

(2000) 04 OHC CK 0011

In the Orissa High Court

Case No : Criminal Appeal No. 293 of 1995

Bhursa alias Bhursa Kira alias Prahallad Mallik

APPELLANT

Vs

State of Orissa

RESPONDENT

Date of Decision : 21-04-2000

Acts Referred:

Penal Code, 1860 (IPC) — Section 376, 551

Citation : (2000) CriLJ 2722 : (2000) 2 OLR 110

Hon'ble Judges : P.K. Patra, J

Bench : Single Bench

Advocate : N.C. Pati, for the Appellant; R.K. Patnaik, Addl. Stg. Counsel, for the Respondent

Judgement

P.K.Patra, J.—The appellant has been convicted u/s 376, IPC and sentenced to undergo rigorous imprisonment for ten years and to pay a fine of Rs. 300.00, in default to undergo rigorous imprisonment for a further period of one year by Shri K.M.Das, learned Assistant Sessions Judge-cum-Civil Judge (Senior division), Nuapada, vide judgment dated 24.6.1995 in Sessions Case No. 7/2 of 1995. The said judgment has been assailed in this appeal.

2. Prosecution case, briefly stated, is as follows :

On 12.10.1994 at about 6.00 p.m. the prosecutrix (P.W.1), a minor girl aged about 9/10 years, had been to the Durga Puja Pandal in village Komna, P.S.Komna in the district of Nuapada with another girl named Sabita (P.W.6). At that time the appellant caught hold of both P.Ws. 1 and 6, but P.W. 6 managed to escape. It is alleged that the appellant gagged the mouth of P.W.I, took her to a nearby school, committed rape on her and left her on the road. While P.W.I was returning to her house on the way she met her mother (P.W.2) and P.W.6 and narrated the occurrence to them. P.W.2 accompanied by P.W.I went to Komna Police Station at 8.30 p.m. and lodged the FIR (Ext.I) before the A.S.I of the Police Station (P.W. 12) who registered the case and took up preliminary investigation. He visited the spot, examined the witnesses, seized the chadi

(M.O.III) and the frock (M.O.IV) of P.W.I. On 13.10.1994 he handed over charge of the investigation to the Officer-in-charge of the Police Station (P.W.I 1) who also examined the witnesses, arrested the appellant, seized his wearing garments, sent the appellant and P.W.I for medical examination, sent the seized garments and the collected samples for chemical examination to the R.F.S.L., Berhampur. After completion of investigation he submitted charge-sheet under Sections. 341/ 376, IPC against the appellant. But charge was framed u/s 376, IPC and the appellant stood his trial.

The appellant pleaded not guilty to the charge. His plea is one of denial and his false implication due to rivalry.

3. In order to bring home the charge, prosecution has examined twelve witnesses in all. P.W.1 is the prosecutrix, P.W.2 is the mother of the prosecutrix. P.W.6 is the friend of P.W.1 who was present at that time of the occurrence. P.Ws. 3 and 4 are post-occurrence witnesses. P.Ws. 5, 7, 8 and 9 are witnesses to the seizure. P.W. 10 is the medical officer who medically examined the appellant. P.Ws. 11 and 12 are the investigating officers.

4. The learned Assistant Sessions Judge has placed reliance on the sole testimony of the prosecutrix (P.W.I) who is aged about ten years and has held the appellant guilty of the charge u/s 376, IPC and inflicted the punishment as stated earlier. 5. Mr. N.C.Pati, learned counsel for the appellant, contended that the learned Assistant Sessions Judge has failed to appreciate the evidence correctly and has reached an erroneous conclusion which cannot be sustained in law and is liable to be set aside. Shri R.K.Patnaik, learned Addl. Standing Counsel for the State supported the judgment. The rival contentions require careful consideration.

6. The medical officer who medically examined the prosecutrix has not been examined in this case since her reports (Exts. 5 and 6) were taken into evidence on admission u/s 294 of the Code of Criminal Procedure. Ext. 5 reveals that the prosecutrix was medically examined on 13.10.1994 at 11 a.m. and it was found that her hymen was intact and no bruise or abrasion or lacerated injury on the perineum, no redness, no tenderness on the labia majora, minora and vulva was there. There was no visible blood or seminal stain on the private part of the victim girl, No marks of injury were detected on the vaginal region and there were no marks of injury on the cheeks, lips, cheen, breast, thigh, back and any other part of the body of P.W.I. It was opined that no intercourse had been done. The age of the girl was determined to be 9 to 10 years after X-ray. Further it is stated that the vaginal swab of P.W.I was collected and examined under microscope and no living or dead sperm was detected and some R.B.Cs. appeared under high power microscope in each field. No foreign particles were found on the private parts of P.W.I. To the further query of the investigating officer, the medical officer opined in her report (Ext. 6) that there was no injury on the private parts like vulva, perineum and thigh and no redness, tenderness or rupture of the hymen and even the little finger could not be introduced up to 1

c.m. On microscopic examination some R.B.Cs.were detected and hence touch of the penis to the vulva and trickling of blood from the penis into the vagina could not be excluded. The medical officer P.W.10 examined the appellant on 13.10.1994 and his report is Ext. 8. He found that phrenulum of the prepuce of the penis was torn due to recent intercourse within twenty-four hours and there was tear mark.

7. The learned Asst. Sessions Judge was of the view that the medical evidence did not rule out the possibility of the appellant trying to introduce his penis into the vagina of the prosecutrix. He has also found that the chemical examiner's report (Ext. 10) would support the prosecution case, inasmuch as marks of semen as detected on the Chadi (M.O.III) which was seized from the victim and the blood group of the semen stains matched with the blood group and sample cement taken from the appellant. Blood stains were also detected on the Chadi and the full shirt, which were of human origin and belonged to "A" blood group. In other words. the blood group of the blood stains detected on the garments of the victim matched with the blood stains detected on the garments of the appellant. No inconsistency or infirmity was found in the statement of the prosecutrix P.W.I. The prosecutrix P.W.I has stated that she and P.W. 6 had been to the Durga Puja Pandal in the evening on the date of the occurrence and the appellant caught hold of both of them (P.Ws. I and 6). but P.W.6 escaped and the appellant put his hand on her mouth and carried her to the high school jumping over a fence and then tried to enter into a room of the school through a window but failed. She has further stated that the appellant laid her down on the verandah and took off her chadi and his pant and rubbed his penis over her vagina. She has stated to have suffered pain and there was some blood. She weeped due to pain but the appellant threatened her to bite if she would shout. After some time the appellant left her and went away after bringing her to some distance. Thereafter she returned home weeping and on the way found her mother (P.W.2) and Sabita (P.W.6) and narrated the occurrence to them. P.W.2. mother of P.W. 1 has stated that P.W. 1 and Sabita (P.W.6) went to witness Durga Puja in the evening and P.W.6 returned back weeping and reported that the appellant had taken away P.W.I and that she searched for P.W.I and after some time found her coming towards her house and was weeping. When questioned, P.W. 1 narrated the occurrence. P.W.6 has corroborated the statement of P.W.2. She has also stated that while she and P.W.I were together near the Puja pandal the appellant caught hold of both of them, but she escaped and the appellant carried away P.W.I across the fence of a mill putting his hand on the mouth of P.W. 1. There is no infirmity or inconsistency in the statements of P.Ws. 2 and 6 as well as in the statements of P.Ws. 1 and 6 regarding the appellant's carrying away P.W.I towards the school. There is no reason to disbelieve the statements of P.Ws. 1, 2 and 6 since they had no axe to grind against the appellant and the appellant has not been able to substantiate his plea that at the instance of the police officers the witnesses were deposing against him. 8. From the statement of the prosecutrix it is evident that the appellant rubbed his penis on her vagina

but there was no penetration. This statement of the prosecutrix (P.W.I) coupled with the medical evidence on record would lead to the conclusion that the appellant attempted to commit rape on the prosecutrix. As such the appellant cannot be held guilty of the charge of rape u/s 376, I.P.C but he will be held guilty of the attempt to commit rape u/s 376/511, IPC. Learned counsel for the appellant had contended that in case the appellant is found guilty. his sentence may be reduced to the period of imprisonment already undergone by him since he is a young boy aged about twenty-one years.

9. In the facts and circumstances of the case, ends of justice will be met if the sentence passed by the learned Asst. Sessions Judge is modified and the appellant is sentenced to undergo rigorous imprisonment for the period he has already undergone. 10. In the result, the appeal is allowed in part. The appellant is acquitted of the charge u/s 376, IPC and the sentence passed thereunder is set aside. He is convicted u/s 376 read with Section 511, IPC and is sentenced to undergo rigorous imprisonment for the period he has already undergone. He be set at liberty forthwith if his detention is not required in any other case.