
(2007) 01 GAU CK 0054
In the Gauhati High Court

State of Mizoram

APPELLANT

Vs

Lalzarliana

RESPONDENT

Date of Decision : 17-01-2007

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 391
Penal Code, 1860 (IPC) — Section 376(1)

Citation : (2007) 2 GLT 764

Hon'ble Judges : A.B. Pal, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

A.B. Pal, J.—The Judgment of acquittal passed by the learned Additional District Magistrate (Judicial) Aizawl in GR. No. 1160 of 2002 stands impugned in the present appeal by the State of Mizoram.

2. I have heard Ms. Dinari T. Azyu, learned P.P. for the State appellant and Mr. C. Lalramzauva, learned Counsel for the convict respondent.

3. The appeal was heard by this Court earlier and by an order dated 07.06.2006 the learned Trial Court was directed to record evidence of the victim girl, who was not examined during trial on the ground that she appeared to be abnormal and unable to understand the question put to her by the learned Trial Court on 02.05.2003. In compliance of the said direction given u/s 391 of the Criminal Procedure Code the learned Trial Court recorded the statement of the victim girl on 27.04.2006 and returned the case record alongwith the said statement for the purpose of disposal of this appeal.

4. The prosecution case in brief, as could be derived from the materials on record placed by the prosecution, is that the victim girl alongwith her elder sister (P.W. 4) Zorammuan were residing in the village Reiek with their grand parents and uncle when their parents were living in Kolasib. On 24.06.2002 Vanlalruata (P.W.-3), the uncle of the victim was at Aizawl when at about 2 a.m. he received

a phone call from his brother-in-law residing in Reiek that the victim girl was found missing since 23.06.2002. However, he was informed later at about 5.30 a.m. on 24.06.2002 that the girl had returned home. After reaching home from Aizawl her uncle asked the Zorammuani (P.W.-4) to know from the victim whether she had sexual intercourse with anybody or what happened to her. Being asked the girl confided to her elder sister (P.W.-4) that the convict-respondent Lalzarliana, a close neighbour had sexual intercourse for four times but she could not remember the date and time of the occurrence. It is the case of the prosecution that she was mentally retarded. The uncle presumed that the incident of rape might have taken place in the month of May-2002. He immediately informed his elder brother, the father of the victim (P.W.-I), who became very angry and intended to lodge complaint. But his brother persuaded him to wait hoping the accused would approach for pardon. As that was not done he lodged the First Information Report on 27.06.2002 thus setting in motion the criminal investigation which finally found a prima-facie case against the convict-respondent u/s 376(1) of the Indian Penal Code. During trial the prosecution examined seven witnesses including the victim girl and after a careful appreciation of the evidence the learned Trial Court recorded an order of acquittal.

5. In the judgment impugned the learned Trial Court observed that except the disclosure made by the mentally retarded girl to her elder sister more than a month after the alleged sexual assault, no independent evidence, direct or substantial, were available to record a finding of guilt against the convict. According to the medical opinion after examination of the sex organ of the victim, her hymen was found intact and the two-finger passage did not definitely suggest that there was sexual intercourse. In view of the above position and in the absence of any statement of the victim girl it was not considered safe to record an order of conviction in spite of the confessional statement of the accused recorded u/s 164 Cr.P.C, which was not formally proved and exhibited. Though on remand the statement of the victim has been recorded and sent to this Court, the confessional statement of the convict could not be formally brought on record. The question that now to be adverted to is whether the prosecution evidence and materials on record along with the statement of the victim have made out a strong case for the prosecution enabling this Court to set aside and quash the judgment of acquittal and instead record an order of conviction u/s 376(1) of the IPC.

6. Certain important aspects of the prosecution story need to be noticed before delving into the details to examine whether material irregularity or infirmity did creep in the findings of the learned Trial Court occasioning a failure of justice. In the first place, the victim never on her own disclosed to anybody anything about her affair with the convict. Only when she was found missing on 23.06.2002 and herself returned later, she, after being asked by her elder sister, confided that she had sexual affair with the convict in the previous month. According to the elder sister (P.W. 4) the victim also stated that their sexual intercourse had taken

place in their own house, in kitchen, sitting room and bedroom when other inmates were absent. Neither in the statement of the elder sister nor in the statement of the victim, later recorded, there is even a whisper that the convict forced her to the sexual act giving thereby a clear indication that she was a willing partner. If she was really a mentally retarded person the question that looms large is whether and to what extent her statement can be given credibility.

7. Though according to prosecution the alleged offence was committed in the month of May 2002 and the same came to be known in the end of June 2002, no attempt was made by the investigating police officer to record the statement of the victim girl. During trial the victim was examined as P.W. 2 but nothing was recorded as the learned Magistrate observed that she appeared to be abnormal and did not understand the questions put to her. At no stage of the investigation and trial she was asked to identify the alleged rapist though he was the close neighbour and was in custody since the launching of the investigation. Thus, her disclosure to her elder sister by name only of the offender when admittedly she was abnormal and was unable to understand any question, stands shrouded by suspicion particularly because only being questioned by the elder sister she made the alleged disclosure. Only after a period of about four years, she was again examined by the learned trial Court after receiving the case record on remand and then only in her statement she disclosed to the learned trial Court that she had sex with the convict. She left no indication that any force was applied on her by the alleged offender. As regards the identification the Court put the following questions:

7. Do you know who is standing in the Court now? Is he Lalzarliana, who had sex with you?

Ans: Yes.

It would appear that the question put by the learned trial Court was suggestive as the name as well as the person of the alleged offender was disclosed to her. Another startling disclosure by her is that she had reached 16 presumably when the occurrence had taken place. This goes to dress down the claim of her father and uncle that she was only 13 in May 2002 when she was subjected to sexual assault.

8. As regards the alleged confession by the convict, which has not been exhibited, it would appear there from that the procedure laid down in Section 164 of Cr.P.C. was not at all followed. The Magistrate, 1st Class, Aizawl recorded only five lines on 26.09.2002 without cautioning the maker of the statement that he was not bound to make such a statement and that if made it would be used as an important piece of evidence in the trial against him. No question was also put to him whether he was making the confession under threat, promise or influence of anybody. In the brief confession he admitted that he had sex with the girl thrice at her sweet will and at that time she was 18 years old. He further stated that she had sex with another male for which she used to go his house.

Be that as it may, in my considered view, for the lapses in recording the statement noticed above, the alleged confession cannot have any evidentiary value to lend any support to the prosecution case.

9. Once it is definitely found that even if there was sex between the victim and the convict, she was a willing partner the most important question, which would then confront is whether at the time of alleged occurrence she was below 16 years, for the reason that if she was a minor her consent is not material. Though there is no documentary evidence or medical test about her age, the statements of her father, uncle and elder sister have tried to establish that she was far below 16. But the victim in her deposition stated that she reached 16 when the alleged sexual act had taken place. Again, according to the medical opinion her hymen being found intact, the two-finger passage itself did not suggest that there was sexual intercourse. No external signs of violence were found on her body during medical examination.

10. The submission of the learned Counsel for the State appellant that the inconsistencies in the prosecution evidence notwithstanding, the confession of the convict that he had sex with the victim girl on three occasions is enough for conviction seems to be misplaced for the infirmities in the unexhibited document discussed above. Mr. C. Lalramzauva, learned Counsel for the respondent, has argued on the other hand, that according to P.W.-3, the uncle of the victim, the accused was not known to have any bad character and as no statement of the victim at the earliest point of time was available it would be unsafe to convict a person solely on her statement recorded after four years in the absence of any other direct or substantial evidence to bring home the charge. Placing reliance on a decision of the Supreme Court in Tota Singh and Another Vs. State of Punjab, , he would submit that if two views are possible the one in favour of the accused should be accepted by the Court which has been exactly done by the learned trial Court in the case on hand. In the said case the Supreme Court has recorded important observation in para 6 which read as follows:

6. The High Court has not found in its judgment that the reasons given by the learned Sessions Judge for discarding the testimony of PW 2 and PW 6 were either unreasonable or independent reappraisal of the evidence on its own and to set aside the acquittal merely on the ground that as a result of such reappraisal, the High Court was inclined to reach a conclusion different from the one recorded by the learned Sessions Judge. This Court has repeatedly pointed out that the mere fact that the appellate Court is inclined on a reappraisal of the evidence to reach a conclusion which is at variance with the one recorded in the order of acquittal passed by the Court below will not constitute a valid and sufficient ground for setting aside the acquittal. The jurisdiction of the appellate Court in dealing with an appeal against an order of acquittal is circumscribed by the limitation that no interference is to be made with the order of acquittal unless the approach made by the lower Court to the consideration of the evidence in the case is vitiated by some manifest illegality or

the conclusion recorded by the Court below is such which could not have been possibly arrived at by any Court acting reasonably and judiciously and is, therefore, liable to be characterized as perverse. Where two views are possible on an appraisal of the evidence adduced in the case and the Court below has taken a view which is a plausible one, the appellate Court cannot legally interfere with an order of acquittal even if it is of the opinion that the view taken by the Court below on its consideration of the evidence is erroneous.

11. What has emerged finally from the above discussions is that at the time of alleged occurrence in May-2002 the alleged victim was mentally retarded and unable to understand any question as observed by the learned trial Court. This being the position her disclosure after being questioned by her elder sister that she had sex with the convict identifying him by name only cannot alone prove the charge of rape, particularly when she was unable to understand any question. As the confessional statement of the convict which was not exhibited and not recorded in accordance with the procedure laid down in Section 164 of Cr.P.C. remains out of consideration, there remains no other evidence to substantiate alleged disclosure by the victim girl to her elder sister particularly when at no point of time during investigation or trial she was asked to identify the convict physically. No circumstantial evidences are on record to show any proximity between the two at any point of time before the alleged occurrence to indicate possibility of any sexual affair. The statement of the victim girl recorded after four years by the trial Court has raised more smoke than fire when she stated that she had reached 16 years of age at the time of occurrence. A girl of sixteen willingly having sex does not amount to rape.

12. The question still hangs to what extent the statement of the victim should be believed! Did she at all understand what did really amount to "having sex" as stated by her when she was questioned by her elder sister in 2002 or by the trial Court in 2006? The question becomes more relevant when according to the medical opinion her hymen was fully intact and the two finger passage alone did not suggest sexual intercourse. I, thus find no infirmity in the findings of the trial Court leading to acquittal.

13. For the reasons and the discussions aforementioned, this appeal has no merit and consequently the same is dismissed.