
(2006) 06 GAU CK 0028
In the Gauhati High Court
Case No : Criminal Appeal No. 11 of 2005

State of Mizoram

APPELLANT

Vs

Lalzarliana

RESPONDENT

Date of Decision : 07-06-2006

Acts Referred:

Constitution of India, 1950 — Article 21
Criminal Procedure Code, 1973 (CrPC) — Section 164, 311, 378, 386, 391
Evidence Act, 1872 — Section 118, 165
Penal Code, 1860 (IPC) — Section 376, 376(1)

Citation : (2006) CriLJ 3504

Hon'ble Judges : B.P. Katakey, J

Bench : Single Bench

Advocate : Dinari T. Azyu, app, for the Appellant; A.R. Malhotra, for the Respondent

Judgement

B.P. Katakey, J.—This appeal is directed against the judgment of acquittal dated 22-6-2005 recorded by the Id. Additional District Magistrate (Judicial) Aizawl in Criminal Tr. No. 1160/2002 acquitting the respondent from the charges framed u/s 376(1) IPC.

2. The prosecution story in brief is that, on 27-6-2002, a written First Information was lodged by Sh. Lalthandinga, PW 1, the father of the victim to the officer in-charge, Kulikawn Police Station, alleging that his abnormal daughter, aged about 13 years, residing at Reiek Village was sexually assaulted by the respondent during the month of May, 2002. The investigating agency, on receipt of the said FIR registered Kulikawn P. S. Case No. 125/02 u/s 376(1) IPC, and upon completion of investigation, submitted the charge sheet. The learned trial Court, thereafter, framed charges against the present respondent u/s 376(1) IPC and when the same was read over and explained to him, he pleaded not guilty and claimed to be tried. The prosecution in order to bring home the charge presented 7 (seven) witnesses including the first informant Sh. Lalthandinga, the victim, Zorammuni, the sister of the victim, Dr. Catherine Ngurbiakveli, who

medically examined the victim, as well as the Investigating Officers, who conducted the investigation. The learned Additional District Magistrate (I) acquitted the respondent from the charges u/s 376(1) IPC, on the ground that there was no eye witness and the prosecution has failed to prove the charges against the respondent. The learned trial Court has also observed that the victim could not give any rational answers to the questions put to her and therefore, it is not safe to convict on the testimony of other witnesses more so, when the doctor did not give any specific opinion that the victim was sexually assaulted. Hence, the present appeal by the State u/s 378 Cr. PC.

3. I have heard Miss Dinari T. Azyu, the learned Assistant Public Prosecutor for the State and also Mr. A. R. Malhotra, the learned Counsel appearing on behalf of the respondent.

4. Miss Dinari T. Azyu, the learned APP referring to the provisions contained in Section 118 of the Indian Evidence Act has submitted that in the instant case as the victim is a mentally retarded person, the learned trial Court is duty bound to put questions to such witnesses to ascertain as to whether she can give rational answer to those questions and is competent to testify. According to the learned APP, the victim of a sexual offence is the most important witness and even the conviction can be based on the sole testimony of such witnesses, therefore, the Courts burdened while examining the victim as the witness, is more than the witnesses of other offences. According to the learned APP, the learned trial Court except recording that no rational answers could be given by the victim, while he was presented as witness on behalf of the prosecution, did not even state what were the questions, the learned Magistrate put to her and what were her answers, to come to such finding, which the learned Magistrate is duty bound to record as the same is open to challenge. The learned APP has further submitted that in fact, the accused person has admitted his guilt by making a confessional statement which was recorded as required u/s 164 Cr PC and such confessional statements, having been on record, the learned Magistrate ought to have examined the witness to prove such confessional statements, even by exercising the power u/s 311 Cr PC, as the purpose of a criminal trial is to find out the truth and to punish the guilty. The learned APP therefore, submits that it is a fit case where this Court may exercise the power u/s 391 Cr PC and direct the learned trial Court to record the evidence of the prosecutrix, as well as such witnesses to prove the confessional statements made by the accused respondent. The learned APP in support of her contention has placed reliance on *Zahira Habibulla H. Sheikh and Another Vs. State of Gujarat and Others*, .

5. Mr. A.R. Malhotra, the learned Counsel for the respondent, on the other hand, has submitted that power u/s 391 Cr PC cannot be exercised for giving a scope to the prosecution to fill up the lacuna, and such power has to be exercised sparingly and in exceptional cases only. Referring to the opinion formed by the learned trial Court regarding the mental state of the prosecutrix, the learned Counsel has submitted that the learned Court below has recorded that the

prosecutrix could not give any rational answer to the questions put to her and therefore, it signifies that some questions were put to her, which she could not answer and therefore, she is not the person competent to testify u/s 118 of the Indian Evidence Act. According to the learned Counsel, non-recording of the questions and the tests applied by the learned trial Court in coming to the finding that the witness could not give any rational answer to the questions, will not make the opinion of the Court invalid. Mr. A. R. Malhotra has further submitted that the alleged confessional statements made by the respondent having been already on record, it was the duty of the prosecution to prove such documents if they want to place reliance on such confessional statements for the purpose of recording the guilt against the respondent. But, in the instant case as the prosecution has chosen not to prove such documents, this Court, in exercise of its power u/s 391 Cr PC will not direct the learned trial Court to record additional evidence regarding the confessional statements made by the accused respondent with a view to give prosecution a scope to fill up the lacuna. Mr. A. R. Malhotra has further submitted that on the basis of the materials available on record, the learned trial Court has rightly recorded the acquittal in favour of the respondent.

6. Section 118 of the Indian Evidence Act provides that all persons shall be competent to testify unless the Court considers that they are prevented from understanding the questions put to them, or from giving rational answer to those questions, by tender age, extreme old age, diseases, whether body or mind, or any other, cause of the same kind. Explanation to Section 118 provides that the lunatic is not incompetent to testify unless he is prevented by his lunacy from understanding the questions put to him and give rational answers to them.

7. It is therefore evident that to make a person incompetent to testify, he has to be prevented from understanding the questions put to him or from giving rational answers to those questions put by the Court. A duty is therefore, cast on the Court u/s 118 to put such questions to those witnesses which the Court considers that they are prevented from understanding the questions put to them and to ascertain whether they can give the rational answers to those questions so as to be competent to testify before the Court. The Court for the purpose of ascertaining the competency of such witness has to put questions and such tests which are to be recorded before coming to the findings that the witness could not give rational answers to those questions put to them so as to make him incompetent to testify. Recording of such questions put and answers given is a must because of the fact that the same is open to challenge and the appellate Court has the power to scrutinize as to whether, in fact, such witness is competent to testify before the Court. But in the instant case, the learned Magistrate except recording that the witness could not give rational answer, did not record what were the questions put to her and what were the answers given. By a stroke of pen, the witness was made incompetent to testify before the Court by the learned trial court, that too in an offence u/s 376 IPC, which offence violates the fundamental rights granted to a citizen under Article 21 of the Constitution of India.

8. Section 311 Cr PC empowers the Court to summon any person as witness or to examine any person though, not summoned as witness, or recalled and re-examine any person already examined. Section 391 Cr PC empowers the appellate Court to record additional evidence for reasons to be recorded, either by itself or directed to be taken by the Magistrate or by the Court of Session.

9. The purpose of a criminal trial is to search for the truth and not a bout over the technicalities and it must be conducted under such rules as will protect the innocent and punish the guilty, The Apex Court in *Zahira Habibulla H. Sheikh and Another Vs. State of Gujarat and Others*, commonly known as *Best Bakery Case*, has held that the Court have to take a participatory roll in a trial and they are not expected to be a tape recorder to record whatever is stated by the witness. It has further been held that Section 311 Cr PC and Section 165 of the Evidence Act confer vast and wide power on the Presiding Officer of the Court to elicit all necessary materials by playing an active roll in the evidence collecting process and they have to monitor the proceeding in aid of justice in a manner that something which is not relevant and not necessary is brought into the record. Even if the prosecutor is remiss in some ways, the Court can control the proceedings effectively so that the ultimate objective i.e. truth is arrived at. The Court cannot afford to be wishful or pretend to be blissfully ignorant or oblivious to such serious pitfalls or dereliction of duty on the part of the prosecuting agency. The Apex Court has further held that if the Court feels that there is necessity to act in terms of Section 311 Cr PC, it can exercise the power and examine such witness, neither to help the prosecution nor the defence but only to subserve the cause of justice and public interest.

10. While dealing with the provision of Section 391 Cr PC, the Apex Court has held as under (Paras 49 to 52 and 58 of Cri LJ):

46. Ultimately, as noted above, ad nauseam the duty of the Court is to arrive at the truth and subserve the ends of justice. Section 311 of the Code does not confer on any party any right to examine, cross-examine and re-examine any witness. This is a power given to the Court not to be merely exercised at the bidding of any one party/ person but the powers conferred and discretion vested are to prevent any irretrievable or immeasurable damage to the cause of society, public interest and miscarriage of justice. Recourse may be had by Courts to power under this section only for the purpose of discovering relevant facts or obtaining proper proof of such facts as are necessary to arrive at a just decision in the case.

47. Section 391 of the Code is another salutary provision which clothes the Courts with the power to effectively decide an appeal. Though Section 386 envisages the normal and ordinary manner and method of disposal of an appeal yet it does not and cannot be said to exhaustively enumerate the modes by which alone the Court can deal with an appeal. Section 391 is one such exception to the ordinary rule and if the appellate Court considers additional evidence to be necessary, the provisions in Section 386 and Section 391 have to be

harmoniously considered to enable the appeal to be considered and disposed of also in the light of the additional evidence as well. For this purpose it is open to the appellate Court to call for further evidence before the appeal is disposed of. The appellate Court can direct the taking up of further evidence in support of the prosecution; a fortiori it is open to the Court to direct that the accused persons may also be given a chance of adducing further evidence. Section 391 is in the nature of an exception to the general rule and the powers under it must also be exercised with great care, especially on behalf of the prosecution lest the admission of additional evidence for the prosecution operates in a manner prejudicial to the defence of the accused. The primary object of Section 391 is the prevention of a guilty man's escape through some careless or ignorant proceedings before a Court or vindication of an innocent person wrongfully accused. Where the Court through some carelessness or ignorance has omitted to record the circumstances essential to elucidation of truth, the exercise of powers u/s 391 is desirable.

48. The legislative intent in enacting Section 391 appears to be the empowerment of the appellate Court to see that justice is done between the prosecutor and the persons prosecuted and if the appellate Court finds that certain evidence is necessary in order to enable it to give a correct and proper finding, it would be justified in taking action u/s 391.

49. There is no restriction in the wording of Section 391 either as to the nature of the evidence or that it is to be taken for the prosecution only or that the provisions of the section are only to be invoked when formal proof for the prosecution is necessary. If the appellate Court thinks that it is necessary, in the interest of justice to take additional evidence, it shall do so. There is nothing in the provision limiting it to cases where there has been merely some formal defect. The matter is one of discretion of the appellate Court. As reiterated supra, the ends of justice are not satisfied only when the accused in a criminal case is acquitted.

The community acting through the State and the Public Prosecutor is also entitled to justice. The cause of the community deserves equal treatment at the hands of the Court in the discharge of its judicial functions.

55. The Courts, at the expense of repetition we may state, exist for doing justice to the persons who are affected. The trial/first appellate Courts cannot get swayed by abstract technicalities and close their eyes to factors which need to be positively probed and noticed. The Court is not merely to act as tape recorder recording evidence, overlooking the object of trial i.e. to get at the truth. It cannot be oblivious to the active role to be played for which there is not only ample scope, but sufficient powers conferred under the Code. It has a greater duty and responsibility i.e. to render justice, in a case where the role of the prosecuting agency itself is put in issue and is said to be hand in glove with the accused, parading a mock fight and making a mockery of the criminal justice administration itself.

11. As observed above, the sexual offence being violative of the basic human rights guaranteed to a citizen and also the rights granted under Article 21 of the Constitution of India, the Court should be more vigilant while recording the evidence more particularly the evidence of the victim, as the conviction can be recorded on the basis of the sole testimony of such victim. A duty is also cast on the court by Section 311 Cr PC, as well as for the sake of having a fair trial, to summon and examine such witness to record his evidence, even if the prosecution has failed to adduce any evidence. In the instant case as discussed above, the learned trial Court has failed to discharge its duty imposed by Section 118 of the Evidence Act in not recording the questions he put to the victim before coming to the finding that the witness is not competent to testify before the Court as she could not give any rational answers to the questions. Moreover, the alleged confessional statement having been on record, the Court ought to have, in such a situation, called such person to give evidence in support of such confessional statement, but nothing has been done in the instant case.

12. In view of the above, to have a fair trial and to prevent miscarriage of justice and also with a view to bring the truth, which is the purpose of criminal trial, I am inclined to exercise the power u/s 391 Cr PC and direct the learned Magistrate i.e. the Ld. Additional District Magistrate (J) Aizawl to record the evidence of the victim and if in his opinion, the victim is not competent to testify, to record the questions put to her and the answers given and thereafter, to record his opinion about the competency of such witness. The learned Magistrate is further directed to examine such witness to bring on record the alleged confessional statement made by the respondent.

13. The Ld. Magistrate is directed to complete the recording of such evidence within a period of two months from today and send the memorandum of such evidence after certify the same to this Court, for the purpose of disposal of the appeal by this Court.

14. Registry is directed to send a copy of this order to the Ld. Additional District Magistrate (J), Aizawl forthwith together with the records of criminal Tr. Case No. 1160/02, who shall, after recording the evidence and certifying the same send back such evidence along with the records to this Court. The Registry is further directed to place the appeal for hearing after receipt of such evidence and records from the learned trial Court. However, this case shall not be treated as part heard.

15. Ordered accordingly.