

(2009) 08 OHC CK 0062
In the Orissa High Court
Case No : Government Appeal No. 79 of 1997

State of Orissa

APPELLANT

Vs

Brajasundar @ Keda Behera and Others

RESPONDENT

Date of Decision : 03-08-2009

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 164
Penal Code, 1860 (IPC) — Section 201, 302, 34, 376

Citation : (2009) CLT 1736 (Suppl CrI)

Hon'ble Judges : S.C. Parija, J;A.S. Naidu, J

Bench : Division Bench

Advocate : J.P. Patra, Addl. Standing, for the Appellant;

Final Decision : Dismissed

Judgement

A.S. Naidu, J.—The Judgment & order of acquittal dated 20th January, 1996 passed by Learned Addl. Sessions, Judge, Bolangir, acquitting the Respondents from the charge under Sections 302, 201 read with Section 34 of the Indian Penal Code (in short, "I.P.C") is assailed by the State of Orissa in this appeal.

2. Bereft of unnecessary details, the prosecution case, in short, is that Shyam Sundar Behera, brother of Respondent Nos. 1 & 3 & son of Respondent No. 2 committed rape on P.W. 17 in the night of 22/23.12.1994 taking advantage of the fact that her mother Kusuma Naik & other family members were absent in the house. On the following day, P.W. 17 disclosed about the incident before her mother Kusuma. After hearing the incident from her daughter, Kusuma went to the house of Shyam Sundar & questioned him with regard to the incident. But then, Shyamsundar completely denied to have any knowledge about the occurrence. Kusuma thereafter insisted that Shyam Sundar should come to temple & swear about the incident. Respondent No. 1, Braja Sundar the brother of Shyam Sundar became annoyed & threatened to murder Kusuma if she insisted about any such swearing in the village Mandap. After being harassed, Kusuma told them that she is going to report the matter to the police &

proceeded towards the Police Station with the intention to lodge an F.I.R. It is alleged that thereafter, her whereabouts were not known & P.W.17 lodged an information on 24.12.1994 about the missing of her mother & also made an allegation that Shyam Sundar had committed rape on her. The O.I.C. had made station diary entry about the said fact. On 27.12.1994 her dead-body was found at Ranisarda potamunda Reserve forest. Basing upon the report of P.W. 17 & after recovery of dead body of Kusum, the O.I.C. lodged an F.I.R. on his own information & took up investigation. He held inquest over the dead-body, examined the witnesses, sent the dead-body for post mortem, arrested the accused except Shyam Sundar, recovered one Tangia (M.O.I) at the instance of accused No. 1 & submitted charge-sheet showing Shyam Sundar as an absconder in G.R. Case No. 472 of 1994 of the Court of Learned S.D.J.M., Bolangir. Learned S.D.J.M., after due application of mind & on being satisfied, took cognizance of the offence & committed the case to the Court of Session for trial.

3. The plea of the defence was that of complete denial.

4. The prosecution in order to establish their case, got examined 19 witnesses whereas the defence did not examine any witness. Out of the witnesses examined, P. Ws.17 & 18 are the daughter & son of Kusuma (deceased), P.W. 8 is her son-in-law, P.W. 16 is the doctor, who conducted autopsy, P.W. 7 is the witness to the inquest, P.W. 6 is the A.S.I, who seized a pair of blue coloured sponge chappal, some broken bangles etc. P.W. 5 is the constable who guarded the dead-body, P.W. 9 is a rickshaw puller & is a witness to the seizure of wearing apparels. P.W. 1 is the witness to the seizure of Tangia.

5. Learned Addl. Sessions Judge after discussing the evidence in extenso came to the conclusion that the prosecution case varied from stage to stage inasmuch as though in the report submitted initially, it was alleged that P.W. 17 was raped, such allegation was given a go bye at a later stage. Neither she was medically examined nor charge-sheet was submitted u/s 376, Indian Penal Code. Learned Addl. Sessions Judge further observed that though the death was caused due to strangulation, a tangia was seized which has absolutely no nexus with the alleged crime. P.W. 17 & her brother claimed to be the eye witnesses. In Court they have given a vivid description as to how the crime was committed by the accused persons, but then neither they have disclosed the said fact before the police, nor stated the same in the statement recorded u/s 164, Code of Criminal Procedure. In view of the aforesaid discrepancies, the Trial Court by a well-discussed judgment arrived at a conclusion that the prosecution has totally failed to establish the charges against the accused persons & acquitted them.

6. In course of hearing, Learned Counsel for the State mainly relied upon the statement of P.W. 17 & submitted that in view of categorical statement made by P.W. 17 giving vivid discussion of the entire offence, Learned Addl. Sessions Judge acted illegally in acquitting the accused persons. P.W. 2 is the uncle of P. Ws.17 & 18. He deposed in Court that P. Ws.17 & 18 came to his house on

24.12.1994 & reported about that their mother was missing. He advised them to file an F.I.R. at the police station. It is also deposed that he accompanied the police in the jeep in search of Kusuma. He has further stated that P. Ws.17 & 18 came to the police station with a pair of blue coloured chappal, one tassel with a net, & broken bangles of different colours & intimated that they have collected the same from the spot & police seized the said articles in presence of P.W. 4 under Ext. 4. P.W. 10 did not support the prosecution case at all so also P. Ws.11 & 12. P.W. 13 is an old lady. She also did not support the prosecution case. P.W. 14 was declared hostile. P.W. 15 is the Gramarakhi & his evidence is of no help to the prosecution. After going through the entire evidence, this Court finds that the statement of P.W. 17 only relates to the occurrence. P.W. 17 has clearly stated that she & her brother went in search of their mother & they found the accused persons chasing their mother near the bus stand & one of the accused assaulted her & other two caught hold of her legs & 4th accused put his feet on the neck of Kusuma & throttled her & thereafter they dragged the dead-body into the jungle. This statement made in Court, however, was not disclosed either before the police nor the same appears to be disclosed while recording the statement of P.W. 17 by the Magistrate u/s 164, Code of Criminal Procedure. The facts stated by P.W. 17 are also not corroborated by any other witness. A reading of the statement made by P.W. 17 u/s 164, Code of Criminal Procedure. & the deposition made in Court reveals that there was exaggeration & some of the facts were disclosed for the first time in Court. Learned Counsel for the State, on the other hand, submits that the statements made by P. Ws. 17 & 18 were not sacrosanctly recorded by the police & as such, the facts stated in Court should not be ignored only because the same were not found in the statements recorded by the police.

7. In the case in hand, after going through the F.I.R., statements made before police as well as statements of P. Ws.17 & 18 recorded before the Magistrate u/s 164, Code of Criminal Procedure. we find that the prosecution has changed their stand from time to time. In the F.I.R. though it is alleged that P.W. 17 was raped by Shyama Sundar, she was not medically examined, the allegation of rape, which is the nucleus of the entire dispute, was given a go-bye & even no charge was framed u/s 376, Indian Penal Code. P. Ws. 17 & 18 have not disclosed with regard to the involvement of the Respondents with the alleged crime in their statements made u/s 164, Code of Criminal Procedure. before the Magistrate. It appears that a complete new story was presented in the Court for the first time. All these facts & circumstances throw a cloud of suspicion with regard to the veracity & truthfulness of the statements made by P. Ws.17 & 18. Apart from the evidence of the aforesaid two witnesses, there is no other evidence to connect the accused persons with the alleged crime. The Addl. Sessions Judge has discussed the evidence threadbare & on being satisfied that the prosecution has totally failed to establish the charges, acquitted the accused persons.

8. After going through the evidence, we find that the reasonings given by the Learned Addl. Sessions Judge do not suffer from any infirmity. They are cogent &

no error apparent appears on the face of the records. We are, therefore, not inclined to interfere with the order of acquittal that too after lapse of 15 years.

9. In the result, the appeal fails & is dismissed.

S.C. Parija, J.

10. I agree.