

(1979) 03 OHC CK 0012

In the Orissa High Court

Case No : Government Appeal No. 19 of 1976 and Criminal Appeal No. 56 of 1979

State of Orissa

APPELLANT

Vs

Pradip Kumar Gour and Others
 Pradip Kumar Gour Vs
The State of Orissa

RESPONDENT

Date of Decision : 29-03-1979

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 164, 184, 377, 386

Penal Code, 1860 (IPC) — Section 376

Probation of Offenders Act, 1958 — Section 4

Citation : (1979) 47 CLT 648

Hon'ble Judges : J.K. Mohanty, J

Bench : Single Bench

Advocate : Addl. Standing in Govt. Appeal No. 19 of 76 and Ganeswar Rath, in Criminal Appeal No. 56/76, for the Appellant; B. Pal and Ganeswar Rath, in Govt. Appeal No. 19 of 76 and Addl. Standing Counsel in Crl. Appeal No. 56/76, for the Respondent

Final Decision : Dismissed

Judgement

J.K. Mohanty, J.—Pradip Kumar Gour and Jitendra Harpal (Respondents in Government Appeal No. 19/76), Babula1 Mahananda and Sawarmal Sharma were tried in the Court of the Assistant Sessions Judge, Bargarh in Sessions Trial No. 33/9(S) of 1975 on the allegation that they in the night of 15th April, 1974 at Bargarh committed rape on Ukia Luhar (P.W. 5) conjointly and in furtherance of their common intention. As during the trial accused Babulal Mahananda absconded, the case against him was split up and the trial proceeded against the remaining three accused persons. An the accused persons were found guilty u/s 376, Indian Penal Code and were convicted there under. Accused Sawarmal Sharma was sentenced to undergo R. I. for three years and six months and accused Pradip Kumar Gaur and Jitendra Harpal were, however, released on Probation of good conduct u/s 4 of the Probation of Offenders Act. On their

executing a bond of Rs. 2000/- with one surety for the like amount to be of good behaviour and not to repeat commission of such offences in breach thereof to appear in Court and to receive such sentence as may be imposed on them. Accused Pradip Kumar Gour and Jitendra Harpal were directed to Pay Rs. 500/- and Rs. 300/- respectively to the prosecutrix (P.W. 5) as compensation. The State Government has filed Government Appeal No. 19 of 1976 u/s 377, Code of Criminal Procedure for enhancement of the sentence passed on accused Pradip Kumar Gour and Jitendra Harpal. During hearing of the Government Appeal, it transpired that accused Pradip Kumar Gour only has preferred Criminal Appeal No. 4(S) of 1976 before the Sessions Judge, Sambalpur against the order of conviction passed against him by the Asst. Sessions Judge. So on the request of the counsel for both sides and for general convenience of Parties and for ends of justice the record of Criminal Appeal No. 4 (S) of 1976 pending in the Court of Sessions Judge, Sambalpur was called for and the case was transferred to this Court for hearing. The appeal has been renumbered as, Criminal Appeal No. 56 of 1976 and was heard along with Government Appeal No. 19/76 and this judgment will govern both the appeals.

2. The case of the prosecution is that the prosecutrix Ukia Luhar (P.W. 5) and her husband Nilambar Luhar (P.W. 1). who are labourers belonging to village-Singharani in Bolangir district, along with one Prahallad Tandi (brother of P.W. 5) went to Bargarh to earn their livelihood. As they did not get employment, they decided to go back to their native place after 8 days of their stay at Bargarh. On 15-4-1975 in the night they came to Bargarh Railway Station to catch the morning train that leaves for Titilagarh in order to return to their native place. While they were at the waiting hall, the accused persons came to them and asked them to come to the police station alleging that Nilambar Luhar has eloped away with a stranger woman, namely P.W. 5. They were taken by the accused persons in two rickshaws upto a canal at that late hours of night and there Nilambar (p w. 1) and Prahallad Tandi were assaulted, threatened with dire consequence and were sent back to the railway station. The case of the prosecution is that thereafter the accused persons took P.W. 5 to a room of a lodging house in which Mandhata Sahu (P.W. 3) and accused Pradip Kumar Gour were staying and had sexual intercourse with her against her will one after the other. In the morning, accused Babulal Mahananda and Jitendra Harpal took her to Sambalpur in a bus and she was kept in the house of Babulal Mahananda where from she was rescued by the Police.

3. Prosecution in support of the case examined 11 witnesses and on behalf of the defence none was examined. P. w 5 is the prosecutrix and P.W. 1 is her husband P. w 3 is room mate of accused Pradip Kumar Gour. P.W. 2 is a R. P. F. constable before whom P.W. 1 is alleged to have reported the matter. P.W. 4 is the Magistrate, who conducted the T. L. parade of the accused persons and filed his report vide Ext. 1, and also recorded the statement u/s 184. Code of Criminal Procedure of P.W. 3 as per Ext. 2 P.W. 6 is the Lady Assistant Surgeon, who examined P.W. 5 on 17-4-1975 and submitted her report vide Ext. 3. P.W. 7 is

the S. I. of Police of Sambalpur Sadar P.S. who sent accused Babulal Mahananda for medical examination, P.W. 8 is the Medical Officer, who examined accused Jitendra Harpal, Pradip Kumar Gour and Sawarmal Sharma. P.W. 9 is another Medical Officer who examined accused Babulal Mahananda. P. w. 10 is the S. I. of police, who rescued P.W. 5 from she house of accused Babulal Mahananda. P.W. 11 is the Investing Officer.

The learned Assistant Sessions Judge after considering the evidence on record has convicted and sentenced the accused persons as aforesaid.

4. Learned Council appearing for accused Pradip Kumar Gour (Appellant in CrI. Appl. 56/79 and Respondent No. 1 in Govt. Appeal No. 19/76) submitted that the case of the prosecution that P.W. 5 was raped by all the accused persons is belied by the evidence of P.W. 6, the lady Assistant Surgeon, who did not find even a scratch on the person of the prosecutrix not did she find any sign of sexual intercourse, that P.Ws. 8 and 9, who are medical Officers and have examined the accused persons also did not find any evidence of their having indulged in sexual inter course; that the evidence of the prosecutrix is absolutely unreliable and in any event does not establish any offence under section, 376 Indian Penal Code against the accused persons ; that the evidence of P.Ws. 1 and 3 is not at all reliable that the circumstances of the case rather go to disprove the prosecution case; and that in any view of the matter, the Appellant-Respondent No. 1 is entitled to acquittal.

On behalf of accused Respondent No. 2 Jitendra Harpal (In Government Appeal No 19/76) the above argument has also been adopted and the learned Counsel submitted that the Government Appeal is to be dismissed and the accused is entitled to acquittal.

5. P.W. 1, the husband of the prosecutrix, has stated that he, P.W. 5 and the cousin brother of p. w, 5 came to Bargarh to earn their livelihood by dint of labour. But as they were unable to find employment, they came to Bargarh railway station ill the night of 15-4-1975 to catch the train for Titilagarh. While they were in the waiting room, at about 10. 00 p. m. the accused persons came there and one of them gave kicks to him and Prahallad Tandi, the cousin brother of p. w 5. They asked them to go to the Police Station as be had eloped with a woman i.e. P.W. 5. The accused persons asked them to board in to the rickshaws that were waiting outside the railway platform. He and Prahallad Tandi were made to sit in one rickshaw in which Sawarmal also sat in another rickshaw the other accused-persons and P.W. 5 sat. When the rickshaws reached the canal embankment the rickshaws were stopped. Accused Sawarmal Sharma threatened him and Prahallad Tandi and asked them to leave the place. As he protested, he was assaulted. So out of fear of life, he and Prahallad Tandi returned to the railway station and informed the above incident to p w. 2, the R. P. F. constable, who was on duty in the platform. P.W. 2 accompanied them to the spot where they search for P.W. 5, but could not find (p. w 5). They all returned back to the railway station. On the next morning P.W. 1 came to tbe police station and made

a report about the incident. On the following night his wife (P.W. 5) was brought to Bargarh Police-station. P.W. 5 narrated, the incident as to how she was taken to a house, made naked and as to how the accused persons had sexual intercourse with her against her will, forcibly. In cross-examination P.W. 1 stated that as they could not yet any engagement at Bargarh, they had to remain without food and they were begging during the last two days prior to the occurrence. He also Hated that there were about 50 persons in the waiting room when the accused persons came and assaulted him and Prahallad Tandi and charged them of having eloped with a woman According to him, the persons who were waiting in the waiting hall did not protest. He subscribed his thumb mark in the report after his wife was brought back by the police from Sambalpur.

P.W. 2 is the R. P. F. constable before whom P.W. 1 complained about the incident. He has stated that he alone with one S. S. Ray, another R. P. F. constable and P.W. 1 and Prahallad Tandi went to the place where P.W. 1 and Prahallad Tandi were threatened and assaulted. As they could not find anybody near about the place of occurrence, they returned to the railway station and did not make any report at the police station nor did he ring up to the police station. He admits that he has not made any entry about the incident in his diary. Even in the morning he did not go to the police-station to report.

P.W. 3 is the room-mate of accused Pradip Kumar Gour. He has stated that on the request of accused Jitendra Harpal he accompanied the accused persons to the Bargarh Railway Station. He has stated that they all went to a hotel near the railway station where liquor is sold illegally, and inspite of his protest they took liquor. He has further stated that the four accused persons entered into the lower class waiting hall and he saw them coming out with P.Ws. 1 and 5 and Prahallad Tandi. Accused Sawarmal Sharma and Babulal Mahananda were saying to P.Ws. 1 and 5 and Prahallad Tandi that they were required at the police station. They all came out of the railway station and in one rickshaw, p. w. 1 and his wife were seated in one rickshaw with accused Babulal Mahananda and Sawarmal Sharma and in the other himself, accused Jitendra. Pradip and Prahallad were sitting. Though he warned the accused persons, they did not listen to his advice and were determined to commit mischief. So, he, out of fear, got down from the rickshaw and came back to the railway station. P.W. 1 and his wife and Prahallad Tandi were helplessly crying for help. Babulal Mahananda offered some money to P.W. 1 and Prahallad Tandi, which P.W. 1 accepted. He returned to his lodge at about 4. 30 a. m. and found accused Sawarmal Sharma, Jitendra Harpal and Pradip Gour were sleeping inside the entrance room and P.W. 5 was sleeping in another room. He asked all of them to vacate his room lest he may be entangled. Babulal Mahananda went away in the company of P.W. 5 first followed by Jitendra Harpal. This witness was declared hostile by the prosecution.

P.W. 4 is the Magistrate before whom p. w. 1 identified all the accused persons and who recorded the statement u/s 164, Code of Criminal Procedure of P.W. 3 as per Ext. 2 P.W. 5 is the prosecutrix. She has narrated almost in the same

manner as P.W. 1 up to the time P.W. 1 and Prahallad Tandi were driven away by the accused persons on the canal embankment. She has further stated that she was taken inside a house and made naked. Then she was made to lie over a carpet and accused Sawarmal Sharma forcibly committed rape on her first. Thereafter all the remaining three accused persons committed rape on her, in spite of her protest, one after the other. She was asked by accused Sawarmal Sharma to take bath at the well. Accused Jitendra drew water from the well and handed over her a soap. She took bath rubbing all the parts of her body with soap. She narrated how she was taken to the bus stand by Jitendra and Babulal Mahanand. In the bus stand they boarded in a bus and proceeded to Sambalpur. She was taken to a house which, according to accused Jitendra and Babulal, was the dwelling house of the sisters father-in-law of accused Babulal. She remained in that house till about the afternoon and was given food. Thereafter accused Babulal took her and his wife in a rickshaw to his own residence and during the night some police officer entered in to the house of Babulal and rescued her. She and Jitendra Harpal were brought to Bargarh police-station in a motor car and there she saw her husband (P.W. 1) and Prahallad Tandi and narrated the entire incident to them. In cross-examination of P.W. 5 has stated that some of the waiters in the waiting hall of the railway station protested while she was being dragged out by accused Babulal. She also resisted and cried for help. She further stated that the rickshawala of the rickshaw in which she was taken also protested. According to her some persons were seen sleeping outside the neighbouring house to which he was taken. She stated that after taking bath in the well, she returned to the verandah and slept there. The accused persons slept in the room and she did not make any attempt to escape from the accused persons after they slept in the room. She admitted that there were some persons at the bus stand, but she did not tell anything to them for fear of the accused persons as accused Babulal gave her to understand that she would be employed at Sambalpur and so she accompanied them. In the bus she sat with some females and the accused persons sat with some male passengers. She told the female passengers sitting by her side that the accused persons were taking her to Sambalpur beating her husband and brother, but did not tell anything more to them.

6. From the above evidence, learned Counsel argued that it is quite improbable that P.W. 5 was forcibly taken out of the waiting hall of the railway station after beating her husband and brother, where admittedly there were several persons including the police officials; that it is quite unbelievable that after P.W. 1 and Prahallad Tandi were beaten at the canal embankment and driven away, they did not approach any of the persons, who were found nearby that though P.W. 1 stated that he informed P.W. 2, P.W. 2 did not take any step in the matter; and that P.W. 2 has admitted that he did not record this fact in his diary nor did he intimate this fact at the police station. It is curious that P.W. 2 and his associate Sri S. S. Roy, another R. P. F. constable, although were informed about the incident by P.W. 1, they did not take any step to rescue P.W. 5. It is further stated

that P.W. 5 has stated that after the accused persons forcibly committed sexual intercourse, she slept outside the verandah and the accused persons were sleeping inside the room, but she did not try to escape. Even after this, she went with two accused persons by a bus to Sambalpur as she was promised employment. P.W. 3, a roommate of accused Pradip Kumar Gour, has stated that P.W. 1 was offered money by accused Babulal and he accepted the same. Thus from the above, it is suggested that even assuming that P.W. 5 were with the accused persons, she did so voluntarily and with the consent of her husband. Even assuming that, the accused persons indulged in sexual intercourse with P.W. 5. it was with her consent and that of her husband. To add to this, learned Counsel for the Respondents pointed out to the evidence of P.W. 6, the lady Assistant Surgeon who examined P.W. 5 and has stated:

Accordingly. I examined her and noted the results of my examination which are as follows:

- (i) No sign of any internal and external violence on her person.
- (ii) No dead or living sperms seen on examination of smear. Ext. 3 is my report.

It is then argued that though Prahallad Tandi, was present in Court, prosecution did not choose to examine him and the inference is that if he would have been examined, he would not have supported the prosecution. This is a circumstance against the prosecution. Further the evidence of p. w. 8, the Medical Officer attached to Bargarh Municipality, who examined three of the accused persons, has stated:

On 17-4-1975 on receipt of police requisition while I was attached to the Government hospital, Bargarh, I examined Sri Sewarmal Sharma (identifying) and found no mark of injury on his person and no semen stains on his clothes. There was no spegna in his penis, Ext. 5 is my report. On the same day and on receipt of police requisition. I have examined one Pradip Kumar Gour and found no injury on his person. There was no spegna in his penis and no semen in his clothes. Ext. 6 is my report.

I also examined one Jitendra Harpal (identifying) and found no injury on his person. There was no spegna in his penis and there was no semen on his clothes. Ext. 7 is my report.

Cross-Examination by K.M. Panda, Advocate.

I did not find any foreign substance in the wearing clothes of the above named 3 persons whom I examined. I did not also find any mark of violence on the person of these 3 accused.

Thus from the evidence of P.Ws. 6 and 8 it is argued that even assuming for the sake of argument and not conceding that the accused persons had sexual intercourse with P.W. 5, it was with her consent. It is the common knowledge that if number of persons commit sexual intercourse forcibly in spite of

resistance of the prosecutrix, some injury must be found on the person of the lady as well as on the body of the persons committing rape. But no such injuries were found by the doctors on the persons of the accused persons or on the person of P.W. 5. This view is supported by the Modi's Medical Jurisprudence and Toxicology, Twentieth Edition, page 310 where it has been observed that marks of violence on fore-arms, wrist, face, breasts, chest, lower part of abdomen inner aspects of thighs and back are more likely to be found on the bodies of grown-up women who are able to resist. In this connection a reference may be made to a decision of the Supreme Court reported in *Pratap Misra and Others Vs. State of Orissa*, where it has been held:

That the absence of any injuries either on the accused or the prosecutrix clearly showed that she did not put up any resistance to the alleged rape committed by the accused. The only irresistible inference there from was that she was a consenting party and that was reinforced by other circumstances in the case.

The above case has full application to the present case. In the absence of any injury either on the accused persons or the prosecutrix, and considering the facts and circumstance of the case, it is doubtful whether P.W. 5 was subjected to sexual intercourse at all and even assuming that she was so subjected, it must be held that it was with her consent and with the connivance of her husband, P.W. 1.

Considering the entire evidence on record and the facts and circumstances of the case, I am constrained to hold that the prosecution has failed to prove the case beyond all reasonable doubt against the accused-Respondents.

7. In the result, therefore, Criminal Appeal No. 56/79 is allowed, Appellant Pradip Kumar Gour is acquitted of the charge levelled against him and Government Appeal No. 19/76 as against him also stands dismissed.

Further in view of the above finding, while dismissing the Government Appeal No. 19/76 as against accused-Respondent Jitendra Harpal, I also hold him not guilty and acquit him of the charge levelled against him in exercise of the powers conferred by Section 386(c)(i) of the Criminal Procedure Code. The Accused Respondents be discharged from their bonds, if executed.

Appeal dismissed.