
(2001) 02 OHC CK 0034

In the Orissa High Court

Case No : Criminal Appeal No's. 2 and 32 of 1995

Hemanta Kumar Sahu and Sribachha Naik

APPELLANT

Vs

State of Orissa

RESPONDENT

Date of Decision : 20-02-2001

Acts Referred:

Penal Code, 1860 (IPC) — Section 34, 366, 376

Citation : (2001) CriLJ 2799 : (2001) 20 OCR 511 : (2001) 1 OLR 596

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

Bench : Single Bench

Advocate : D.P. Dhal and A.K. Acharya, for the Appellant; A.G.A., for the Respondent

Final Decision : Allowed

Judgement

P.K. Patra, J.—The appellants in both the appeals have challenged the judgment dated 23.12.1994 passed by Shri M. R. Behera, Sessions Judge, Phulbani in S.T. No. 37/93, convicting the appellant Hemanta Kumar Sahu Under Sections 366/34, Indian Penal Code (for short "I.P.C.") and sentencing him to undergo rigorous imprisonment for five years and to pay to fine of Rs. 200/-, in default, to undergo rigorous imprisonment for a further period of two months and convicting the appellant Sribachha Naik Under Sections 366/376, I.P.C. and sentencing him to undergo rigorous imprisonment for five years on each count and to pay a fine of Rs. 200/- In default, to undergo rigorous imprisonment for a further period of two months on each count. Both the appeal were heard together and this judgment will dispose of both the cases.

2. Briefly stated, prosecution case runs as follows :

The victim girl (P.W. 13) is the daughter of the informant (P. W.4). They were residing in village Hasanipadar under Phiringia Police Station in the district of Phulbani where the mother of the victim was serving in the Anganwadi. P.W. 13 was aged about 14 years and was reading in Class-IV in the U.G.M.E. School,

Kasinipadar. It is alleged that on .10.7.1991 at about 11.00 A.M. while P.W. 13 came out of her house to bring curry from the house of a neighbour, both the appellants (hereinafter referred to as "accused persons") who were waiting under a tree near the house, called her and forcibly took her on a "silver plus" two wheeler to the house of accused Sribachha in village Bareiguda. Thereafter accused Hemanta left that village. It is further alleged that P.W. 13 was detained there for three to four days and on 12.7.1991 accused Sribachha committed rape on her inside the house. When the informant (P.W.4) found P.W. 13 missing from his house, he searched for her and went to the house of his parents-in-law at Phulbani and informed them about the missing of P.W. 13. The parents-in-law of P. W.4 went to the house of accused Sribachha and enquired about P.W. 13 but accused Sribachha informed them that P.W. 13 was not there in his house. Thereafter the informant P.W.4 went to Phiringia police station on 15.7.1991 and lodged the F.I.R. (Ext. 4) before the officer-in-charge of the P.S. (P.W.9) who registered the case Under Sections 363/34, I.P.C. and took up investigation. During the investigation he examined the informant and some witnesses, searched for the accused persons, but in vain. On 18.7.1991 P.W.9, on his transfer from the P.S. made over charge of the investigation to the A.S.I. of the P.S. (P.W. 15) who seized the chadi (M.O.V) and the frock (M.O.VI) of P.W. 13 on production of the same by P.W. 13 herself who was produced in the P.S. on 19.7.1991 by P.W.4. On the same date P.W. 13 was sent for medical examination. On 20.8.1991 P.W. 15 made overcharge of the investigation to one S.I. of the P.S. (P.W.14) from whom the Inspector of Police attached to the Headquarters office, Phulbani (P.W. 16) took over charge. P.W. 16 seized the two-wheeler from accused Hemanta and left the same in his zima. Accused Sribachha surrendered in Court on 19.8.1991 and was remanded to jail custody. On 5.9.91 accused Hemanta surrendered in Court and was released on bail. After completion of investigation, on 5.1 1.1992 P.W. 16 submitted charge-sheet Under Sections 366/376/34, IPC against accused persons who stood their trial.

3. The defence plea is one of denial. Accused Hemanta who was serving as a peon in the office of Officer on Special Duty, Land Reforms, Phulbani took the plea of alibi.

4. In order to bring home the charge against the accused persons, prosecution has examined as many as sixteen witnesses in all. P.W.4 is the informant and P.W.13 is the victim girl. P.Ws.1 and 2 are witnesses to the seizure. P.W.3 has stated to have seen the accused person taking the victim girl on a motor-cycle. P.W.5 is the lady doctor who medically examined accused Sribachha. P.Ws. 7 and 12 have been examined as eye-witnesses to the occurrence; but they did not support the prosecution case and turned hostile. P.W.8 is the Headmaster of Kasinipadar U.G.M.E. School who produced the admission register of the school and stated that the date of birth of P.W.13 is 12.6.1978. P.Ws. 9, 14, 15 and 16 are Investigating Officers. P.W. 10 is the Radiologist who conducted the ossification test on P.W.13. P.W.I 1 is the medical officer who examined the vaginal fluid collected from P.W.I 3. Accused Hemanta has examined one witness

in support of his plea of alibi.

5. Shri A. K. Acharya, learned counsel for the appellants and learned Addl. Government Advocate were heard at length. While Shri Acharya contended that the impugned judgment is unsustainable in law due to incorrect appreciation of evidence on record, learned Additional Government Advocate supported the impugned judgment.

6. The learned Sessions Judge placed reliance on the statements of P.W. 13, her father (P.W.4) and P.W.3 and found the accused persons guilty and convicted them as stated earlier.

7. The medical evidence on record does not support the prosecution case. As per the statement of the medical officer (P.W.5), P.W.13 was medically examined on 22.5.1991 at 5.00 p.m. and no injury on her thigh, pubic region, breast or any other part of the body was found and pubic hairs were not metted. The hymen was torn and vaginal orifice easily admitted two fingers. In her opinion, there was no sign of recent intercourse. Her report is (Ext.5). The medical officer (P.W.6) medically examined the accused Sribachha and submitted his report (Ext.6). According to him he was requested to collect the semen of the accused; but the accused failed to ejaculate. According to the report (Ext.9) of the Radiologist (P.W. 10) the ossification test reveals that P.W. 13 was aged more than twelve and less than sixteen years. The report (Ext. 10) of the Pathologist (P.W. 11) reveals that there was no spermatozoa in the vaginal fluid collected from P.W. 13. The medical examination report (Ext.I) reveals that no mark of semen was detected in the chadi (M.O.V) and the frock (M.O.VI).

8. In the absence of corroboration from the medical evidence on record, the sole testimony of the prosecutrix (P.W.13) requires careful scrutiny before placing reliance on her to sustain the conviction of the accused persons.

9. It is well settled in law that conviction can be based on the sole testimony of the prosecutrix if her evidence does not suffer from infirmities or is not improper and is found to be trustworthy and reliable and corroboration is not necessary unless there are compelling reasons for seeking corroboration. Corroboration is not a required rule and may be dispensed with whenever the Court is satisfied that it is safe to do so and that the rule is not that the corroboration is essential before there can be a conviction, but there is necessity to corroboration as a matter of prudence. It is also well settled in law that absence of injury on the private part of the victim or stains of semen or spermatozoa is of no consequence and could not negative the offence of rape. Further the law is well settled that where the medical evidence was to the effect that there are no signs of recent intercourse or injury on the girl's private part and where it is clear that the prosecutrix is not a reliable witness or is a willing party to the sexual intercourse, it would not be safe to convict the accused, on her uncorroborated testimony.

10. In the present case, as per the F.I.R. (Ext.4) and the statement of the father

of the prosecutrix, the age of the prosecutrix was fourteen years. As per the school admission register (Ext.7) the date of birth of the prosecutrix was 12.6.78 and as such on the date of alleged occurrence she was aged about thirteen years. As per the ossification test, her age was more than twelve years and below sixteen years. In the case of *Sribatcha Khamari v. State of Orissa* reported in (1993) 6 OCR 661 this Court held that there may be variation of age determined on ossification test by two years this side or that side and this variation will enure to the benefit of the accused. It has also been held in *Jaya Mala Vs. Home Secretary, Government of Jammu and Kashmir and Others*, that it is notorious and one can take judicial notice that the margin or error in age ascertained by radiological examination is two years on either side. On the date of her deposition, i.e. 21.12.1993 the age of prosecutrix (P.W.I 3) has been assessed to be nineteen years.

11. The prosecutrix (P.W. 13) has stated that she got married on 9.12.1992. i.e., about one year and five months after the alleged occurrence. She has stated that the accused Sribachha was related to her as uncle being the son of the aunt (PIUSI) of her father and that the accused compelled her to marry him against her will and she declined and that while taking her on the two-wheeler they stopped at a tea-stall at Khajuripada where both the accused persons took tea but she did not disclose the fact to anybody. In her statement in cross-examination, P.W. 13 has stated that the mother of accused Sribachha was present in the house and that she went to the house of accused Sribachha in village Khaliberna covering a distance of fifty feet by foot. The statement of prosecutrix (P.W. 13) that they reached the house of accused Sribachha at about 3.00 p.m. to 4.00 p.m and that the accused committed rape on her in the house at about 2.00 p.m. to 3.00 p.m., is incredible and gives a fatal blow to the prosecution case regarding the rape on P.W. 13. Her silence for three to four days while residing in the house of accused Sribachha and the presence of the mother of the accused in the house, renders the prosecution allegation of rape on P.W. 13, quite improbable. P.W. 13 has also not stated that she washed the wearing apparels viz. M.Os. V and VI after the rape. That, apart, P.W. 13 has stated that accused Sribachha and his mother left her in the house of her grandfather at Phulbani and on the next day her parents took her to village Kasinipadar. In her statement (Ext. 11) recorded u/s 164, Cr. P.C. P.W. 13 has stated that Rekha, mother of accused Sribachha, gagged her mouth with a napkin and kept her inside closed door and that accused Sribachha committed rape on her in the evening, after gagging her mouth with a cloth and disrobing her, after the departure of her grand parents who had come in search of her and that Rekha left her in her grandfather's house. It cannot be believed for a moment that the mother of the accused Sribachha would have abetted or allowed the accused to commit rape on P.W. 13 in the house during her presence. The conduct of the prosecutrix in accompanying the accused persons without raising hulla or without any struggle to escape from the accused persons, raises grave doubt on the veracity of the prosecution case. If at all it is believed that P.W. 13 was taken to

the house of accused Sribachha, it was definitely with her consent.

12. For all the reasons stated above, coupled with the medical evidence on record, the sole testimony of the prosecutrix which is bristling with infirmities and improbabilities, is found to be untrustworthy and unreliable. Hence it would not be safe to convict the accused persons on her uncorroborated testimony and the accused persons will be entitled to an acquittal. The learned Sessions Judge has failed to appreciate the evidence on record properly and correctly and erred in placing reliance on the statements of P.Ws. 3, 4 and 13 to base a conviction of the accused persons. Therefore, the impugned judgment is found to be unsustainable in law and is liable to be set aside.

13. In the result, both the Criminal Appeals are allowed and the impugned judgment dated 23.12.1994 is set aside. The appellants in both the appeals are found not guilty and are acquitted of the charge. They be set at liberty forthwith, if their detention is not required in connection with any other case.