

(2021) 09 OHC CK 0031

In the Orissa High Court

Case No : Criminal Appeal No .487 Of 2020

Sidheswar Bindhani @ Petu

APPELLANT

Vs

State Of Odisha And Another

RESPONDENT

Date of Decision : 08-09-2021

Acts Referred:

Code of Criminal Procedure, 1973 — Section 164, 374(2)

Indian Penal Code, 1860 — Section 328, 363, 376(D), 506

Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 — Section 3(1)(w)(i), 3(2)(va), 14A

Citation : (2021) 09 OHC CK 0031

Hon'ble Judges : S.K.Panigrahi, J

Bench : Single Bench

Advocate : Bishnu Prasad Pradhan, P.K. Maharaj, M.K. Mohapatro, S. Khan, P.K. Behera

Final Decision : Dismissed

Judgement

S. K. Panigrahi, J

1. The appellant in the instant appeal under Section 374(2) of the Code of Criminal Procedure, 1973 ('Cr.P.C') seeks to challenge the order dated 24.10.2019 passed by the learned Special Judge, Mayurbhanj, Baripada in G.R. Case No.33 of 2019 arising out of Kuliana P.S. Case No.60 of 2019 for commission of offence punishable under Sections 363/376(D)/ 328/506 of IPC read with Section 3(1)(w)(i)/3(2)(va) of the S.C. & S.T. (PA) Act.

2. The prosecution story reveals that on 07.07.2019, at about 7:00 AM, the informant's wife (hereinafter 'victim') had been to the village Patharaghera Bandha to attend the call of nature when two persons forcibly carried her to the nearby forest and gang raped her. When she shouted for help, the appellant tried to administer a liquid substance on her body which smelled like kerosene. Hearing such holler, two girls of the nearby village came to the spot while the accused fled. The police implicated the appellant along with the co-accused on

the confessional statement of the victim.

3. Learned counsel for the appellant submitted that the appellant is innocent and in no way connected to the occurrence. He highlighted the fact that the FIR was initially lodged against unknown persons and the victim disclosed the name of the appellant at much later stage of investigation. He also contended that the concurrent statements of the victim are contradictory to each other and do not proffer a consistent story. In closing, he submitted that the medical report did not reveal any sign or symptom of recent sexual intercourse and/or bodily injury to the victim which goes to contradict the narrative of any forceful sexual assault against her. The charge-sheet has already been submitted. Yet, the appellant is languishing in custody since 24.07.2019.

4. Learned counsel for the State vehemently opposed the prayer of the appellant. He submitted that it is a case of gang rape after abduction of the victim and hence, the appellant does not deserve to be enlarged on bail. Also, the material on record reveals that the appellant had attempted to administer poisonous substance to the victim at the time of occurrence. If he is released on bail, there is a strong apprehension of threat to the life of the victim and the witnesses in the case.

5. Heard Mr. Bishnu Prasad Pradhan, learned Counsel for the appellant, Mr. P.K. Maharaj, learned Additional Standing Counsel appearing for the State and Mr. S. Khan, learned counsel appearing for the Respondent No.2 and perused the case records.

6. The first question, which comes up for consideration in this case, is whether deviation or inconsistencies in the victim's testimony could jeopardize the case of the prosecution. This issue came up for consideration before the Supreme Court in *State of Punjab v. Gurmit Singh and others*, (1996) 2 SCC 384 where it was held that:

"9. ...The Courts must, while evaluating evidence, remain alive to the fact that in a case of rape, no self-respecting woman would come forward in a Court just to make a humiliating statement against her honour such as is involved in the commission of rape on her. In cases involving sexual molestation, supposed considerations which have no material effect on the veracity of the prosecution case or even discrepancies in the statement of the prosecutrix should not, unless the discrepancies are such which are of fatal nature, be allowed to throw out an otherwise reliable prosecution case. The inherent bashfulness of the females and the tendency to conceal outrage of sexual aggression are factors which the Courts should not overlook. The testimony of the victim in such cases is vital and unless there are compelling reasons which necessitate looking for corroboration of her statement, the Courts should find no difficulty to act on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable. [emphasis supplied]

7. In *Sunil Kumar Sambhudayal Gupta and others v. State of Maharashtra*,

(2010) 13 SCC 657 while dealing with the issue of material contradictions, the Court held:

"14. While appreciating the evidence, the court has to take into consideration whether the contradictions/ omissions had been of such magnitude that they may materially affect the trial. Minor contradictions, inconsistencies, embellishments or improvements on trivial matters without effecting the core of the prosecution case should not be made a ground to reject the evidence in its entirety. The trial court, after going through the entire evidence, must form an opinion about the credibility of the witnesses and the appellate court in normal course would not be justified in reviewing the same again without justifiable reasons."

8. In the appeal, learned counsel for the appellant sought to bring out that, in the absence of corroboration of statement of the prosecutrix by the aforementioned medical report, the detention of the appellant was bad. This contention has been totally rejected by Indian Courts and it was also reiterated that there is no need for corroboration.

9. In *Guddoo vs State of U.P.*, 2017 All HC 497 Hon'ble Allahabad High Court shed light upon the value of medical evidence in cases of rape:

"66. Value of Medical Evidence: Appreciating Sociological and Psychological Aspect of Rape:

Courts used to take the position that if there was no proof of physical assault there would be no rape. The presumption that if no physical injury is evident on the victim, no sexual intercourse has taken place or rape has not been committed, ignores the fact that rape is not only an offence involving physical violence, but also psychological violence. This too when existing laws recognize mental agony and psychological violence as offences against the body. The victim of rape besides being physically ravished is psychologically wounded. It is the feeling of having been exploited and violated more than anything else which leaves lifelong scars on the mind of the victim. Perhaps this trauma has been recognized in a case where it was held that the absence of injuries on private parts of the prosecutrix would not rule out her being subjected to rape. Krishna Iyer, J. who is famous for his humanistic approach towards law, observed in *Rafiq Vs. State of U.P.* (1980) 4 SCC 262: "when no woman of honour will accuse another of rape since she sacrifices thereby what is dearest to her, we cannot cling to a fossil formula and insist on corroborative testimony, even if taken as a whole, the case spoken to by the victim strikes a judicial mind as probable. In this case, the testimony has commanded acceptance from two courts. When a woman is ravished what is inflicted is not merely physical injury but the deep sense of some deathless shame". Judicial response to human rights cannot be blunted by legal bigotry."

10. In similar spirit, *Madan Gopal Kakkad vs. Naval Dubey*, (1992) 3 SCC 204 where the question as to what constitutes sexual intercourse and rape was

discussed, the Apex Court has put the matter in perspective: -

"37. To constitute the offence of rape it is not necessary that there should be complete penetration of penis with emission of semen and rupture of hymen. Partial penetration of the penis within the Labia majora or the vulva or pudenda with or without emission of semen or even an attempt at penetration is quite sufficient for the purpose of the law. It is therefore quite possible to commit legally the offence of rape without producing any injury to the genitals or leaving any seminal stains. In such a case the medical officer should mention the negative facts in his report, but should not give his opinion that no rape had been committed. Rape is crime and not a medical condition. Rape is a legal term and not a diagnosis to be made by the medical officer treating the victim. The only statement that can be made by the medical officer is that there is evidence of recent sexual activity. Whether the rape has occurred or not is a legal conclusion, not a medical one.

38. In Parikh's Book of Medical Jurisprudence and Toxicology, the following passage is found:

Sexual intercourse: In law, this term is held to mean the slightest degree of penetration of the vulva by the penis with or without emission of semen. It is therefore quite possible to commit legally the offence of rape without producing any injury to the genitals or leaving any seminal stains." [emphasis supplied]

11. In the backdrop of above mentioned legal and factual aspects, it is prima facie, evident that there are serious charges of gang rape against the appellant and another. Victim in her statement recorded under Section 164 Cr.P.C. has specifically mentioned the name of the appellant to be the second assailant, as mentioned in the FIR, therefore, there is, prima facie, direct allegation against the appellant under Section 376D IPC. Also, it appears that other offences under the Indian Penal Code are, prima facie made out, which needs to be determined in further prosecution. Be that as it may, credibility and reliability of statement of witnesses cannot be looked deeply into, at this stage. Therefore, in totality of above discussion, the learned Special Judge has rightly dismissed the application for grant of regular bail to the appellant. No substantial case is made out for grant of bail.

12. Accordingly, the appeal is dismissed with liberty to the appellant to revive the prayer for grant of bail before the trial Court after examination of prosecutrix in Court. The trial Court may decide the subsequent application on merits at that stage without getting influenced by the order of this Court.

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