

(2002) 01 OHC CK 0049
In the Orissa High Court
Case No : Government Appeal No. 21 of 1983

State of Orissa

APPELLANT

Vs

Sankar Khadia and Others

RESPONDENT

Date of Decision : 30-01-2002

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 164, 378(3)
Penal Code, 1860 (IPC) — Section 337, 34, 342, 376, 380

Citation : (2002) 01 OHC CK 0049

Hon'ble Judges : B.P. Das, J

Bench : Single Bench

Advocate : Sisir Das, Addl. Govrnment, for the Appellant; Srikanta Kumar Sahoo, for the Respondent

Judgement

B.P. Das, J.—This appeal has been filed against an order of acquittal and this Court by its order dated 7.1.1983 granted the leave to appeal in terms of Section 378(3), Code of Criminal Procedure.

2. The fact leading to this appeal is that on 2.12.1980 at about 10.30 P.M., the accused persons committed lurking house trespass by night by entering into the house of Liti Rout, pelted stones to his house causing simple, hurt to Rathu Bhumij, damaged the roof tiles of earthen pots, committed theft of an axe kidnapped Radha Rout, Hara Rout and Sumitra Majhi from their house at the point of knife and wrongfully confined the inmates of the house. Accused Sankar took the victim Radha to his house and committed rape on her. Accused Arabindo took the victim Hara Rout and committed rape in a field and subsequently in the house of the accused Sankar. Accused Karlus and Raju also committed rape on the victim Sumitra. The informant i.e. P.W.5, Liti Rout informed the police about the incident and the police rescued Radha and Hara from the house of accused Sankar. The victim girls as well as the accused persons were medically examined. After completion of investigation, charge-sheet was submitted against all the accused persons under Sections 376/337/342/457/380 and 34, IPC.

3. The plea of the accused persons is total denial of the prosecution case.

4. To bring home the charges, the prosecution has examined as may as 10 witnesses and exhibited several documents as well as material objects. None were examined on behalf of the defence. P.W.1 Sumitra Majhi. P.W.2. Radhika Rout and P.W.3, Hara Rout are the victims who are eye witnesses to the occurrence. P.W.4, Rathu Bhumij as Anr. eye-witness to the occurrence. P.W.5, Liti Rout is the informant, P.W.6, Sabitri Rout is the wife of P.W.5 who is also an eye-witness to the occurrence. P.W.7, Sukumjani Gop is a neighbour of P.W.5 who heard about the occurrence. P.W.8 is the Doctor who examined P.Ws. 1 to 4 and P.W.9 is the Medical Officer who examined the accused persons.

5. The trial Court after evaluating the evidence on record ultimately came to a conclusion that all the accused persons are not guilty of the charges under Sections 457/34, 380/34, 337/34, 342/34, 366/34, IPC, accused Sankar and Arabinda are not guilty of the charge u/s 376, IPC and accused Karlus and Raju-are not guilty of the charge u/s 376/34, IPC.

6. The main reason behind the order of acquittal, as it transpires from the judgment of the trial Court, is due to disbelieving the testimony of P.Ws. 4 and 5 who have named the accused persons in the FIR and claim to be identified the accused persons at the time of occurrence. In their cross-examination, they have stated that they are unable to see clearly in the night due to old age. For this reason the trial Court disbelieved the version of P.Ws. 4 and 5 as it was a dark night and there was no light. That apart, the trial Court held that as there was no T.I. Parade in respect of the accused persons, it is difficult to place any reliance on the identification of the accused in Court. Added to this, the trial Court believed the version of P.W.8 who examined the victims of rape and found that there was no sign of recent intercourse and no injury was detected on their private parts. At the same time on examination of the accused persons, the Doctor. P.W.9 found no injury or discharge on their external genitals. So the trial Court found that the case of the prosecution and the evidence of P.Ws. 1 to 3 regarding commission of rape on them is not supported by the medical evidence. During the course of cross-examination P.W.2 who is the victim stated that she as well as accused Sankar sustained injury. But the same was also not supported by any medical evidence. That apart, the trial Court further held that even though P.W.2 in her statement stated that the knives were lying near the room from which she was rescued by the police, strangely enough police did not seize any knife. In the statement of the victim girl, P.W.2 recorded before the Judicial Magistrate u/s 164. Code of Criminal Procedure and in her statement before the trial Court, she stated that the light was off and she could not identify the accused. P.W.3 also stated that she sustained injuries alongwith accused at the time of occurrence. But the same is not supported by any medical evidence. The trial Court disbelieved the evidence of P.W.4 on the ground that though the claims to have identified the accused persons, in cross-examination, he stated that his eye-sight is defective. Basing on the aforesaid findings, the trial Court

recorded an order of acquittal.

7. In order to find out whether the trial Court is right in arriving at the conclusion, it is worthwhile to scan the evidence. At the first instance, my attention was drawn to the deposition of P.W.1, Sumitra Majhi who is one of the victims. She has stated that the occurrence took place in their village. Though in her examination-in-chief, she has corroborated the story of rape being committed on her in the field, she has stated that she was not able to identify the culprits at the time of occurrence. On being confronted with the statement made before the I.O. she again stated that her aunt lighted a chunki and she could see that four boys namely. Karlus. Arabindo Bhumji of Laxmi market, Sankar Khadia of Laltanki ana Raju Singh of Modern India entered inside the room and searched for Buterni the daughter of Radhu Bhumtj. Her aunt declared that Buterni was not there. The culprits forcibly dragged herself. Radha and Hara at the point of knife. Accused Raju Singh and Karlus Oram guarded her uncle and Lethu Bhumij while accused Sankar Khadia and Arabindo Bhumij took them to outside and the other two culprits followed them. Accused Raju Singh and Karlus Oram took her to the field and raped her. During cross-examination, she has also refused to identify the accused persons present in the dock. P.W.2 is Anr. victim. She has stated that the culprits entered into her room and forcibly dragged her and P.W.1 and Hara to outside. She identified one of the accused in the dock, i.e. accused Sankar Khadia who dragged her from the house to outside and took her to his house, where she was raped by him. On her resistance, she was threatened to be killed at the point of knife. The accused also closed her mouth by a piece of cloth. She has further stated that Anr. victim, namely, Hara was also taken to the house of Sankar where she was raped by Arabindo in the same room in which P.W.2 was confined. Though during cross-examination, she has stated that she sustained bleeding injuries on her private part, the same has not been corroborated by the medical evidence. However, the remaining part of her evidence that she and other victim Hara were in one room and the police rescued them remains unshattered and has not in any manner been demolished during the cross-examination. She has also resisted to the suggestion of the defence that she has not stated before the I.O. about the identity of the accused persons and accused Arabindo committing rape on her. P.W.3, Hara Rout is the daughter of the informant Liti Rout. In course of her examination in chief, she stated in unequivocal terms that he accused Arabindo lifted her from the house to outside. The accused Karlus and Raju dragged P.W.1 from her house to outside. The accused Sankar lifted P.W.2 from her house to outside as well as corroborated the story of the prosecution saying that accused Arabindo raped her in the field. She also identified all the accused parsons During cross-examination she has clearly implicated accused Araundo as well as Sankar who took P.Ws. 2 and 3 to the house of Sankar and committed (sic) there therefrom both the victim girls were rescued later on by the police P.W.4 m his examination-in-chief has clearly stated that the culprits forcibly took away P.Ws. 1 to 3 from the house to outside. When they protested, they were threatened at the point of knife. He has

specifically stated that he could identify the culprits at the time of occurrence. He has also stated that he is able to see very distinctly in dark night. P.W.5. the informant corroborated the story of the prosecution. He is the person who accompanied the police to the house of Sankar wherefrom P.Ws. 2 and 3 were rescued. P.W.6 also corroborated the story of the prosecution and identified all the accused persons. P.W.8 is the Doctor who examined the victim girls. She has stated that there was no sign of recent sexual intercourse. At the same time, during Cross-examination, she has stated that there must be injury on the private part of a victim in case of rape by forcible penetration if she is not accustomed with sexual intercourse and is a virgin. In her examination-in-chief, she has also stated that vagina admitted two fingers easily. No observation has been made by her as to whether the victim girls are accustomed with sexual intercourse.

P.W.9 is the doctor who examined the accused persons. He also found no injury or discharge in the external genitals. P.W. 10 who is the officer-in-charge has stated that he rescued the victim girls namely Radhika Rout and Hara Rout from the house of one Sankar Khadia and sent the victim girls as well as the injured Raghu Bhumij for medical examination. The said witnesses stated that the victim girls were with him from the time of their rescue till they were sent for medical examination. They were not allowed to wash their person prior to sending them for medical examination. The forensic examination of the wearing apparels of the accused as well as the victim shows that they were stained with semen.

8. This being the factual matrix of the case, as I find it is Only P.W.1 who has stated that she could not identify the person who raped her. The other victim girls have identified the accused persons and have vividly described how they entered into their house by breaking open the door after pelting stones and then dragged them from the house to outside and raped them. P.Ws. 2 and 3 were also rescued from the house of one of the accused persons. There is no reason as to why all these young girls would Implicate the accused persons in the offence like rape. The arguments of the learned Counsel for the Respondents that there was no sign of recent sexual intercourse or injury on the private parts or the body of the girls and there was absence of injuries on the person of the accused persons, in my opinion, is not fatal to the prosecution.

9. It is argued on behalf of the Respondents that the discrepancy in the statement of the victim girls and the contradiction crept in the prosecution evidence made the testimony of those victims doubtful and accordingly, the trial Court disbelieved the same. This Court in case of *Fanibhusan Behera and Ors. v. State of Orissa* reported in (1995) 8 OCR 123 held that-

xxx In the Indian setting, refusal to act on the testimony of a victim of sexual attack in the absence of corroboration as a rule is adding insult to the injury. Why should the evidence of a girl or the woman who complains of rape or sexual molestation be viewed with the aid of spectacles fitted with lenses tinted with doubt, disbelief or suspicion? The victim of rape cannot be treated as an

accomplice. Absence of injuries on the person of the victim may not be fatal to the prosecution and corroborative evidence may not be an imperative component of judicial credence in rape cases. Corroboration as a condition for judicial reliance on the testimony of a prosecutrix is not a matter of law, but a guidance of prudence under given circumstances. Indeed from place to place, from age, from varying life-styles and behavioural complexes, inferences from a given set of facts, oral and circumstantial, may have to be drawn not with dead uniformity but realistic diversity, lest rigidly in the shape of rule of law in this area be introduced through a new type of presidential tyranny. The same observation holds good regarding the presence or absence of the injuries on the person of the aggressor or aggressed. In rape cases, the Court must bear in mind, the human psychology and behavioural probability when assessing the testimonial potency of the victim's version. What girl would foist a rape charge on a stranger unless a remarkable set of facts of clearest motives were made out? The inherent bashfulness, the innocent naivete and the feminine tendency to conceal the outrage of masculine sexual aggression are factors which are relevant to improbabilities the hypothesis of false implications.

In the case at hand, there is evidence that the accused persons reached the spot, entered into the house of the informant and dragged the girls to outside at the point of knife. Admittedly two of the victim girls were rescued from the house of one of the accused persons. In this case, all the prosecutrix were adult and they did not lack understanding. There is no reason as to why the trial Court failed to base the conviction on the testimony of the prosecutrix. That apart, there is nothing on record to indicate that the prosecutrix have a strong motive to falsely involve the accused persons. There is no evidence laid in that regard by the defence. The testimony of the prosecutrix particularly P.Ws. 2 and 3 is absolutely unshaken and has been re-informed by the evidence of P.W. 5, the informant and P.W.4 who was an eye-witness to the occurrence; The evidence of P.W.4 should not have been discarded by the trial Court on the plea that he had a defective eye-sight. As it appears, he has stated in his evidence that he is only 45 years old. He has categorically stated that in the night he is able to see perfectly and distinctly and that he has seen the accused persons. It is not clear as to why this part of the evidence of P.W.4 has not been relied upon by the trial Court. In my considered opinion, looking into the evidence of the prosecutrix as well as the evidence of other witnesses reinforcing the case of the prosecution and in absence of remote suggestions that the prosecution had any axe to grind against the accused persons, it was not proper on the part of the trial Judge to throw away the statement of the prosecution witnesses being not trustworthy. As it appears, the victims were threatened with knives. That indicates the defenselessness and unpreparedness of the victim girls. Naturally, hardly there would be any resistance. It is not that in all cases where there is resistance, there must be some injury. While considering the aforesaid aspects, I find that the evidence is cogent and clear to convict the accused persons for the offences under Sections 457/342/376 read with Section 34, IPC. However, there is no

evidence so far as taking away of articles is concerned. There is also nothing on record that the accused persons in any way endangered the life or safety of anybody by their act of rash and negligence. Therefore, their acquittal of the offences under Sections 380/337, IPC was just and proper.

10. For the foregoing discussions, I agree with the trial Court that the accused-Respondents are not guilty of the offences under Sections 380/337, IPC and I confirm the order of their acquittal of those offences. I, however, find all the accused-Respondents guilty of the offences under Sections 457/342/376, IPC read with Section 34, IPC and convict -them thereunder. Each of the accused-Respondents is sentenced to undergo R.I. for one year for the offence u/s 457, IPC and six months for the offence u/s 342, IPC. So far as the conviction for the offence u/s 376, IPC is concerned, considering the age of Respondent Nos. 2, 3 and 4, namely, Arabindo Bhumij, Karlos Oram and Raju Singh, being 16 years and of Respondent No. 1 Sankar Khadia being 21 years each of them is sentenced to undergo R.I. for five years. The sentences are to run concurrently.

11. In the result, the appeal is allowed in part as indicated above.