
(2009) 12 OHC CK 0013
In the Orissa High Court
Case No : Criminal Appeal No. 216 of 1995

Dalu ' Sailendra Pradhan

APPELLANT

Vs

State of Orissa

RESPONDENT

Date of Decision : 19-12-2009

Acts Referred:

Penal Code, 1860 (IPC) — Section 347, 375, 376

Citation : (2010) 1 ILR (Ori) 386

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

Bench : Single Bench

Final Decision : Allowed

Judgement

B.P. Ray, J.—Challenge in this appeal is to a judgment and order of conviction and sentence passed by the Asst. Sessions Judge, Khurda in ST. Case No. 7/467 of 1995/94 in its file. Learned Asst. Sessions Judge vide the impugned judgment of conviction and sentence held the Appellant guilty of charge u/s 376 I.P.C. and sentenced him to undergo R.I. for 8 years and to pay a fine of Rs. 2,000/- in default to undergo R.I. for two months more.

2. The case of the prosecution against the Appellant is that the Appellant had brought the victim (P.W.9) along with her brother, when she was a child of 8 years old, from their native place and kept them in his house and engaged both of them as his domestic servants. Some years thereafter, the Appellant assaulted and drove out the brother of the victim from his house keeping the victim in his home. Subsequent to the same, when the victim attended her puberty and was aged about 16 years, the Appellant kept physical relationship with her. On the pretext of searching the brother of the victim, the Appellant took her along with him from place to place and continued to keep physical relationship with her in such places against her will and without her consent. Such relationship of the victim with the Appellant when came to the knowledge of the wife of the Appellant, the relationship between the Appellant and his wife became strain and as such the Appellant kept the victim in another place and there from he took

her to Nayagarh and wrongfully confined her there, engaging "goondas". It is the further case of the prosecution that the victim conceived out of the physical relationship with the Appellant, but the same was aborted in a clinic at Bhubaneswar. The Appellant was also extending threat to the victim not to report the matter to the police, but on 1.5.1994 the victim could escape from the clutches of the Appellant and reported the matter to the I.I.C. Khurda on 8.5.1994, pursuant to which the present case in question was registered against the Appellant. After completion of investigation, charge sheet was submitted against the Appellant alleging offence u/s 347/376 I.P.C. The Appellant in the trial court faced his trial being charged for the aforesaid offences. The trial court in the conclusion of the trial while acquitting the Appellant of the charge u/s 347 I.P.C. held him guilty for the charge u/s 376 I.P.C. and sentenced him as stated earlier.

3. Assailing the impugned judgment and order of conviction and sentence passed, it is submitted by learned Counsel for the Appellant that the same are unsustainable in the eye of law inasmuch as there is no credible evidence worth on record to hold the Appellant guilty of charge u/s 376 I.P.C. Elaborating the submissions, it is submitted that no doubt an order of conviction can be recorded on the sole testimony of victim in a case u/s 376 I.P.C. but such testimony of the victim must be clear, cogent, confidence inspiring. Here in this case, according to him, since the evidence of the victim is full of material contradictions and there is no other corroborating evidence on record, the judgment of conviction recorded on such evidence can not be sustained. Hence, it is submitted by learned Counsel for the Appellant, the impugned judgment of conviction and sentence in such premises recorded by the trial court is liable to be set aside and the Appellant needs to be acquitted of the charge u/s 376 I.P.C.

4. In response, learned Counsel appearing for the State submits that the evidence of the victim in this case that she was subjected to sexual intercourse against her will and without her consent by the Appellant being clear, cogent and confidence inspiring and it being well settled that the sole testimony of the victim in a case of this nature is sufficient to hold the Appellant guilty of charge without any corroboration, no fault can be found with the impugned judgment of conviction and sentence recorded, which also appears to be commensurate to the facts and circumstances of the case.

5. On perusal of the materials on record it appears that in this case the trial court placing reliance on the evidence of the victim (P.W.9) recorded the judgment of conviction and sentence. Before adverting the merit of the contention raised, this Court is well aware of the position of law that corroboration is not the sine qua non to the testimony of victim for a conviction in a case of sexual assault. Hon"ble apex Court in the case of Bharwada Bhoginbhai Hirjibhai Vs. State of Gujarat, has held that:

...In the Indian setting, refusal to act on the testimony of a victim of sexual assault in the absence of corroboration as a rule, is adding insult to injury. Why

should the evidence of the girl or the woman who complains of rape or sexual molestation be viewed with the aid of spectacles fitted with lenses tinged with doubt, disbelief or suspicion? To do so is to justify the charge of male chauvinism in a male dominated society.

A girl or a woman in the tradition bound non-permissive society of India would be extremely reluctant even to admit that any incident which is likely to reflect on her chastity had ever occurred. She would be conscious of the danger of being ostracized by the society including by her own family members, relatives, friends, and neighbours. She would face the risk of losing the love and respect of her own husband and near relatives, and of her matrimonial home and happiness being shattered. If she is unmarried, she would apprehend that it would be difficult to secure an alliance with a suitable match from a respectable or an acceptable family. In view of these and similar factors the victims and their relatives are not too keen to bring the culprit to book. And when in the face of these factors the crime is brought to light there is a built-in assurance that the charge is genuine rather than fabricated.

On principle the evidence of a victim of sexual assault stands on par with evidence of an injured witness. Just as a witness who has sustained an injury (which is not shown or believed to be self inflicted) is the best witness in the sense that he is least likely to exculpate the real offender, the evidence of a victim of a sex-offence is entitled to great weight, absence of corroboration in the form of eye-witness account of an independent witness may often be forthcoming in physical assault cases, such evidence cannot be expected in sex offences, having regard to the very nature of the offence. It would therefore be adding insult to injury to insist on corroboration drawing inspiration from the rules devised by the Courts in the Western World. If the evidence of the victim does not suffer from any basic infirmity, and the "probabilities-factor" does not render it unworthy of credence, as a general rule, there is no reason to insist on corroboration except from the medical evidence, where, having regard to the circumstances of the case, medical evidence can be expected to be forthcoming subject to the following qualification: Corroboration may be insisted upon when a woman having attained majority is found in a compromising position and there is a likelihood of her having leveled such an accusation on account of the instinct of self-preservation. Or when the "probabilities-factor" is found to be out of tune.

Keeping in mind the aforesaid settled position of law, the testimony of a victim in a case of sexual assault has to be addressed.

6. Needless to say that in a case of rape, the prosecution in order to sustain a charge must establish cogently that victim who has attained the age of discretion i.e. 16 years on the date of commission of offence was subjected to sexual intercourse by the perpetrator of the crime and that was against her will and without her consent. Coming to the evidence on record, it is seen from the evidence of P.W.3-Dr. Ashok Kumar Pani, who had examined the victim on police requisition in this case on 10.5.1994 that the age of the victim was 18-20 years.

The victim in her evidence also deposed that when she was of 16 years of old, she was subjected to sexual intercourse by the Appellant. From the same, it is clear that by the time the accused was having sexual intercourse with the Appellant, the Appellant had already attained the age of discretion to consent for sexual intercourse. In view of such evidence on record, prosecution must prove to the hilt that the victim was subjected to sexual intercourse against her will or without her consent to establish the charge. It appears from the evidence on record that the victim was brought when he was a child of 8 years old and the accused kept her as his domestic servant and on her attaining the majority when she was 16 years, the Appellant committed sexual intercourse on her. Such sexual intercourse appears to have been committed for more than three years and the victim also deposed to have conceived through the Appellant which was aborted later. The victim's evidence goes to show that the accused took her from place to place and cohabitated with her on different occasions. The victim deposes that such sexual intercourse was without her consent and against her will and on account of such sexual intercourse, the relationship of the Appellant with her wife became strained and thereafter the Appellant kept her in another place and continued to cohabitated with her. There is no convincing evidence on record to show that the accused had extended any threat on her or forced her to have sexual intercourse with him, when she cohabitated with him. There is also nothing on record to show that the victim was kept in a such condition that such sexual intercourse of the Appellant with her which she deposes against her will and without her consent could not be disclosed by her to anyone during the said period. It appears that for these three years till she conceived the accused committed sexual intercourse with her, aborted her pregnancy and also thereafter continued to have sexual intercourse with her. The victim has made no whisper before anyone complaining such conduct of the Appellant during such period. There is absolutely no evidence on record to show that the Appellant had exercised any threat or coercion on the victim or had put the victim or any person on whom she is interested in fear of death or hurt compelling the victim to submit for such sexual intercourse with him. The victim in this case may be hesitating or reluctant to consent for such sexual intercourse, but when she consciously permitted the same and also continued to have sexual intercourse with the Appellant and subsequently became pregnant through such relationship and had no grievance for he same at any point of time before any one even though she was in a position to do so, it can be said that she is a consenting party to such sexual intercourse. The same is further fortified from the unexplained delay in lodging the report. The delay in lodging the report to the police in a case of this nature though no fatal, but in the facts and circumstance, the same cast a cloud in the case of the prosecution and fortified the version of the defence that when the Appellant denies to keep the victim as his wife, the victim made the allegation of sexual assault. The sexual intercourse as deposed by the victim with the Appellant in this case though acceptable to be trustworthy, but the same is a consensual intercourse. A sexual intercourse with a lady, who has attained the age of discretion on consent it goes without saying that does not

attract the ingredients of evidence of sexual assault, as defined u/s 375, IPC which has been made punishable u/s 376, IPC. In such premises, here the evidence of the victim with regard to the sexual intercourse without consent on the face of the evidenced on record being not confidence inspiring in spite of the fact that she has deposed that the same was without her consent and against her will, the trial court appears to have erred in accepting the evidence of the victim that the sexual intercourse on her by the Appellant was without her will against her consent and as such the Appellant was guilty of charge u/s 376, IPC.

7. Hence on reappraisal of the evidence on record in the opinion of this Court, there was no clear, cogent and convincing evidence to hold the Appellant guilty of charge u/s 376, IPC and the judgment of conviction and sentence returned by the trial court in this case appear to be indefensible. Hence, the appeal stands allowed. The impugned judgment of conviction and sentence returned by the trial court are set aside and the Appellant is acquitted of the charge.

The Appellant stands discharged of his bail bond.