
(2016) 11 GAU CK 0071
In the Gauhati High Court
Case No : Criminal Appeal No. 17 of 2016 (J)

Sh. Anil Tudu

APPELLANT

Vs

State of Mizoram

RESPONDENT

Date of Decision : 25-11-2016

Acts Referred:

Penal Code, 1860 (IPC) — Section 376(2)(f)

Citation : (2017) 2 GauLR 42 : (2017) 1 GauLT 22

Hon'ble Judges : S. Serto, J.

Bench : Single Bench

Advocate : Mrs. Linda L. Fambawl, Addl. Public Prosecutor, Mizoram, for the Respondents; Mr. K. Lalchhanliana, Amicus Curiae, for the Appellant

Final Decision : Dismissed

Judgement

S. Serto, J. (CAV) - This is a Jail appeal of a convict who has been in Jail since he was found guilty of having committed the offence punishable under Section 376 (2) (f) of IPC hence convicted and sentenced to imprisonment of 10 years Rigorous Imprisonment and to a fine of Rs. 25,000/- by the Ld. Adl. Session Judge, Aizawl District vide her Judgment and Order dated 23.07.2013 and sentence order dated 25.07.2013 passed in CrI. Trial No. 1533/2012. The appeal is confined to the quantum of sentence. Since the appellant cannot afford to hire the service of lawyer, Mr. Lalchhanliana Khiangte, Advocate was appointed as Amicus Curiae to help him present his case.

2. Heard the Ld. Amicus Curiae, Mr. Lalchhanliana Khiangte and the Ld. Additional Public Prosecutor, Mrs. Linda L. Fambawl.

3. The brief facts of the case leading to the conviction and sentence of the appellant/accused under Section 376 (2) (f) of IPC is briefly stated as follows:

That the appellant/convict after having divorce his wife lived with his two children who are minors and one of which is the prosecutrix. In the night of 25.06.2012 at about 9:00 p.m., one Lalchhuanmawii, who is the sister of the ex-wife of the

appellant/convict who lived in the same house where the appellant/accused lived with his children with just a wall made of bamboo between them heard an unusual sound of the prosecutrix saying "Baba, a na a na" meaning "Daddy, it is paining" suspected that the prosecutrix must have been sexually assaulted/abused by the appellant/convict informed her sister, namely, Hrangthangi who is the mother of the prosecutrix. After getting all the informations from her daughter Ms Hrangthangi consulted her daughter's the teacher on the matter. The teacher and Ms Hrangthangi then approached CWCA and thereafter, submitted a report to Bawngkawn Police Station on 28.06.2012. The Bawngkawn Police Station on receipt of the complaint registered an FIR Case No. 171 of 2012 u/s 376(2) (f) of IPC and arrested the accused and set the criminal justice system in motion. After investigation was completed, charge sheet was filed and trial was conducted in the Court of the Addl. Sessions Judge-III, Aizawl Judicial District.

The prosecution examined as many as 6 prosecution witnesses including the prosecutrix, her mother, her aunty who reported the incident to the mother of the prosecutrix, the Doctor who examined the prosecutrix and the Police Officers who were involved in the investigation of the case. The appellant/accused could not afford to hire service of an a counsel, therefore, he was given the service of an Advocate who was appointed as Amicus Curiae.

4. After hearing the parties and considering the evidence, the learned Additional Sessions Judge-III, Aizawl found the appellant/convict guilty and hence convicted him under Section 376(2)(f) of IPC and sentenced him to undergo 10 years Rigorous Imprisonment with a fine of Rs. 25,000/-. The learned Additional Sessions Judge also directed that in case the convict failed to deposit or pay the fine amount, he shall undergo imprisonment for a further period of six months.

5. The appellant/convict being aggrieved with the quantum of sentence has filed the Jail appeal and prays for reduction of the period of imprisonment and to eliminate the fine of Rs. 25,000/-. The ground on which the appellant/convict has sought for reduction of the Jail term and elimination of the fine by filing his appeal petition are as follows:

- i) That this is the first time in his life that he had been convicted in a criminal case.
- ii) That he will henceforth be a good citizen and respect the laws of the country.
- iii) That ever since he had been in Jail following his sentence in this case, he has not only kept the rules and regulations of the prison but he has always obeyed the prison authorities and assisted them in keeping the Jail in order except when he is not physically well. Besides, he had been assisting the Warders and also Office Bearers of Prisoners Welfare Committee in the maintenance of the Wards of the Prison.
- iv) That the delay in lodging the FIR was not explained properly and that was

admitted even by the Investigating Officer in the cross examination.

v) That there is no evidence to show that the prosecutrix had shown unusual behaviour and to that Dr. Catherine, who examined her on 29.06.2012 had stated that there was no mark of violence and there was no obvious seminal or other stain on the body and cloths of the prosecutrix.

vi) That he has been suffering from all kinds of illness in the Jail where no proper medicine and treatment are available. Besides, he has no money to supplement what is provided in the Prison, therefore, he has suffered from diminished vision and hearing capacity on the left ear. As such, he needs to take medical treatment outside the Jail but due to the long period of the detention, he will not be able to do the same and this has caused a lot of mental trauma.

vii) That since he and his wife had divorced, there is no one to look after his children. The children being minors are in danger of facing starvation besides not being able to go to school. These worries him and gives him sleepless nights. That while he is in Jail, his mother had also passed away.

viii) That his daughter i.e. the prosecutrix is willing to stay with him and is eagerly waiting for the time of his release from Jail.

6. It is submitted by the learned Amicus Curiae that there was no eye witness to the crime allegedly committed by the appellant/convict and no scientific methods were employed for examination of the cloths and body of the prosecutrix and appellant/convict to ascertain whether rape was actually committed on the prosecutrix by the appellant/convict or not. The learned Amicus Curiae also submitted that according to the medical examination conducted by the Doctor her (prosecutrix) hymen was partially present and only old tear was seen, if the appellant/convict had committed rape on the prosecutrix on the date as alleged, there should have been fresh wounds found on the private parts of the prosecutrix. The learned Amicus Curiae further submitted that prosecution witness i.e. PW 6, aunt of the prosecutrix, in her deposition did not directly state that rape was committed by the appellant/convict on the prosecutrix but only stated that she heard the sound of the prosecutrix saying "Baba a na a na" meaning "Daddy it is paining" therefore, the conviction was based only on the sole evidence of the prosecutrix and no eye witness. Lastly, the learned Amicus Curiae submitted that in his examination under Section 313 of the Cr.P.C., the appellant/convict was asked "do you want to adduce defense evidence and he had said "yes"" but there is nothing in the record which shows that he was given a chance to do so. Taking into account all these, the quantum of sentence given by the learned Trial Court may, therefore, be reduced as prayed for by the appellant/convict.

7. Mrs. Linda L. Fambawl, learned Addl. Public Prosecutor, Mizoram at the very outset submitted that the appeal is confined only on the quantum of sentence and no where did the accused deny commission of the crime, therefore, there is no necessity of going back to the evidence adduced by the prosecution and the

findings given by the learned Trial Court. The learned Addl. Public Prosecutor also submitted that the appellant's petition also shows that he was guilty of the offence. She further submitted that the evidence given by the PW 6, the prosecutrix and the Doctor, who examined her (prosecutrix) are all corroborative to each other, besides, evidence given by the prosecutrix does not suffer from any discrepancy, therefore, that alone could have been sufficient for convicting the appellant. The learned Addl. Public Prosecutor, lastly, submitted that considering the nature of the crime committed by the appellant/convict, and the strong evidence against him, there is no room or reason for showing leniency.

8. I have gone through the evidence of the 6 PWs, the relevant documents like, the FIR, Medical Examination Report of the Doctor who examined the prosecutrix and the Judgment dated 23.7.2013 and the sentence order dated 25.7.2013 of the learned Additional Session Judge, Aizawl, wherein the appellant had been convicted and sentenced.

The evidence given by the prosecutrix that she was raped by her own father in the night of 25.06.2012, and due to the pain she cried is corroborated by the statement of the PW 6, her aunty, who lives in the same house with them but separated by a bamboo wall only. The PW 6 had stated in her evidence that in the night of 25.06.2012 around 9:00 p.m., she heard the prosecutrix saying "Baba, a na a na" meaning "Daddy, it is paining". The same is also corroborated by the statement of PW 1, namely, Hrangthangi, who in her evidence had stated that she was informed about the incident by her sister that is PW 6, as stated above. Further, credence is added to the evidence of the three PWs by the evidence given by the Doctor who examined the prosecutrix. The Doctor stated both in her oral and documentary evidence that hymen of the prosecutrix was found to be partially present, old tear was seen and the vagina opening with two finger easily. The prosecutrix also stated in her evidence that what happened in the night of 25.06.2012 was not the first time but she had been raped several times by her father since she attained the age of 10 years. When she gave the statement the prosecutrix was only 13 years old, as such, no motive or motives could have been imputed on her for the evidence she gave against her own father. For a normal child of her age, love and affection, sense of respect and awe for her father is a natural expectation, even more in her case, because, her father is from another state, having no other relatives within the state except she and her brother. But to come to Court with such statement or evidence against her own father, it could have been only because of compelling circumstances, such as, the inhumane acts of her father committed on her. Therefore, there is no room for entertaining any doubt on the genuineness of her evidence. As such, I agree with the learned Addl. Session Judge, Aizawl that the appellant/convict had committed the crime of rape punishable under section 376 (2) (f) of IPC against his own daughter i.e. the prosecutrix.

9. The question of delay in filing FIR raised by the learned Amicus Curiae in my considered view will have no bearing on the merit of the case. Firstly, because,

before the FIR could be lodged, the news of the incident had to come from the aunty of the prosecutrix i.e. PW 6 to her mother i.e. PW 1 on the following day of the night in which the incident took place, and the mother being uneducated, therefore, not knowing how to go about had to take advice of the teacher of the prosecutrix, and thereafter approached the Child Welfare Committee who then only help her to report to the Police Station. All these had taken time and it is not unusual in rape cases, specially in the circumstances of the mother of the prosecutrix it is perfectly reasonable.

Secondly, considering socio-economic background of the parties involved in this case, especially the mother of the prosecutrix, who is also uneducated as stated above what made her take the time in lodging the FIR is quite reasonable. In fact, the I.O. of the FIR had also explained the facts and circumstances that took place between the night when the incident of rape took place and the day on which the FIR was finally lodged i.e. on 28.06.2012.

In rape cases, victim's family or relatives usually take time to finally make up their mind before a report to the police is submitted because of social stigma involved both for the victim and the family. In view of the reasons given above, the delay of two days in lodging the FIR can not be overemphasized and it should have no bearing on the merit of the case.

10. Coming to the quantum of the sentence, the learned Addl. Session Judge had taken into consideration the grounds the appellant/convict had taken in this appeal. The reasons given by the learned Addl. Session Judge in sentencing the appellant/convict to 10 years of Rigorous Imprisonment and a fine of Rs. 25,000/- and to suffer a further period of Rigorous Imprisonment of 6 months in the event of default in paying the fine appears to be fair and reasonable and I find no discrepancy or illegality in it. It is apparent from the sentence order dated 25.07.2013 that the appellant/convict was sentenced under Section 376 (2) (f).

11. The relevant portion of the sentence order dated 25.07.2013 is given here below:

"The honourable Apex Court while considering the question of imposition of sentence in the offence of rape has held in the case of State v. Putaraja reported in 2004 CRL. LJ 579 (SC) that "Any liberal attitude by imposing meager sentences or taking too sympathetic view merely on account of lapse of time on consideration personal to the accused only in respect of such offences will be result wise counter productive in the long run and against societal interest which needs to be cared for and strengthened by the required string of deterrence inbuilt in the sentencing system. It is the nature and gravity of the crime but not the criminal, which are germane for consideration of appropriate sentence in a criminal trial. Leniency in matters involving sexual offences is not only undesirable but also against public interest. Such types of offences are to be dealt with severity and with iron hands. Showing leniency in such matters would be really a case of misplaced sympathy...."

The informant submitted a letter for withdrawal of the FIR as stated by the Id. State Defence Counsel. I have read the contents of the said letter wherein the informant express her willingness to forgive the accused if the accused can keep his promise that he will not behave in the manner as he used to do earlier. Upon hearing the accused today, he has not made any submission about he being remorseful or he making a commitment to reform himself. Apart from the fact that the offence u/s 376 (2) (f) IPC is a non compoundable offence, it appears that the reason why the informant forgave the accused have not been complied with by the accused. As rightly pointed out by the Id. Addl. PP, such compromise cannot have a bearing on the sentence. The parties may live in peace but using the same as a ground to reduce the sentence would not be proper in view of the fact that imposition of appropriate sentence is the only means by which the Court can show the abhorrence of society to such a crime.

Upon balancing the right of the accused, his age, character and antecedents on one hand and the nature of offence, the age of the prosecutrix, the relationship between the accused and the prosecutrix, the lifelong effect the incident will have on the prosecutrix on the other hand, I am of the considered opinion that no adequate and special reasons have been made out to impose a sentence lower than the minimum sentence.

Accordingly, accused Anil Tudu is sentenced to undergo Rigorous Imprisonment for a period of 10 years and to pay a fine of Rs. 25,000/- and in default to further undergo R.I for a period of 6 months.

As there is no material on record to suggest that the accused has other criminal antecedents, taking recourse to Section 428 Cr.P.C., imprisonment undergone by the accused during investigation and trial is hereby set off and the accused will undergo RI for the remaining period."

12. Section 376 of the IPC reads as follows:-

"376. Punishment for rape.-(1) Whoever, except in the cases provided for in sub-section (2), commits rape, shall be punished with rigorous imprisonment of either description for a term which shall not be less than seven years, but which may extend to imprisonment for life, and shall also be liable to fine.

(2) Whoever,-

(a) being a police officer, commits rape -

(i) within the limits of the police station to which such police officer is appointed; or

(ii) in the premises of any station house; or

(iii) on a woman in such police officer's custody or in the custody of a police officer subordinate to such police officer; or

(b) being a public servant, commits rape on a woman in such public servant's

custody or in the custody of a public servant subordinate to such public servant;
or

(c) being a member of the armed forces deployed in an area by the Central or a State Government commits rape in such area; or

(d) being on the management or on the staff of a jail, remand home or other place of custody established by or under any law for the time being in force or of a women's or children's institution, commits rape on any inmate of such jail, remand home, place or institution; or

(e) being on the management or on the staff of a hospital, commits rape on a woman in that hospital; or

(f) being a relative, guardian or teacher of, or a person in the position of trust or authority towards the woman, commits rape on such woman; or

(g) commits rape during communal or sectarian violence; or

(h) commits rape on a woman knowing her to be pregnant; or

(i) commits rape on a woman when she is under sixteen years of age; or

(j) commits rape, on a woman incapable of giving consent; or

(k) being in a position of control or dominance over a woman, commits rape on such woman; or

(l) commits rape on a woman suffering from mental or physical disability; or

(m) while committing rape causes grievous bodily harm or maims or disfigures or endangers the life of a woman; or

(n) commits rape repeatedly on the same woman, shall be punished with rigorous imprisonment for a term which shall not be less than ten years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and shall also be liable to fine."

13. On mere perusal of the above section, it would be seen that punishment for rape has been broadly classified into two categories; one as given in clause (1) of the section and the other as given in clause (2) of the same section. In this case, the punishment applicable is under clause (2). Under clause (2) sub-clause (n) of the section the quantum of sentence/punishment to be awarded to the offender of rape who committed the same under the circumstances described in sub-clause (a) to (m) of the same clause is provided as follows; that those who commit rape under the circumstances mentioned in the sub-clause (a) to (m) shall be punished with Rigorous Imprisonment for a term which shall not be less than 10 years but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life , and shall also be liable to fine.

The crime committed by the appellant/convict as stated is against his own daughter, therefore, it comes under Clause (2) (f) of section 376 of IPC, and such crime attracts the punishment prescribed under sub-clause (n) of the clause (2) of the same section which is as stated above.

The said sub section provides minimum punishment of ten years imprisonment and fine which the learned Session Judge in this case has found it just and proper to award to the appellant/convict. The settled principle of law is that whenever or where ever in a law minimum punishment is provided for commission of a crime no court can exercise discretion to reduce the quantum of sentence lesser than the minimum prescribed by such law. Therefore, in this case also, the minimum quantum of Jail term awarded by the Ld. Additional Session as provided under the law stated above cannot be reduced. As such, what remains is only the question of whether the amount of fine which the appellant/convict was sentenced to pay can be reduced or not.

14. In the case of State of Punjab v. Gurmit Singh reported in (1996) 2 SCC 384, the Apex Court observed as follows:

"21. Of late, crime against women in general and rape in particular is on the increase. It is an irony that while we are celebrating woman's rights in all spheres, we show little or no concern for her honour. It is a sad reflection on the attitude of indifference of the society towards the violation of human dignity of the victims of sex crimes. We must remember that a rapist not only violates the victim's privacy and personal integrity, but inevitably causes serious psychological as well as physical harm in the process. Rape is not merely a physical assault ---it is often destructive of the whole personality of the victim. A murderer destroys the physical body of the victim, a rapist degrades the very soul of the helpless female. The courts, therefore, shoulder a great responsibility while trying an accused on charges of rape. They must deal with such cases with utmost sensitivity. The courts should examine the broader probabilities of a case and not get swayed by the minor contradictions or insignificant discrepancies in the statement of the prosecutrix, which are not of a fatal nature, to throw out an otherwise reliable prosecution case. If evidence of the prosecutrix inspires confidence, it must be relied upon without seeking corroboration of her statement in material particulars. If for some reason the court finds it difficult to place implicit reliance on her testimony, it may look for evidence which may lend assurance to her testimony, short of corroboration required in the case of an accomplice. The testimony of the prosecutrix must be appreciated in the back ground of the entire case and the trial court must be alive to its responsibility and be sensitive while dealing with cases involving sexual molestation." The Hon'ble Supreme Court had also observed in the case of Bodhisattwa Gautam v. Subhra Chakraborty as reported in (1996) 1 SCC 490 as follows:

"10. Rape is thus not only a crime against the person of a woman (victim), it is a crime against the entire society. It destroys the entire psychology of a woman and pushes her into deep emotional crisis. It is only by her sheer will-power that

she rehabilitates herself in the society which, on coming to know of the rape, looks down upon her in derision and contempt. Rape is, therefore, the most hated crime. It is a crime against basic human rights and is also violative of the victim's most cherished of the Fundamental Rights, namely, the Right to Life contained in Article 21. To many feminists and psychiatrists, rape is less a sexual offence than an act of aggression aimed at degrading and humiliating women. The rape laws do not, unfortunately, take care of the social aspect of the matter and are inept in many respects."

15. Rape of one's own child that too a minor is a crime not only inhumane, but brutal and barbaric beyond measure. As observed by the Hon'ble Supreme Court in the cases cited above rape does not only violate privacy and personal integrity of the victim but causes serious psychological and physical harm to her which leads to destruction of her whole personality . And it also degrades the victim's very soul. It is in deed a crime against basic human rights and is also violative of the victim's most cherished of the Fundamental Rights, namely, the Right to Life. Rape, as such, is the most cruel of all crimes. Therefore, those who commit such crime deserves to be awarded if not the maximum, at least, the minimum punishment as provided under the provision of law.

In view of what has been stated above and the observations of the Hon'ble Supreme Court on the crime of rape in the judgments cited above and in the judgment cited by the learned Adl. Session Judge in her sentence order I see no reason why the quantum of sentence which has been appropriately awarded should be reduce. Therefore, the appeal stands dismissed.

Before parting with this judgment, I must record appreciation of this Court on the assistance rendered by Mr. Lalchhanliana Khiangte, learned Amicus Curiae, the Mizoram State Legal Services Authority as per rules and practice applicable, shall pay to him the appropriate fee.