

(1984) 08 OHC CK 0004

In the Orissa High Court

Case No : Jail Criminal Appeal No. 88 of 1984

Bijaya Kumar Christian

APPELLANT

Vs

State of Orissa

RESPONDENT

Date of Decision : 28-08-1984

Acts Referred:

Penal Code, 1860 (IPC) — Section 376

Citation : (1984) 58 CLT 402

Hon'ble Judges : J.K. Mohanty, J

Bench : Single Bench

Advocate : B. Bhuyan, State Defence, for the Appellant; Jairaj Behera, Addl. Stdg. Counsel, for the Respondent

Final Decision : Allowed

Judgement

J.K. Mohanty, J.—The accused-Appellant has been convicted u/s 376, IPC by the Additional Sessions Judge, Koraput, Jeypore, and has been sentenced to undergo rigorous imprisonment for five years. The case against him, as alleged by the prosecution, is as follows:

The victim girl (P.W. 1) accompanied by two other girls (P.Ws. 2 and 3) of her village had been to village Deula to witness Nacha (opera) after taking night meal. After seeing the opera, they were returning to their village at about 1.00 a.m. It is alleged that the Appellant along with two others, namely, Misra Harijan and Sasmu Harijan, who were hiding themselves under Khadiamunda bridge, came out. The Appellant, caught hold of P.W. 1 and his two companions caught hold of the other two girls and took them forcibly by dragging to the nearby field. The Appellant removed the wearing apparels of the victim girl and committed rape on her. The other two also raped the other girls (P.Ws. 2 and 3). The three girls raised a cry. On hearing such cry four person of village Deula came to the spot. Seeing them the Appellant and his companions ran away. The three girls were naked at that time. Seeing the persons, they covered their body. P.W. 1 along with her companions went to village Deula and took shelter in the house of

Bandhu Harijan (P.W. 10) in that night. Next morning they returned to their village and narrated about the incident before their parents. Subsequently, the master was reported to the police. During investigation of the case started on the report of Hira Domuni (P.W. 2), the I.O. (P.W. 11) lodged report in the present case on his own information and investigated into the case. On completion of investigation, charge sheet was submitted against the accused Appellant.

2. The defence is one of complete denial.

3. Prosecution examined as many as eleven witnesses P.W. 1 is the victim girl and P.Ws. 2 and 3 are the two girls who were accompanying her, P.Ws. 4 and 5 are the fathers of P.Ws. 2 and 3 respectively, P.W. 7 is the Lady Doctor who examined P.W. 1. P.W. 8 is the Doctor who examined the Appellant, P.W. 9 is the Radiologist who conducted ossification test of P.W. 1, P.W. 10 is the person in whose house the girls had taken shelter in the night of occurrence and P.W. 11 is the I.O. The learned Judge accepted the evidence of P.Ws. 1 to 3 and convicted and sentenced the Appellant as mentioned earlier.

4. Mr. Bhuyan, learned Counsel appearing for the Appellant, submitted that even assuming that the Appellant had sexual intercourse with the victim girl (P.Ws. 1). it was not forcible but with her consent. He submitted that the learned Sessions Judge has categorically found that there was no physical resistance by P.W. 1. There is no injury on any part of the body of the victim girl. According to the evidence of the Doctor (P.W. 7) and the Radiologist (P.W. 9), she was more than 16 years of age.

5. From the evidence of P.W. 1, it transpires that the Appellant took her by pushing on her neck. After removing her clothes he gave her another push as a result of which she fell down with face upward and he had sexual intercourse with her. P.Ws. 2 and 3 have also stated that P.W. 1 was taken by the Appellant by giving push on her neck. P.W. 7, the Lady Assistant Surgeon who examined the victim girl, has found:

Hymen torn admitting two fingers but no sign of inflammation . No teeth mark or any injury over chest, breast or any other part. No stain was found. Vaginal fluid preserved. She was capable of sexual intercourse. The age of the girl was more than 13 years and below 17 years.

P.W. 8 is the Doctor who examined the Appellant. He has found:

Sex organs normally developed. No external injury seen in prepuce, glans, frenulum of penis. No presence of semen or blood on the clothing. No tearing of clothing present at the time of examination. No presence of smegma round the corona or glans penis.

P.W. 9 has stated that the girl was more than 17 years, of age.

6. As seen from the above evidence, though the victim has stated that she was given a push as a result of which she fell on the ground and the Appellant had

sexual intercourse with her, not a scratch was found on her body, what to speak of injuries on the private parts. When she was given pushes and she fell down it is normally expected that some sort of injury would be found on her body, but there was none. She has also not stated that she resisted when the sexual assault was made on her. P.W. 7 has not found any injury on her person nor has P.W. 8 found any injury on the person of the Appellant. P.W. 7 has stated that the age of the girl is between 13 and 17 years and P.W. 9 has stated that her age would be less than 17 years. No other evidence has been adduced to show that her age was less than 16 years. There is no definite evidence to the effect that the girl was less than 16 years of age. From the evidence on record, it cannot be ruled out that the victim girl was a consenting party to the sexual intercourse and she was more than 16 years of age. The F.I.R. lodged by P.W. 2 has also not been produced in this case to show that this incident had also been reported therein.

7. After bearing the argument of both sides, considering the evidence on record and in the facts and circumstances of the case, I am of the view that the Appellant is entitled to benefit of doubt. The appeal is accordingly allowed and the order of conviction and sentence passed against the Appellant is set aside and sentence passed against the Appellant is set aside and he is acquitted. He be set at liberty forthwith.