
(1985) 07 OHC CK 0043
In the Orissa High Court
Case No : Government Appeal No. 86 of 1981

State of Orissa

APPELLANT

Vs

Tari Syam Das alias Shyama Sundar Das

RESPONDENT

Date of Decision : 17-07-1985

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 145, 162, 378
Penal Code, 1860 (IPC) — Section 354

Citation : (1985) 2 OLR 193

Hon'ble Judges : G.B. Pattnaik, J

Bench : Single Bench

Advocate : Jairaj Behera, Addl. Standing, for the Appellant; None, for the Respondent

Final Decision : Allowed

Judgement

G.B. Pattnaik, J.—The respondent stood his trial in the Court of the Judicial Magistrate, First Class, Baripada, under Sees. 448: 354 and 341, Indian Penal Code, in Trial Case No. 238 of 1980. By order dated 18. 7. 1981, the learned Magistrate has recorded an order of acquittal and hence the present appeal by the State.

2. According to the prosecution case, Prahalad Mall (P. W. 3), the husband of the victim, was a tenant in one of the houses of the accused. On 4. 4. 1980, said Prahalad had been to Calcutta leaving his wife and children in the rented house. On 6. 4. 1980, Prahalad returned home in the evening and learnt from his wife that the accused had come to their house in his absence and outraged her modesty. Hence, he lodged the First Information Report on 7. 4. 1980 in Baripada Police Station. The First Information Report reveals that while the victim lady (P. W. 4) was in her house, the accused came to the house and asked about the time when her husband would return home. When P. W. 4 wanted the reason as to why the accused was asking about the time of return of her husband, the accused went away saying that he would come during the noon.

The accused again came at 2 p. m. and offered a Saree to P. W. 4. P. W. 4 refused to keep the Saree, but the accused threw the same and then entered into the house from the front side and closed the door. At that time, P. W. 4 was inside the kitchen. The accused then entered inside the kitchen and tried to undress P. W. 4 and embraced her. P. W. 4 somehow released herself from the clutches of the accused and opened the door. Then the accused came and gave her a slap and dragged her by holding her hand and then demanded the Saree which he had given. The accused then took the Saree and dragged P. W. 4 from the rented house to his own house and there threatened P.W.4 to beg apology. In the house of the accused, there were some girls. Thereafter, P. W. 4 returned to the rented house. After investigating into the offence, charge sheet was submitted and the accused faced trial before the learned Magistrate.

3. To prove the prosecution case, six witnesses were examined. P. W. 1 is the witness who saw the accused dragging P. W. 4 to his house from the house of the informant and P. W. 4 was half-naked and shouting. P. W. 2 was a tenant in the house of the accused, but as he turned hostile, he was cross-examined by the prosecution. P. W. 3 is the husband of P. W. 4 who lodged the F. I. R. after his return from Calcutta. P. W. 4 is the victim lady. P.W. 5 also did not support the prosecution case for which he was declared hostile and was cross-examined by the prosecution. P. W. 6 is a seizure witness. The investigating Officer could not be examined in this case, as he expired before the case was taken up.

4. During the trial, the plea of the accused was one of denial. The learned Magistrate after considering the evidence on record came to hold that the prosecution had not been able to establish the case beyond reasonable doubt and accordingly recorded the order of acquittal.

5. At the hearing of this appeal, the learned Additional Standing Counsel seriously urges that this is a case where the trying Magistrate has failed to appreciate the evidence on record and the appreciation of evidence made by the learned Magistrate is so perverse that this Court should interfere with the order of acquittal.

6. There is no dispute over the proposition that the Code of Criminal Procedure does not make any difference between the ambit of an appeal from a conviction and that of an appeal against acquittal and the procedure for dealing with the two kinds of appeals is identical. In case of an appeal against an order of acquittal even though the power of the Court is as wide and comprehensive as in an appeal from conviction and the Court has full power to re-appraise the entire evidence and to reach its own conclusion, but if both views on the evidence are reasonably possible, one supporting acquittal and the other indicating conviction, then the High Court should not interfere merely because it feels that it would, sitting as a trial Court, have taken the other view. See *Labh Singh and Others Vs. State of Punjab*, and AIR 1979 S. C. 1566 : (*Harijan Megha Jesha v. State of Gujarat*). No doubt, the initial presumption in favour of innocence of an accused is strengthened, he having been acquitted during trial, but that by itself would

not in any way be a fetter on the powers of the High Court to re-appraise the evidence and interfere with an order of acquittal where the Court comes to the conclusion that there has been some manifest error or illegality and there are some compelling reasons to interfere with the order of acquittal. Where the trying Magistrate does not make any real effort to assess the credibility of the evidence and superficially discusses the evidence and records an order of acquittal, then in such a case, gross miscarriage of justice is resulted and the High Court should interfere with the order of acquittal in such cases. Bearing the aforesaid principle in mind, I would examine the evidence in this case and also the reasonings of the trying Magistrate in recording the order of acquittal.

7. I shall discuss the prosecution evidence in respect of the offence u/s 354, Indian Penal Code, at the first instance. The essential ingredients for the offence u/s 354 are (i) assault or use of criminal force to a woman and (ii) intention or knowledge of likelihood of her modesty being outraged. "Criminal force" is that force which is used against one's consent in order to commit an offence, with the intention or knowledge of likelihood of causing an injury, fear or annoyance and "assault" means making a gesture or preparation with the intention or knowledge of causing an apprehension of criminal force being used. According to the prosecution evidence, as unfolded during trial, this offence by the accused was committed both inside the rented house where P. W. 4, was staying and also on the public road where the accused was dragging P. W. 4 while she was almost half-naked. So far as the incident inside the rented house is concerned, there is only the evidence of the victim lady (P. W. 4). In fact, the manner in which and the time and place when and where the incident is alleged to have occurred, no other witness can be expected of, apart from the victim lady herself. It has been held in large number of cases that in such a situation, conviction of the accused is permissible on the sole uncorroborated testimony of the prosecutrix, provided the evidence of the prosecutrix is held to be reliable. P. W. 4 in her evidence stated the entire incident as to how the accused came to her house and enquired about the presence of her husband and knew that the husband of the victim was away at Calcutta. Thereafter the accused went away and came back and closed the front door which was open. At that time the victim was cooking in the kitchen. The accused had come with a Saree and persuaded the victim to act in accordance with what the accused says so that she would get lot of things free of cost, The accused then told the victim to have sexual intercourse with him and when the victim lady blatantly denied and started saying at the accused as to whether he had not any mother or sister, the accused became furious, gave the victim a slap and embraced her, Thereafter, when the victim lady cried, the accused caught hold of her hand and dragged her to his own house while she was half-naked and in his house he compelled her to beg apology in presence of many girls who were being taught in his house. There the victim apologised and came away. The defence tried to elicit contradictions from her earlier statement by suggesting that she did not state to the Investigating Officer that the accused embraced her and further that the accused asked her to have sexual intercourse

with him and also the victim apologised before the accused, but as the Investigating Officer could not be examined, her previous statement to the police has not been brought on record. The attention of the witness has also not been drawn to that part of the statement made before the police. The proviso to Section 162 of the Code of Criminal Procedure enables the accused to make use of such statement to contradict a witness in the manner provided by Section 145 of the Evidence Act. The procedure provided for contradicting a witness by his previous statements made during the investigation is that if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him. Section 145 of the Evidence Act indicates the manner in which contradiction is brought out. It is really unfortunate that the provision of Section 145 of the Evidence Act has not been followed and neither the trying Magistrate nor the defence counsel has taken any steps in that regard. The Supreme Court in the case of *Tahsildar Singh and Another Vs. The State of Uttar Pradesh*, has clearly indicated the procedure and the manner in which contradictions can be brought out. Unfortunately, nobody has cared to look to the law as laid down in the said decision of the Supreme Court and, therefore, the Court has not followed the said provision of law. Thus, the procedure provided for in Section 145 of the Evidence Act not having been followed, no contradiction has been brought out on record. Therefore, there is no reason to discard the evidence of P. W. A, the victim lady, and her evidence clearly establishes the offence u/s 354, Indian Penal Code, against the accused. There is no reason as to why a lady of the status of P. W. 4 would perjure herself and depose falsehood even to the extent of her modesty being outraged and would thereby receive condemnation in the society where she lives. I would, therefore, believe the statement of P. W. 4 and hold that the first part of the incident, as narrated by P. W. 4, which happened inside the rented house has been duly proved by the prosecution and consequently, the offence that the accused outraged the modesty of P. W. 4 is established.

Coming to the second part of the prosecution case, the same happened on the road when the accused was dragging P. W. 4 while she was half-naked. This fact has been narrated by P. W. 4 herself in her evidence and has been duly corroborated by P. W. 1 who was coming to his house from L. I. C. Colony. The said P. W. i categorically stated that he found the accused dragging the wife of the informant to his house from the house of the informant and she was half-naked and was shouting. Nothing has been brought out in the cross-examination of this witness so as to discredit his version. His evidence appears to be thoroughly reliable and thus the second part of the prosecution story is also fully established through the evidence of the victim (P. W. 4) and the eye-witness (P. W. 1). Dragging a lady carrying her hand to inside one's own house while the lady was half-naked would also constitute the offence u/s 354, Indian Penal Code. The essence of a woman's modesty is her sex. The modesty of an adult female is writ large on her body. The woman possesses a modesty capable of

being outraged. The intention of the accused is the crux of the matter in an offence u/s 354, Indian Penal Code. See *State of Punjab Vs. Major Singh*, In the circumstances, I would hold that the prosecution has been able to prove beyond reasonable doubt that the accused did outrage the modesty of Bijayi Mall (P. W. 4) on 6. 4. 1980 while she was away in Calcutta, both inside her house as well as on the road.

8. I shall now examine the reasonings of the learned Magistrate as to why he had recorded an order of acquittal. After discussing the evidence of P. W. 4, the learned Magistrate has observed that certain portion of her evidence has not been stated in the F. I. R. Nothing has been asked to the victim lady while she was deposing about that. That apart, F. I. R. can be used to contradict the maker thereof P. W. 4 did not lodge the F. I. R. It was her husband (P. W. 3) who lodged the F. I. R. after returning from Calcutta. Therefore, the learned Magistrate was not justified in discarding P. W. 4 on the ground that the F. I. R. does not contain some parts of her statements as made in the Court. Further, as the Investigating Officer could not be examined and the contradictions could not be brought in, the learned Magistrate has observed that the evidence of P. W. 4 cannot be taken for granted. In my opinion, this is rather a curious way of dealing with the matter. Only because the provisions of Section 145 of the Evidence Act have not been followed and the so-called contradictions have not been brought out, the substantive evidence of the witness cannot be ignored. The learned trying Magistrate committed gross error in so doing. Then again, no reason has been ascribed as to why the evidence of P. W. 1 cannot be believed. The only reason given by the learned Magistrate is that there were many persons who had witnessed, but P.W.I could not state their names. The learned Magistrate also has taken into account the fact that P. W, 5 who was alleged to have been present did not speak a word about the occurrence. I find from the records that P. W. 5 was declared hostile and was permitted to be cross-examined by the prosecution. In this view of the matter, in my opinion, the grounds on which the learned Magistrate has disbelieved the evidence of P. W. 1 cannot be sustained in the eye of law. Moreover, the observation of the learned trying Magistrate that the accused being a man of 66 years, it is not probable that a man of his age would commit such offence, is on the face of it perverse. In my opinion, therefore, the reasonings of the learned Magistrate in support of the order of acquittal cannot stand a moment's scrutiny.

9. So far as the offence u/s 341, Indian Penal Code, is concerned, it has been proved through the evidence of the victim lady herself. It is in her evidence that the accused closed the front door, did not permit the lady to come out and committed the offence as stated earlier. I have already held that the evidence of the prosecutrix is wholly reliable and in that view of the matter, it must be held that the offence of wrongful restraint against the accused is also fully established.

10. So far as the offence u/s 448, Indian Penal Code, is concerned, the fact that the accused entered into the dwelling house of the victim lady which the

intention to commit the offence. as has been established through the evidence of P. W. 4, constitutes the offence u/s 448, Indian Penal Code and, therefore, in my opinion, the prosecution has been able to establish the said offence against the accused.

11. In the result, therefore, the accused-respondent is convicted under Sees. 334: 341 and 348, Indian Penal Code. So far as the question of sentence is concerned, the accused is sentenced to undergo rigorous imprisonment for one year and to pay a fine of rupees one thousand, in default, to undergo rigorous imprisonment for a further period of six months for the offence u/s 354, Indian Penal Code. Separate sentence for the other two offences is not necessary. The Government Appeal is accordingly allowed. The bail bond of the accused-respondent stands cancelled and he may be apprehended forthwith to serve the sentence.