

GAHC030006012024



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : CrI.A./36/2024

.... Appellant

-VERSUS-

The State of Mizoram r/b Secretary to Govt. of Mizoram, Home Dept. and Anr.
Aizawl

2:J.

.... Respondents

Advocate for the petitioner : Mr. Lalrokunga Pautu, Adv

Advocates for the respondents : Mrs. Vanneihsiami, PP
Ms. Lalngaihsaki Fanai, R 2

:::BEFORE:::

HON'BLE MR. JUSTICE SANJEEV KUMAR SHARMA

Date on which judgment is reserved : 29.06.2026

Date of pronouncement of judgment : 31.07.2026.

**Whether the pronouncement is of the
Operative part of the judgment : NA**

**Whether the full judgment has been
Pronounced :**

Judgment & Order(CAV)

(Sanjeev Kumar Sharma,J)

Heard Mr. Lalrokunga Pautu, learned counsel for the appellant. Also heard Mrs. Vanneihsiami, learned Additional Public Prosecutor for the State, and Ms. Lalngaihsaki Fanai, learned counsel for respondent No. 2.

2. This is an application filed under Section 415(2) of the BNSS, 2023 against the impugned Judgment & Order dated 18.06.2024 passed by the Court of Sessions Judge, Lunglei Judicial District, Mizoram in CrI.TrI. No. 77/2024 (Hnahthial P.S. Case No. 18/2022) under Section 376(2)(1) IPC, 1860 whereby the appellant was convicted and sentenced to undergo RI for 10 years and to pay a fine of Rs. 3000/- and in default of payment of fine to undergo SI for 10 days.

3. The prosecution story of the case in brief is that an FIR was submitted by the victim's mother Mrs. Y of Hnahthial to the effect that the accused had sexual intercourse with her daughter X, who is a

mentally retarded person in her shop near their residence. The reason of delay of lodging the FIR is that the victim's family remained silent when the Baptist Church Mission of Electric 'North', revoked ordination of the accused as Church Elder. But the complainant submitted the FIR against the accused when she received notice from the accused through Advocate, Mr. Laldinsanga. Hence, HNTL-P.S. Case No. 18/2022 dated 22.07.2022 under Section 376(2)(I) IPC was registered by Inspector, Robert L. Hnamte but Sub-Inspector, H. Lalliansanga investigated the case and on conclusion thereof, he filed charge sheet against the accused. Charge under Section 376(2)(1) of IPC was framed against accused . The charge was read over and explained in the language known to him, to which he pleaded not guilty and claimed to be tried.

4. The prosecution examined as many as seven prosecution witnesses and recorded their statements. On closure of the prosecution evidence, incriminating prosecution evidence was put to the accused in his examination u/s 313 CrPC. The accused produced two defence witnesses including himself. The learned Trial Court also examined two witnesses. The appellant has been convicted and sentenced as aforesaid. Hence the appeal.

5. At this stage, the evidence on record may be adverted to. PW-1 Mrs. Y is the mother of the victim (Ms. X). Ms. , who is her niece, informed her that the accused had sexual intercourse with the victim and the incident became viral to public. After dinner they enquired about the matter from the victim. The victim disclosed to them that the accused had come to their shop on 09.05.2022 at around 11:00 AM to 12:00 Noon and had sexual intercourse with her. The victim also disclosed that the accused had sexual intercourse with her on two occasions earlier at the places below Indra Middle School and in his house. The incident was not disclosed to them earlier due to fear of the accused. When she contacted over phone, the accused replied to her that he was out of town, and she should not believe what her daughter had stated to them. Even after returning on 16.05.2022, the accused did not

meet her. When the matter was known, the Church Pastor and Church Elders came to enquire about it. On the next week, the accused with Church Elder Pianglawma, came to their residence. Instead of making apology, the accused argued on his stand that he had no sexual intercourse with victim Ms. X and wanted to have blood test. The Church withdrew ordination of the accused as Church Elder. At this, they received notice on 21.07.2022 through Advocate Mr. Laldinsanga. Though, they tried to have amicable settlement on the issue, they were compelled to lodge the FIR at Hnahthial Police Station on 22.07.2022.

6. The victim informed the earlier incidents to Ms. _____, but her friend did not believe it to be true since the accused was a Church Elder. The victim recorded the incident of 09.05.2022 by her video-mobile phone and sent it to Ms. _____, which she got from her. Mr. _____, who is the victim's friend was an eyewitness of the incident on 09.05.2022. He came to know that the accused had tried to dissuade Mr. _____ from disclosing the truth. The victim suffered from serious illness while she was 7 months old, and she has been having mental retardation at 40% disability since then. Ext. P-1 is the FIR. Ext. P-2 is the FIR Integrated Form. Ext. P-3 is the Disability certificate dated 20.06.2009 issued by Dr. John M. Ralte, Psychiatrist. Ext. P-4 is the Disability Certificate dated 08.09.2021 issued by the Medical Authority, Hnahthial, Mizoram. Ext. P-5 is the certificate to the effect that ordination of the accused as Church Elder was withdrawn. Ext. P-6 is the Notice dated 19.07.2022 which was received by her from Mr. Laldinsanga, Advocate. Ext. MO1 is the disk containing the video clip which she enclosed in the FIR. Ext. MO2 is the underwear of the victim. Ext. MO3 is the short pants of the victim. Ext. MO4 is the t-shirt of the victim. Ext. MO5 is the pants of the accused. Ext. MO6 is the t-shirt of the accused.

7. In the cross-examination led by the learned defence counsel, it is revealed that the victim was assisted by them while managing her shop. The victim has been having mental problem since her birth

and she passed class-XII under disabled quota. Certificate of mental disability was issued when the victim was 11 years. She denied that the victim had given consent to have sexual intercourse with the accused. There was an eyewitness to the incident on 09.05.2022 whose name is _____ and he is the victim's friend, but _____ did not disclose what he had seen till the incident was known to the public. He agreed that the FIR was not submitted immediately when he came to know about the incident. They lodged the FIR when they had received the Notice dated 19.07.2022. They did not have intention to lodge the FIR at the beginning. He agreed that the victim was raped when she was 5 or 6 years. The accused was prosecuted, and he was in jail for a long time.

8. CW-2 Mr. Jacob Challiandinga is a Clinical Psychologist posted at Civil Hospital, Lunglei since 2020. He completed M. Phil in Clinical Psychology from Doctor MGR University in the year 2023. He was directed to assess mental disability of X (PW-2) on 23.04.2024. The learned Court examined the Clinical Psychologist who was cross-examined and discharged.

The extract of deposition of CW-2 may be reproduced herein:-

2. Ms. X, who was the client of CW-2 Mr. _____, went to Civil Hospital, Lunglei on 23.04.2024 at around 10:30-11:00 AM. The said client completed registration at the hospital, and the case was endorsed to him for psychological assessment. Accordingly, he conducted a psychological assessment in respect of Ms. X and submitted the psychological assessment report before the Court.

His findings were as follows:

(i) On SPM, she had a raw score of 27 which placed her on the 5th percentile, with Grade V, indicating 'Intellectual Defective'.

(ii) On BKT, her Mental Age (MA) was found to be 8 years 8 months with a corresponding prorated Intelligence Quotient (IQ) of 63, indicating Mild Impairment in Intellectual

Functioning.

(iii) On VSMS, the client's Social Age (SA) was found to be 9 years with a corresponding Social Quotient (SQ) of 60, indicating Mild Deficit in Socio-Adaptive Functioning.

3. Final impression: Mild Intellectual Disability (50% disability)

4. Ext. C-1 is the psychological assessment report.

In the cross-examination led by the learned defence counsel, he stated that he came to know from the victim's mother that the victim has a shop, but she has mild intellectual disability (50% disability). If training is properly given to the victim, her mentality can improve. He cannot say whether the victim was given proper training by rehabilitation professionals.

9. The learned counsel for the appellant with reference to the evidence on record submitted that the appellant admittedly had sexual intercourse on one occasion with the alleged victim, but it is a case of consensual sex keeping in view the fact that the victim was 24 years old at that time. The prosecution though has exhibited certain documents in the form of disability certificates, the fact remains that the victim was quite capable of understanding the nature of the act to which she consented. Buttressing his aforesaid arguments, he has referred to the evidence showing that the victim herself used to run a shop and submitted the proceeds thereof to her parents. It is further submitted that the victim has also passed the XII standard under the disabled quota, which further shows her intellectual and mental development and therefore, it cannot be presumed that there was no valid consent to the act of sexual intercourse with the appellant. It is further submitted that the victim herself stated during cross-examination that she had sexual intercourse with the appellant at his house, and also in the school where the appellant was working, and she herself went to both the places upon being asked by the appellant. The victim had also stated that she did not remember whether she protested or not when she

had sexual intercourse with the appellant at the school.

10. Drawing the attention of the Court to the statement of the victim recorded under section 164 CrPC, it is pointed out that no videography of the scene was done and no special educator was engaged during the exercise of recording the statement of the victim, which is in violation of the provisions of Sub Section (5A) of Section 164 CrPC and therefore, no reliance can be placed on the said statement. Furthermore, the recording of the episode of alleged sexual intercourse taking place in the shop of the victim was an electronic record derived from another source, and since the same was not accompanied by certificate under Section 65B of the Evidence Act, the same is inadmissible in evidence.

11. In view of the aforesaid lacunae in the prosecution case, the appellant deserves an acquittal, submits learned counsel.

Per contra, the learned Additional Public Prosecutor and the learned counsel for respondent No. 2 submit that the prosecution has duly established the fact of mental disability of the victim and since the accused/appellant has himself admitted to the act of intercourse, the same amounts to rape as defined under Section 375 IPC, inasmuch, as the victim was not capable of giving valid consent. It is further submitted that in view of the provisions of Section 114 A of the Evidence Act, a presumption of absence of consent arises when the act of sexual intercourse is proved and therefore, on that ground itself, the impugned judgment deserves to be upheld.

12. I have given my anxious considerations to the rival submissions.

13. The accused/appellant has categorically admitted to having had sexual intercourse with the victim, albeit only once, in his defence evidence as well as in his statement under Section 313 CrPC. He claims that her alleged mental retardation is not readily discernible. The defence case is therefore, one

of consensual sexual intercourse between two adults.

Per contra, the prosecution case is that in view of her mental incapacity, it was not possible for the victim though aged 24 years to give valid consent to such act.

14. The fact of mental retardation was sought to be ascertained through the evidence of CW2 Mr. _____, as the prosecution did not lead any evidence in this regard through and expert in the field. Prosecution had, through the PW-1 exhibited two disability certificates in respect of the victim (Exbt. 3 & 4). Exbt.P3 was issued on 26.02.2009 by one Dr. John M. Ralte wherein, it was mentioned that the victim suffered from mental retardation to the extent of 40% and the other certificate was issued on 08.09.2021, by the 'issuing medical authority' Hnahthial, Mizoram wherein, she was stated to be a case of 'mental illness' and diagnosed as having 'mental retardation' and also as having 40% 'mental disability'. The said Dr. John M. Ralte or the 'issuing medical authority' were never examined to explain the implications of the above terms, in order to enable the learned trial court to come to a finding whether the victim was capable of understanding the nature of the act or not, and whether she could give a valid consent to such act. The evidence of CW2 Mr. _____ does no better on this count. He deposed that the victims mental's age was 8 years 8 months with an IQ of 63 indicating mild impairment in intellectual functioning and the social age was 9 years indicating mild deficit in 'socio adaptive functioning' and the final impression was 'mild intellectual disability' (50% disability)' but he too, deposed nothing with regard to the victim's capacity to understand the nature of the act.

15. A 24 year old woman assessed to have a mental age of 8/9 years cannot be straightaway equated with an actual 8/9 years old girl, as she has 24 years of lived experience as well as physical and social development, exposure to adult social environment and emotional maturity levels quite ahead of an actual 8/9 nine years old child. Further, the question of sexual autonomy of the woman, which itself is a

valuable right personal to the individual concerned, is also involved and such right of the individual cannot be stripped away merely on vague presumptions based on some abstract scores or numbers generated by psychological tests, which may vary under different settings. Specific evidence by way of expert opinion in that regard is the least that is demanded of the prosecution. What is also to be noticed is that the assessment of the victim was done on 23.04.2024 i.e., nearly 2 years after the incident which has its own significance.

16. The deposition of the victim as PW 2 was recorded on 24.04.2023 by the learned trial court wherein, it was recorded as follows:

“I was born in the year 18.04.1998. I read up to class-XII. I am ummarried. I am 24 years old. I run a small shop. I know the accused who is sitting inside the Court room.

The Court read over the Judicial Statement of X and X admitted it to be correct and true. She testified that it was recorded by a lady who looked good. Ext.P-7A is the Judicial Statement and Ext.P-7/1 is her signature.

17. Immediately thereafter, the cross-examination commenced, followed by re-examination. But no examination-in-chief was conducted. Presumably, the learned trial court preceded under Section 164 (5A)(b) and treated the statement of the victim under Section 164 CrPC as the examination-in-chief. Section 164 CrPC (5A) provides as follows:

“(5A) (a). In cases punishable under section 354, section 354A, section 354B, section 354C, section 354D, sub-section (1) or sub-section (2) of section 376, section 376A, section 376AB, section 376B, section 376C, section 376D, section 376DA, section 376DB, section 376E or section 509 of the Indian Penal Code (45 of 1860), the Judicial

Magistrate shall record the statement of the person against whom such offence has been committed in the manner prescribed in sub-section (5), as soon as the commission of the offence is brought to the notice of the police:

Provided that if the person against whom the offence is committed is temporarily or permanently mentally or physically disabled, then the Magistrate shall take the assistance of an interpreter or a special educator in recording the statement.

Provided further that if the person against whom the offence is committed is temporarily or permanently mentally or physically disabled, the statement recorded by the Magistrate, with the assistance of an interpreter or a special educator, shall be videographed.

(b). A statement recorded under clause (a) of a person who is temporarily or permanently mentally or physically disabled shall be deemed to be a statement in lieu of examination-in-chief, as specified in section 137 of the Indian Evidence Act, 1872 (1 of 1872) such that the maker of the statement can be cross-examined without the need for recording the statement at the time of trial.”

18. A perusal of the statement recorded by the learned Magistrate under Section 164 CrPC nowhere indicates that the learned Magistrate had proceeded under the provisions of Sub Section 5A of Section 164 CrPC. No aid of any interpreter or special educator was taken nor was any videographic recording of the statement done. In fact, there is nothing to indicate that the learned Magistrate was even aware of the allegedly deficient mental state of the victim. Even though the papers sent to the Magistrate by the Police would have included the FIR which mentioned the said fact along with the disability certificate enclosed, there is no indication as to whether the Magistrate had perused the same. Had it done so, an exercise to determine the mental capacity of the witness to depose was imperative in view of Section 118 of the Evidence Act which reads: “*that **all persons are competent to testify** as witnesses in court, unless the judge decides they cannot understand the questions or give smart answers. This*

rule applies to everyone, but the court checks if a person is unable to speak or think clearly due to very young age, old age, or sickness. You can read the official text on the India Code Portal.” but no such enquiry is indicated in the record of the deposition of the victim, save and accept questions as to the name, age and occupation of the victim.

19. If the statement of the victim is to be regarded as one under sub-section 5 A of Section 164 CrPC, the condition stipulated in the provisions thereto must be strictly followed, as indicated by the use of the word ‘shall’ therein and more so, when it is sought to be treated as a substantive piece of evidence under clause (b) of sub-section 5 A, in lieu of examination-in-chief under Section 137 of the Evidence Act, inasmuch as it is a departure from or exception to the statutory rules of evidence, entailing some disadvantage to the accused, the deposition having been recorded in his absence. It rather appears that the learned Magistrate treated the victim as a normal person.

20. The learned trial court recorded the deposition of the victim on 24.04.2023, much prior to the psychological assessment done by CW 2 on 23.04.2024. Therefore, the learned trial court had no material other than the Exbt P3 & P4 disability certificates, while proceeding to treat the statement of the victim under Section 164 CrPC as one under sub-section 5 A (a) thereof and appears to have been unmindful of the requirements laid down therein, in the absence of compliance of which the provision of clause (b) thereof could not have been resorted to.

21. The upshot of the above is that there is no substantive evidence of the victim herself on record, either by way of examination-in- chief or a prior statement admissible under Section 164 (5A)(a)(b) CrPC in lieu of examination-in-chief. Therefore, the cross-examination or re-examination of the victim recorded is not based on any examination-in- chief or admissible statement in lieu thereof and therefore, whatever has been stated in course of such examination is of little consequence and lack of consent has not been established.

22. PW-5 admitted that she did not see the commission of the sexual act. She stated that she heard the victim saying “ka duh lo (I do not want)” and “tha lo (not good)”. He also heard the accused telling the victim “a ho em mai (to take easy) and “min hrem mai mai mahse a pawilo (he does not care if he is punished)”. This itself shows that the victim was very much aware of the nature of the act and its moral consequences. Therefore, the evidence of PW-5 is not sufficient to establish lack of consent, as the victim was under no compulsion to succumb to the enticements of the accused, the aspect of mental incapacity not having been proved.

This brings us to Section 114A of the Evidence Act referred to by the learned Additional Public Prosecutor which reads as follows:

“14. Facts showing existence of state of mind, or of body or bodily feeling.—Facts showing the existence of any state of mind such as intention, knowledge, good faith, negligence, rashness, ill-will or good-will towards any particular person, or showing the existence of any state of body or bodily feeling, are relevant, when the existence of any such state of mind or body or bodily feeling is in issue or relevant.

(a) A is accused of receiving stolen goods knowing them to be stolen. It is proved that he was in possession of a particular stolen article.”

This means that if sexual intercourse by the accused is proved, and the woman states before the Court that she did not consent, the Court shall presume that she did not consent. This is a mandatory legal presumption unless rebutted in accordance with law.

23. Since, no examination-in-chief of the victim was recorded before the learned trial court and the statement under Section 164 CrPC cannot be admitted as substantive evidence in lieu of examination-in-chief under Section 164 (5A)(b), there exists no statement of the victim before the Court stating that she did not consent. Consequently, Section 114A of the Evidence Act has no application herein.

24. Another aspect of the prosecution case is that the victim and the complainant have also alleged that there have been other instances of sexual activity between the victim and the accused. PW 1 deposed, "I agree that X did not disclose the first two incidents to us before the third incident happened. The first incident happened below Indira Middle School and the second inside the bedroom of the accused...I do not know if X had voluntarily gone to the house of the accused when the second incident happened.." PW 2 also deposed, "I entered the house of the accused as he called me (min lo hui a). I went to the school where the accused worked as he called me... I do not remember if I protested or not before he had sex with me below the school." In the absence of proof of mental incapacity, the above would be suggestive of consent on the part of the victim.

In the case of ***Chamanlal Vs. State of Himachal Pradesh*** reported in (2020) 17 SCC 69 cited by the prosecution, the relevant paras of which are:

"18. So far as the merit of the appeal is concerned, on re-appreciation of the entire evidence on record, more particularly the deposition of doctors examined as PW 11, Dr Ramesh Kumar and PW 22, Dr Rama Malhotra, the High Court has specifically found that the IQ of the victim was 62 which was based on the history and mental state examination of the victim. The High Court has also come to the conclusion that the victim was not in a position to understand the good and bad aspect of the sexual assault. Merely because the victim was in a position to do some household works cannot discard the medical evidence that the victim had mild mental retardation and she was not in a position to understand the good and bad aspect of sexual assault. It appears that the accused had taken disadvantage of the mental illness of the victim. It is required to be appreciated coupled with the fact that the accused is found to be the biological father of the baby child delivered by the victim. Despite the above, in his Section 313 CrPC statement the case of the accused was of total denial. It was never the case of the accused that it was a case of consent. Therefore, considering the evidence on record, more particularly the deposition of PW 11 and PW 22 and even the deposition of the other prosecution witnesses, the High Court has rightly observed that the case would

fall under Section 375 IPC and has rightly convicted the accused for the offence under Section 376 IPC.

19. Even as per clause fifthly of Section 375 IPC, "a man is said to commit rape", if with her consent when, at the time of giving such consent, by reason of unsoundness of mind, is unable to understand the nature and consequences of that to which she gives consent. As observed hereinabove, even it is not the case on behalf of the accused that it was a case of consent. On evidence, it has been established and proved that the victim was mentally retarded and her IQ was 62 and she was not in a position to understand the good and bad aspect of sexual assault. The accused has taken disadvantage of the mental sickness and low IQ of the victim."

25. It is quite evident that in the above case, there was specific medical evidence that the victim had mild mental retardation and she was not in a position to understand the good and bad aspect of sexual acts and further, it was not a case where the accused claimed consent. Hence, this decision does not help the prosecution/respondent.

26. In view of the above discussion, this Court is constrained to hold that the case of the prosecution has not been proved by the legally admissible evidence and hence the impugned Judgment & Sentence cannot be sustained. Accordingly, the same is set aside and appeal stands allowed.

27. Appellant be set at liberty forthwith.

JUDGE

Comparing Assistant