the State of Mizoram, has fairly submitted that the learned trial Judge, while fixing the case for argument after examination of the accused under Section 313 CrPC, by order, dated 09.01.2010, failed to call upon the accused person to adduce defence evidence, although it was reflected in the impugned judgment and order, that the accused person was asked to adduce defence evidence and that he declined to enter into his defence.

11. In the case of Lal Behari Das (supra), the learned trial Judge, after examination of the accused person under Section 313 Cr.PC., fixed the case for argument without calling upon the accused person to adduce defence evidence. The learned Judges, in the Division Bench, in the above referred case, observed as follows:

"15. Although in the instant case the accused persons were not acquitted under Section 232 Cr. PC. there is nothing on record to show that they were ever called upon to enter on their defence and to adduce any defence evidence. What is worse, the learned Sessions Judge while examining the accused persons under Section 313 Cr.P.C. did not put to them the usual question "Do you want to adduce any defence evidence?"invariably put at the end of such examination with rare exceptions. Had the learned Sessions Judge put this question to the accused persons, it could have been construed as amounting to calling upon them to enter on their defence and adduce defence evidence in substantial compliance with the requirements of Section 233(1) Cr.P.C."

While setting aside the impugned judgment and order, the learned Judges, in the Division Bench, agreed with the decisions of the Karnataka High Court, reported in 1993 Cr. LJ. 907, which reads as follows:

"Sections 232/233 Cr. P.C. lay down the procedure to be followed by the Sessions Court in the process of trial of an accused person. It is one thing to say that the said procedure should be complied with. However, it is quite another thing to say that failure on the part of the Sessions Court to comply with the said procedure would ipso facto vitiate the conviction. The failure on the part of the Judge to call upon the accused person to enter on his defence in terms of Section 233, Cr.P.C. would not in all cases vitiate the conviction, if there are materials to indicate that no prejudice whatsoever has been caused to the accused. In other words, if on the facts of a particular case, no prejudice can be said to have been caused on account of the failure to comply with the procedure as laid down under Section 233 Cr.P.C. conviction cannot be said to be vitiated."

12. In the case of N. Pishak Singh (supra), another Division Bench of this Court, observed that the failure on the part of the trial Court to call upon the accused appellant, to enter on his defence, caused prejudice to him. Relying on the decision rendered in the case of Lal Behari Das (supra) and the view taken by the Karnataka High Court in 1993 Cr. LJ. 907, their Lordships, in the Division Bench, set aside the impugned judgment and order, on the ground of not calling upon the accused person to enter into his defence and remanded the matter to the trial Court for proceeding afresh from the stage of Sections 232 and 233 CrPC.

Sections 232 and 233 CrPC, read as follows:

"232. Acquittal

If, after taking the evidence for the prosecution, examining the accused and hearing the prosecution and the defence on the point, the Judge considers that there is no evidence that the accused committed the offence, the Judge shall record an order of acquittal." "233. Entering upon defence

(1) Where the accused is not acquitted under Section 232, he shall be called upon to enter on his defence and adduce any evidence he may have in support thereof.

(2) If the accused puts in any written statement, the Judge shall file it with the record.

(3) If the accused applies for the issue of any process for compelling the attendance of any witness or the production of any document or thing, the Judge shall issue such process unless he considers, for reasons to be recorded, that such application should be refused on the ground that it is made for the purpose of vexation or delay or for defeating the ends of justice."

13. In view of the above statutory provisions and the principles of law laid down by the Courts, there is no dispute that it is the bounden duty of the trial Court to call upon the accused person to enter on his defence to adduce any evidence, he may have in his support, if he is not acquitted under Section 232 Cr.P.C.

14. In the present case, the learned trial Judge, while fixing the case for

argument, after examination of the accused person under Section 313 Cr. P.C., by his order, dated 19.01.2010, passed the following order:

"19.1.10.

Accused on bail absent. His D/L is present. Fix 2.3.10 for 313 Cr.P.C. Issue notice to party, later on accused present, examine under Section 313Cr.P.C. Fix 4/3 2010 for argument."

15. In examination under Section 313 Cr.P.C. also, the learned trial Judge did not ask any question to the accused as to whether he had other things to say or if he wanted to adduce any defence witness.

16. The statement made by the learned trial Judge, in his judgment, that the accused was asked if he wanted to enter into his defence and that he declined to do so, is not supported by the order, dated 19.01.2010 aforesaid as well as the statement recorded under Section 313 Cr.P.C. Therefore, the said statement, obviously made after hearing of the argument, does not inspire confidence that the requirement of the statutory provision under Section 233 Cr.P.C. was complied with.

17. In view of the above discussion, it is found that no opportunity was given to the accused person to adduce defence evidence and thereby much prejudice has been caused to him. Noncompliance of the mandatory provision prescribed by Section 233 Cr.P.C., is a serious lapse causing prejudice to the accused person. Therefore, the conviction and sentence recorded by the learned trial Judge, without applying with the statutory provision as prescribed by Section 233 Cr.P.C. can't stand the test of law.

18. In the light of what has been stated above, I set aside the impugned conviction and sentences awarded to the accusedappellant and send back the matter to the learned trial Court for retrial from the stage provided by Section 232 and Section 233 Cr.P.C., after duly complying with the statutory provision as prescribed by law. It is also provided that, the learned trial Judge shall take steps to dispose of the matter within a period of 4 (four) months from the date of receipt of a copy of this judgment and order.

19. The Registry shall return the Lower Court Records along with a copy of this judgment and order, to the learned trial Court immediately. The accused person be produced before the trial Court on a date, as may be fixed by the learned trial Judge.

20. With the above observations and directions, both the appeals stand disposed of.