

(2016) 01 OHC CK 0014

In the Orissa High Court

Case No : Jail Criminal Appeal No. 12 of 2006 and Criminal Appeal Nos. 56 and 165 of 2006 and 23 of 2007, (from an order dated 21.12.2005 passed by Shri K.L. Mohapatra, 2nd Addl. Sessions Judge, Bhubaneswar in S.T. No. 5/7 of 2001)

Kalandi Charan Sahu

APPELLANT

Vs

State of Orissa

RESPONDENT

Date of Decision : 29-01-2016

Acts Referred:

Penal Code, 1860 (IPC) — Section 372(2)(g)

Citation : (2016) sup1 CutLTCriminal 566

Hon'ble Judges : Dr. D.P. Choudhury, J.

Bench : Single Bench

Advocate : Mr. T. Mishra and L. Samantaray, A.S.C, for the Respondents; Mrs. P. Mohanty, Advocate, for the Appellants

Final Decision : Disposed off

Judgement

Dr. D.P. Choudhury, J. - The appellants assail the order of conviction dated 21.12.2005 passed by learned 2nd Additional Sessions Judge, Bhubaneswar under section 376(2)(g) IPC and sentencing thereunder and further conviction against the appellant Kamalakanta, Kailash and Ranjan under section 366 IPC and sentencing them thereunder. Since all these appeals arise out of one occurrence vide S.T. No. 5/7 of 2001, these appeals are disposed of by this common judgment.

FACTS :

2. The unravelled story of the case of the prosecution is that the victim woman belongs to the State of Kerala. She left Kerala and reached Bhubaneswar on 17.2.2000 early morning by train. It is further alleged, inter alia, that after reaching the railway station, she searched for a job. She met one old man near the station and asked for a job. Then she went with that person to a national highway side hotel (Dhaba) at Phulnakhara. In that night she took shelter there,

by requesting hotelier there to provide job. In the next morning she went to another hotel nearby as former hotel keeper refused to keep her.

3. On 18.2.2000 afternoon, the line hotel keeper sent her back to the hotel where she had taken rest on 17.2.2000 night. But the hotel keeper refused to keep her there. So she went towards petrol pump close to the Dhaba in the afternoon. There one of the accused took her forcibly in the bicycle. Then other two accused persons joined from that line hotel (Dhaba), in total three accused persons forcibly took the victim woman towards a dilapidated house. Then four other accused persons came there. It is alleged, inter alia, that all the accused persons including the present appellants after opening her wearing apparels, committed rape on her one after another in that dilapidated house. After rape they left her in that house. She came to the Dhaba site, thereafter police came there in the early morning and picked her up. She orally reported the matter to the police who reduced the same to writing. Thus the F.I.R. was lodged.

4. After lodging of the F.I.R, the statement of the victim was recorded. She was sent for medical examination, witnesses were examined, her wearing apparels were seized. During investigation, the T.I. parade of appellants were held and she identified all the appellants. Statement of the victim under section 164, Cr.P.C. was also recorded during investigation. After completion of investigation, charge-sheet was submitted under section 376(2)(g) IPC read with section 366 IPC.

5. It is revealed from cross-examination of the prosecution witnesses and the statement of accused persons that they have denied the charges squarely and abjured their responsibility from criminal liability.

6. After examining 38 witnesses and verifying several documents of the prosecution, learned trial court came to the conclusion that prosecution has been able to prove offence under section 376(2)(g) IPC against all the appellants and sentenced each of them to undergo R.I. for a period of ten years and to pay fine of Rs.5000/- in default to undergo R.I. for one year. In addition to the above sentence, learned court below further convicted the appellants; Kamalnath, Kailash and Ranjan under section 366 IPC and sentenced each of them to undergo R.I. for two years and to pay fine of Rs.2,500/- in default, to undergo R.I. for six months. It is also observed by the learned court below that the sentences will run concurrently.

SUBMISSION :

7. Mrs. P. Mohanty, learned counsel for the appellants submitted that the conviction and sentence passed are against the principle of law. She further submitted that the statement of the victim ought to have been disbelieved by the learned court below because her evidence is couched with surmises and conjectures. According to her, the statement of the victim is inconsistent, vulnerable and is not above reproach to be relied upon solely to base conviction. She submitted that the statement of the victim is not consistent, clear and

cogent to show why she has come from Kerala to Odisha alone without any money with her. Moreover, T.I. parade held by the prosecution is not above suspicion because before T.I. parade, the photograph of the suspects were showed to the victim-informant. She also stated that the statement of the victim has many disturbing features to rely upon her testimony inasmuch as her evidence is full of contradictions and cannot be solely relied upon. She further stated that there is no any occurrence witness to the occurrence but there is no chain of circumstances proved to prove the case of the prosecution. Thus she submitted that the occurrence has not been proved by the prosecution beyond all reasonable doubts for which the benefit of doubt be accrued to the appellants. So she submitted to acquit the appellants by setting aside the conviction and sentence passed against the appellants.

8. Learned Additional Government Advocate submitted that there is clear evidence of rape committed by the present appellants because the evidence of all the witnesses read together only pointed out guilt of the present appellants. In view of the clear evidence of the T.I. parade and unblemished evidence of the victim woman, there is no room for any suspicion except the clear complicity of the present appellants with the commission of offence as alleged against them. He further submitted that the chain of circumstances, the evidence of part occurrence witnesses coupled with the post occurrence witness, clearly make out a case of abduction and rape against the present appellants. Hence he submitted to reject the appeals filed by the appellants and confirm the order of conviction and sentence passed against the appellants.

DISCUSSIONS :

9. At the outset it is required to find out the duty of the appellate court in respect of the criminal case because at times the duty of the appellate court is not properly understood with proper perspective. In *Kamlesh Prabhudas Tanna v. State of Gujarat*, (2013) 15 SCC 263 dealing with the duty of the appellate court, Hon"ble Apex Court observed :

"At this juncture, we are obliged to state that though it may be difficult to state that the judgment suffers from sans reasons, yet it is not at all difficult to say that the reasons ascribed are really apology for reasons. If we allow ourselves to say so, one may ascribe certain reasons which seem to be reasons but the litmus test is to give seemly and condign reasons either to sustain or overturn the judgment. The filament of reasoning must logically flow from requisite analysis, but, unfortunately, the said exercise has not been carried out. In this context, we may refer with profit to the decision in *Padam Singh v. State of U.P.*, wherein a two-Judge Bench, while dealing with the duty of the appellate court, has expressed thus :

"2.... It is the duty of an appellate court to look into the evidence adduced in the case and arrive at an independent conclusion as to whether the said evidence can be relied upon or not and even if it can be relied upon, then whether the

prosecution can be said to have been proved beyond reasonable doubt on the said evidence. The credibility of a witness has to be adjudged by the appellate court in drawing inference from proved and admitted facts. It must be remembered that the appellate court, like the trial court, has to be satisfied affirmatively that the prosecution case is substantially true and the guilt of the accused has been proved beyond all reasonable doubt as the presumption of innocence with which the accused starts, continues right through until he is held guilty by the final Court of Appeal and that presumption is neither strengthened by an acquittal nor weakened by a conviction in the trial court."

In *Rama v. State of Rajasthan*, (2002) 4 SCC 571 the Hon"ble Apex Court has expressed about the duty of the appellate court thus :

"4.... It is well settled that in a criminal appeal, a duty is enjoined upon the appellate court to reappraise the evidence itself and it cannot proceed to dispose of the appeal upon appraisal of evidence by the trial court alone especially when the appeal has been already admitted and placed for final hearing. Upholding such a procedure would amount to negation of valuable right of appeal of an accused, which cannot be permitted under law."

Similar principles have been reiterated in *Iqbal Abdul Samiya Malek v. State of Gujarat*, (2012) 11 SCC 312, *Padam Singh v. State of U.P.*, (2000) 1 SCC 621, *Bani Singh v. State of U.P.*, (1996) 4 SCC 720 and in *Majjal v. State of Haryana*, (2013) 6 SCC 798 Their Lordships have ruled thus :

"It was necessary for the High Court to consider whether the trial court's assessment of the evidence and its opinion that the appellant must [pic] be convicted deserve to be confirmed. This exercise is necessary because the personal liberty of an accused is curtailed because of the conviction. The High Court must state its reasons why it is accepting the evidence on record. The High Court's concurrence with the trial court's view would be acceptable only if it is supported by reasons. In such appeals it is a court of first appeal. Reasons cannot be cryptic. By this, we do not mean that the High Court is expected to write an unduly long treatise. The judgment may be short but must reflect proper application of mind to vital evidence and important submissions which go to the root of the matter."

Above decisions have been relied on in *Mohd. Ali @ Guddu v. State of U.P.*, 2015(3) SCALE 274). Keeping in mind the above parameters and evidence, the facts of this case have to be assessed.

10. In the decision reported in *Mohd. Ali @ Guddu v. State of U.P.* (supra), Hon"ble Apex Court have been pleased to deal with the importance of the sole testimony of the prosecutrix in the following manner :

"21. Be it noted, there can be no iota of doubt that on the basis of the sole testimony of the prosecutrix, if it is unimpeachable and beyond reproach, a conviction can be based. In the case at hand, the learned trial Judge as well as

the High Court have persuaded themselves away with this principle without appreciating the acceptability and reliability of the testimony of the witness. In fact, it would not be inappropriate to say that whatever the analysis in the impugned judgment, it would only indicate an impropriety of approach. xx xx xx xx. It can be stated with certitude that the evidence of the prosecutrix is not of such quality which can be placed reliance upon. True it is, the grammar of law permits the testimony of a prosecutrix can be accepted without any corroboration without material particulars, for she has to be placed on a higher pedestal than an injured witness, but, a pregnant one, when a Court, on studied scrutiny of the evidence finds it difficult to accept the version of the prosecutrix, because it is not unrepachable, there is requirement for search of such direct or circumstantial evidence which would lend assurance to her testimony. As the present case would show, her testimony does not inspire confidence, and the circumstantial evidence remotely do not lend any support to the same. In the absence of both, we are compelled to hold that the learned trial Judge has erroneously convicted the accused-appellants for the alleged offences and the High Court has fallen into error, without re-appreciating the material on record, by giving the stamp of approval to the same."

11. With due respect to the decision, it is found that the position of the prosecutrix in the rape occupies a special place to reach out the conclusion. At the same time, the evidence of the prosecutrix alone can base conviction provided it is cogent, clear, consistent and above reproach. Bereft of her evidence, the circumstances proved in such case should be also counted to form a chain of circumstance so that they would point out unerringly the guilt of the accused. Keeping in mind these principles, let the evidence of prosecutrix (P.W.28) be assessed.

12. It is revealed from evidence of P.W.28 that she had come from Kerala alone on 17.2.2000 for touring in Bhubaneswar but she has categorically admitted in her examination-in-chief that since she had no money, she searched for a job. On first impression, it is not understood as to how she came to another State without money. However, it is further revealed from her statement that she asked for tiffin in a hotel nearby and after taking tiffin, she went from there searching a job to meet her day today life. On the assistance of another person, she went to roadside highway hotel near Phulnakhara. There the hotelier gave Rs.10/- and also fooding, but refused to keep her as a worker in his hotel (Dhaba). As night has approached, she stayed there. But on the next day she left the line hotel (Dhaba) and she went to another hotel nearby. But the later hotel keeper refused to keep her and sent back to earlier hotel where she had reached at first by the side of the national highway. On 18.2.2000 a man approached her and asked her to accompany in a bi-cycle but she refused to go with him. But two other persons also joined that man and all of them dragged the victim towards the school and there they torn her clothes, made her naked and committed rape on her. She pointed out all the accused persons standing in the dock, have committed rape on her. After commission of rape two of the accused

persons gave her dress and helped her to come to the road. After she went to the P.S., she orally reported the matter to the Police about the incident and the police recorded the same. It was read over and explained and after understanding, she signed thereon. She proved the F.I.R. vide Ext.23. She admitted to have been examined by the doctor and also her statement has been recorded under section 164, Cr.P.C. by the Magistrate. She proved her such statement vide Ext.24 and her signature vide Ext.24/1. She has been grilled during cross-examination. During cross-examination P.W.28 could not tell the name of the hotel where she met a person. She also could not recollect the name of the hotel where she was taken to work near the high way. She also admitted in para-3 of the cross-examination that she has raised shout for help when the person followed her and took her in the cycle, but it was very dark place. It is not understood as to why she has not raised hulla. She has stated that after jumping down from the cycle, she did not shout because there was light; she sat there thinking the same to be a secured place. She has also stated that she has not raised any cry when the cyclist and other two persons dragged her forcibly. She stated to have shouted when she was forcibly taken away to school, but none came to her rescue. In detail cross-examination she has categorically stated that in the school there was only three persons and there was no light in the school and it was a dark place. She identified accused Ranjan Ojha to have supplied her dresses after commission of rape. In further cross-examination she categorically stated that accused Ranjan has not followed her on the bicycle, but he had come along with cyclist again and dragged her to the school. She also categorically stated that accused Kamalakanta Panigrahi was the man who followed her on the cycle. She also stated that accused Kailash Chandra Sahoo was the man who along with accused Ranjan and Kamalakanta dragged her. It is not clear from marathon cross-examination as to how the six accused persons raped her when she uttered the names of accused Kamalakanta, Kailash and Ranjan to have dragged her to the school. In examination-in-chief she has not uttered name of any appellants to have forced her to sit on cycle and dragged her; but in cross-examination, she identified these three appellants to have dragged her. On the other hand, her evidence is not consistent as to how many accused persons raped her. Moreover, her evidence is also not clear as to which accused had forcibly taken her in the cycle and she jumped from the cycle.

13. It is also revealed from the statement of P.W.28 that while she jumped from the cycle, she sustained injury, but never stated whether she sustained any external injury on her person while she was raped by the accused persons. She narrated in Ext.23 (FIR) that three workers of Dhaba (line hotel) dragged her to the school and three others waiting there and all the six persons took her to an abandoned place where they committed rape. On the other hand during trial she only stated to have been taken to a school where the three accused persons committed rape upon her. In the F.I.R. she has stated that another aged person having beard came there and also committed rape on her after the six accused persons committed rape on her but such fact has not been stated by her during

trial. Of course, her statement under section 164 Cr.P.C. duly proved by her vide Ext.24 only shows that three accused persons have dragged her to the school side but altogether the seven persons raped her. During trial, she has not stated so. So the prevaricating statement of P.W.28 at different stages cast doubt on the credibility of prosecutrix. Although under law she is injured and traumatized witness, but further scrutiny of her evidence is necessary due to presence of inconsistency in her evidence.

14. P.W.21 who is the doctor, has stated that he found the hymen was represented by tags of hymen with healed tears at 9, 6 and 9 o'clock position. He has also found external injury on her right thigh, abrasion on the inner aspect of left nipple and abrasion on the left buttock. According to him, the external injuries are within 24 hours but the tears found in the hymen are old tears. On the other hand the doctor did not find out any fresh tear on the hymen showing recent sexual intercourse with her. It appears from her evidence that the doctor examined her on 19.2.2000 whereas the alleged occurrence took place on 18.2.2000 night. Had there been a gang rape committed by the accused persons with the victim, there must be injury on her private part, but not the old tears. Apart from this, it is revealed from the evidence of P.W.21 that the vaginal swab collected from the victim did not disclose presence of any living or dead spermatozoa as per the report of the pathologist. On the other hand the report of the doctor does not corroborate with the evidence of the prosecutrix (P.W.28) about commission of rape. With regard to external injury on her person, she has admitted that while she jumped down from the cycle she sustained such injuries on her person.

15. P.W. 28 has also stated to have identified the accused persons in the jail. The Magistrates examined as P.Ws.34 and 36 reveal that in their presence the victim has identified the accused persons but the P.W.34 has stated that P.W.28 has not specifically stated about the overt act of each of accused Manoranjan, Kamalakanta, Kailash and Ranjan. At the same time P.W.36 has stated that the victim has identified Jhaian @ Kamalakanta vide Ext.40 and she has categorically stated that the victim could identify the suspect as he took her in a bicycle forcibly and he had seen him with the help of electric light near petrol pump. She further stated before P.W.36 that on 19/20.2.2000, the suspect along with six others raped her. On perusal of T.I. Parade sheet (Ext.40) it is found that P.W.36 has recorded that the victim could identify the person as the suspect took her forcibly in the bicycle but there is nothing found from the Ext.40 that P.W.28 stated before the Magistrate that the suspect along with six others raped her. P.W.28 has not also stated that while identifying in jail, she has stated before the Magistrate that she has identified Kamalakanta because suspect with six other suspects, raped her. So the evidence of P.W.36 in this regard is also hearsay being uncorroborated. However, her evidence after scrutiny shows that the victim has identified accused Kamalakanta because he has forcibly taken her in a bicycle. Learned counsel for the appellant has seriously urged that the T.I. parade cannot be the basis for conviction as it is conducted during investigation

and it can not be only used for the purpose of establishing the substantive evidence. In the decision reported in the case of *State of Maharashtra v. Sukdev Singh*, (1992) 3 SCC 700, relying on the decisions in the case of *Kanan and others v. State of Kerala*, (1979) 3 SCC 319, Their Lordships observed that Test Identification Parade, if held promptly and after taking the necessary precautions to ensure its credibility, would lend the required assurance which the court ordinarily seeks to act on it. In the absence of such test identification parade it would be extremely risky to place implicit reliance on identification made for the first time in court after a long time and that too of persons who had changed their appearance.

16. It is also reported in *Vijay @ Chinee v. State of Madhya Pradesh*, (2010) 8 SCC 191 relying on *State of H.P. v. Lekh Raj*, AIR 1999 SC 3916, *Malkhan Singh v. State of M.P.*, AIR 2003 SC 2669, where Their Lordships observed that Holding of the Test Identification Parade is not a substantive piece of evidence, yet it may be used for the purpose of corroboration; for believing that a person brought before the Court is the real person involved in the commission of the crime. However, the Test Identification Parade, even if held, cannot be considered in all the cases as trustworthy evidence on which the conviction of the accused can be sustained. It is a rule of prudence which is required to be followed in cases where the accused is not known to the witness or the complainant. Moreover, it is held by Hon'ble Apex Court in *Subash Krishnan v. State of Goa* (Criminal Appeal No. 1089 of 2010) disposed of on 17.8.2012 where Their Lordships observed that the purpose of a prior test identification is to test and strengthen the trustworthiness of that evidence, Courts generally look for corroboration of the sole testimony of the witnesses in court so as to fix the identity of the accused who are strangers to them in the form of earlier identification proceedings. This rule of prudence, however, is subject to exceptions, when, for example, the court is impressed by a particular witness on whose testimony it can safely rely, without such or other corroboration. It has also to be borne in mind that the aspect of identification parade belongs to the stage of investigation, and there is no provision in the Code of Criminal Procedure which obliges the investigating agency to hold, or confers a right upon the accused to claim a test identification parade. Mere failure to hold a test identification parade would not make inadmissible the evidence of identification in court. What weight is to be attached to such identification is a matter for the courts of fact to examine.

17. With due respect to the said decisions, it is clear that the T.I. parade being conducted during investigation, is required to strengthen trustworthiness of the evidence adduced by the prosecution. But it has to be proved with proper perspective and weight attached to such identification only depends on the facts and circumstances of each case. In the instant case, when there is nothing found from the evidence of P.W.28 that she has identified the appellants during T.I. parade for the reason that they have raped her and there is no injury found on her private part due to such gang rape, T.I. parade evidence gains no momentum. It is evident from her evidence that during occurrence there was

darkness prevailed and she had seen accused persons for 2/3 times beforehand, thus, the T.I. parade held, has no weight to be added with the case of the prosecution nor it has lent any assurance to evidence of P.W.28.

18. For the aforesaid reasons, it is not safe to rely on the sole testimony of P.W.28 to prove occurrence of kidnapping and rape. It requires further corroboration. It is revealed from P.W.1 that he is the hotel keeper to whom the victim woman came at first and took food in his hotel and worked there. On 17.2.2000 she also remained in that night in his hotel. On the next morning he came to know that the victim is a woman as per version of his employee. Then on 18.2.2000 he told the victim woman to go away from the hotel. Later on he came to know from police that she has been raped.

19. P.W.3 only found the victim had come to his shop for work but he denied to give work. P.W.5 has expressed his ignorance about the occurrence but only admitted that he has paid Rs.10/- to the victim and asked her to go away. During cross examination by prosecution, he did not confirm his statement made before police about searching of accused Kailash, Kamalakanta and other worker from his Dhaba for the whereabouts of the victim girl and he saw at about 2.30 A.M. that accused Kailash, Kamalakanta, Nura Sahoo brought the girl from petrol pump and went towards Phulnakhara. But his statement was not confronted to the I.O. for which, it cannot be said that P.W.5 has turned hostile to the prosecution. It must be remembered that the prosecution while putting leading question during cross-examination to this witness by confronting his earlier statement, the prosecution should not forget to confront such denial of his earlier statement to the I.O. inasmuch as in absence of any denial or confirmation of such statement of witness by the I.O. on confrontation, the witness cannot be declared hostile and it cannot be said that the witness has resiled from his earlier statement. It is the duty of the prosecution to keep it apprised of the legal provisions and to examine the witness properly so that the case of the prosecution will not be allowed to suffer.

20. P.W.6 who is the headmaster of the concerned High School, expressed his ignorance about the occurrence. He was cross-examined by the prosecution and during cross-examination he denied to have stated before police that on 19.2.2000, he witnessed patches of semen, pubic hair and one Gutkha on the floor of the school. His statement has been confronted to one of the I.O. in this case. The I.O. confirmed about such statement of P.W.6 before him. So it must be held that P.W.6 has resiled from his earlier statement having contradicted the same. It is settled law that even if a witness turned hostile, his evidence should be assessed to find out how far his evidence promotes the case of the prosecution or proves the innocence of the accused. Merely because the witness is declared hostile, it does not mean that his evidence cannot be considered for any purpose. So it depends on every fact and circumstances where hostile witness is to be assessed with proper perspective. P.W.6 being the headmaster of the School having not corroborated his earlier statement, is found to have

become hostile to the case of the prosecution and his evidence has not supported the case of the prosecution in any respect.

21. P.W.8 also expressed ignorance about the occurrence. But during cross-examination by prosecution, he admitted that he has refused to keep the victim girl in his hotel when she was accompanied by Babuli Sahoo in the afternoon of 18.2.2000. In the cross-examination by defence, he expressed his ignorance but identified the girl. So nothing has been found from his evidence to lend corroboration to the case of the prosecution as to prove the fact that the victim girl being accompanied by Babuli Sahoo has reached the shop of P.W.8. P.W.9 expressed his ignorance about the occurrence but in cross-examination by prosecution, he admitted that he has a hotel in between Pahal and Phulnakhara. He has got hotel near Laksheswar Petrol Pump. But on 18.2.2000 night at about 2.00 A.M., he found appellants; Kamalakanta and Ranjan to have talked loudly. There is no previous statement confronted by prosecution to this witness nor during cross-examination it has come out from his evidence that on occurrence night at 2.00 A.M., Kamalakanta and Ranjan were not talking in his hotel. Thus it does not conceive as to how these appellants were engaged in committing rape during that night in a school if they were talking at hotel at 2.00 A.M.. On the other hand he has not supported the prosecution case since there is nothing dispelled from his cross-examination by prosecution to prove him to have contradicted earlier statement or any discrepancy in his evidence.

22. P.W.10 expressed his ignorance about the occurrence. During cross-examination by the prosecution, nothing has been elicited to show that he has contracted his earlier statement. Rather it is found from his cross-examination by the prosecution that he has got a hotel, namely, Laksheswar Bhojanalaya near Laksheswar Temple.

23. P.W.12 who is a journalist, simply stated that on 15.2.2000 he found two to three persons dragging a small boy and he ran to Cuttack and informed the police. In cross-examination he stated to have not protested for the girl who has been dragged nor he has talked to her. There is no such police report produced by P.W.12. Since the occurrence allegedly took place on 18.2.2000, but he narrated about the occurrence of 15.2.2000, thus his evidence is futile one to support the prosecution.

24. P.W.13 expressed ignorance about the occurrence. He has been cross-examined by the prosecution. During cross-examination by prosecution, he admitted to have stated before police that on 17.2.2000 while he was taking meal, he met a boy who was unable to talk Odiya and was talking in English, that he brought him to hotel by a hotel boy at 10.30 A.M. for work and at 1.00 P.M. when he went to talk, he could know that he is a girl who was wearing shirt and pant. He denied to have stated before police that his employer refused to keep the girl and gave her Rs.10/-. He also denied to have stated before police that on 18.2.2000 night he found two persons came by bicycle and the girl narrated before the employer that she was being forcibly dragged by two persons and on

the next morning he came to know that the accused persons committed rape on that girl. P.W.35 confirmed about the statement of P.W.13 before him. So P.W.13 has contradicted his earlier statement and as such become hostile to the case of the prosecution.

25. P.W.17 also did not support the case of the prosecution. P.W.22 who is a cook in the line hotel of Babuli Sahoo near Laksheswar Petrol Pump, also did not support the statement of P.W.28 about her working there. P.W.27 who happened to work as employee in the Dhaba of Babuli Sahoo expressed his ignorance about occurrence but in cross-examination by prosecution, he admitted that on 17.2.2000 a boy came to their hotel and stayed there for a night and on the next morning when that boy took bath, he came to know that she was a girl. The accused persons were near the hotel of Tuna Sahoo gave her indication but it is not clear from his evidence as to what indication was given by the accused persons. In cross-examination by the defence, he clearly stated to have no any communication with the girl and he has not seen the victim girl after taking bath nor he has seen the accused persons giving indication. Thus his evidence has been well shaken by the defence. Be that as it may, the evidence of P.W.27 does not corroborate the evidence of P.W.28 as to involvement of accused persons with the occurrence.

26. P.W.30 also expressed his ignorance about the occurrence. In cross-examination by the prosecution, he denied to have stated before police that he has got line hotel (Dhaba) and his brother was working in that hotel and on 19.2.2000 when he came to the hotel, he found his brother had gone away and the employees have been arrested. P.W.30 also did not support the case of the prosecution about the presence of his hotel near Phulnakhara. P.W.38 who is a cook in the line hotel of Guna Sahoo also neither corroborate the statement of the victim girl nor has supported the case of the prosecution.

27. From the foregoing discussions, it appears that none of the P.Ws. has lent corroboration to P.W.28 about her stay at the hotel and dragging her by the accused persons to the school.

28. Moreover, the prosecution has produced the evidence towards seizure of wearing apparel of the victim girl and the appellants, the same are allegedly to have stained with semen and blood. But the Exts.15, 16, 17 and 18 which are the reports of the Chemical Examiner, disclose that no conclusive opinion was given due to want of direct blood grouping test and the blood grouping also could not be made due to deterioration of the prosecution material and not suitable for serological test. There is no other supporting evidence produced by the prosecution to lend corroboration to the evidence of P.W.28 who is the victim major woman in this case. Thus there is neither direct evidence nor circumstantial evidence proved by prosecution to prove the fact that the victim woman was raped by the appellants in the night of 18.2.2000.

29. So far as the charge under section 366 IPC is concerned, it requires

introspection. It has been held in the aforesaid paragraphs that statement of P.W.28 cannot be solely reliable being untrustworthy. Also there is no clear, cogent, consistent and substantial evidence to show that she was dragged by the appellants to the school. Section 366 IPC has got the following ingredients :

- a. appellants induced the victim to go from any place;
- b. such inducement was by deceitful means;
- c. such inducement took place with intent that the victim may be seduced to illicit intercourse; and
- d. appellants knew it to be likely that the victim may be seduced to illicit intercourse as a result of her abduction.

30. In the instant case, none of the ingredients has been proved by the prosecution. Even if the statement of the victim is relied to show that the appellants dragged her to the school but in absence of the proof of rape, mere dragging the victim by the appellants falls short of the proof of one of the ingredients. In *Gabbu v. State of M.P.*, AIR 2006 SC 2461 at para-11, Their Lordships held :

"11. Apart from this, to constitute an offence under Section 366 IPC, it is necessary for the prosecution to prove that the accused induced the complainant woman or compelled by force to go from any place, that such inducement was by deceitful means, that such abduction took place with the intent that the complainant may be seduced to illicit intercourse and/or that the accused knew it to be likely that the complainant may be seduced to illicit intercourse as a result of her abduction. Mere abduction does not bring an accused under the ambit of this penal section. So far as a charge under Section 366 IPC is concerned, mere finding that a woman was abducted is not enough, it must further be proved that the accused abducted the woman with the intent that she may be compelled, or knowing it to be likely that she will be compelled to marry any person or in order that she may be forced or seduced to illicit intercourse or knowing it to be likely that she will be forced or seduced to illicit intercourse. Unless the prosecution proves that the abduction is for the purposes mentioned in Section 366 IPC, the Court cannot hold the accused guilty and punish him under Section 366 IPC."

31. With due respect to the said decision, it is amply clear that mere abduction does not bring appellants under the ambit of penal section 366 IPC without proof that the appellants abducted victim with intent that she may be compelled or compelled her to be seduced for illicit intercourse. So where the offence of rape and abduction or kidnapping of the I.P.C. are alleged, if the offence of rape is not proved, offence of abduction or kidnapping is likely to fail, of course, subject to facts and circumstances of each case. In the instant case, in absence of offence of rape being proved, the main ingredient of 366 IPC also remained far from proof. Thus the offence under section 366 IPC is not proved by the prosecution against the appellants beyond all shadow of doubts.

CONCLUSION :

32. Learned trial court appears to have not analysed the evidence properly and has swayed away of the statement of P.W.28 without having scrutinized the same with the adjunct parameters as required. Similarly although learned trial court has outlined the principles towards appreciation of evidence of the prosecutrix in rape case but in the instant case, evidence of P.W.28 has been appreciated to base conviction without considering the evidence of other witnesses for which conclusion of learned trial court appears to be perverse. Hence the findings of the learned trial court to the fact that the prosecution has proved the charges against the appellants beyond all shadow of doubts, cannot be sustained. On the other hand the order of conviction and sentence passed by the learned trial court against the present appellants being illegal and unjust, the same is liable to be set aside.

33. In the result the appeals succeed, the conviction and sentence passed by learned trial court are set aside. The appellants are acquitted of the charge under section 376(2)(g) IPC read with 366 IPC beyond all reasonable doubts and they are discharged from bail bonds. The appeals are disposed of accordingly.