
(2007) 03 OHC CK 0024
In the Orissa High Court

Trinath Bhoi

APPELLANT

Vs

State of Orissa

RESPONDENT

Date of Decision : 07-03-2007

Acts Referred:

Penal Code, 1860 (IPC) — Section 354, 375, 376, 511

Citation : (2007) 104 CLT 116 : (2007) CriLJ 3227 : (2007) 1 OLR 777

Hon'ble Judges : Pradip Mohanty, J

Bench : Single Bench

Judgement

Pradip Mohanty, J.—This appeal is directed against the judgment and order dated 12.05.2006 passed by the learned Addl. Sessions Judge, Jharsuguda in S.T. Case No. 27 of 2006 convicting the appellant under Sections 376/511, IPC and sentencing him to undergo rigorous imprisonment for seven years and pay a fine of Rs. 5,000/-, in default to undergo rigorous imprisonment for six months.

2. The case of the prosecution is that on 09.04.2006 in between 10.30 and 10.00 A.M. the victim girl, who was aged about four years at the relevant point of time and residing adjacent to the shop-cum-residence of the appellant, came to purchase a sweet Pudia (small packet). The appellant, finding her alone, called her inside, opened her undergarment and ejaculated. The victim returned home and narrated the incident before her parents. Thereafter, first information report was lodged basing upon which a case was registered and investigation commenced. In course of investigation, the appellant was arrested. After closure of investigation, final form was submitted against the appellant u/s 376(2)(f), IPC.

3. The plea of the appellant was one of complete denial of the occurrence.

4. In order to prove its case, the prosecution examined as many as ten witnesses including the doctors and the father, mother and aunts of the victim. It also pressed into service eleven documents marked Exts. 1 to 11. The appellant in support of his plea did not adduce any evidence, oral or documentary. The

learned Addl. Sessions Judge, who tried the case, by his judgment dated 12.05.2006 convicted and sentenced the appellant, as mentioned earlier.

5. Mr. Ragada, learned Counsel for the appellant submits that the prosecution has not been able to prove the ingredients of Section 376, IPC. Although the victim was produced before the trial Court, the prosecution did not examine her since she stood mum. P.Ws. 2, 3 and 5 are all interested witnesses. There was no material or evidence before the trial Court that any attempt was made by the appellant to commit rape. In other words, there was no evidence that any attempt was made by the appellant to penetrate at the slightest degree. The prosecution has not examined the doctor who medically examined the victim. In support of his submissions, he places reliance on *Tarkeshwar Sahu v. State of Bihar* 2006 (10) SBR 326.

7. Mr. Behera, learned Addl. Government Advocate, vehemently contends that the judgment and order of conviction is legal and there is no reason to interfere with the same. He also submits that since the victim at the relevant time was aged about four years, the matter should be seriously viewed.

8. Perused the statement of the witnesses and the documents exhibited. P.W. 1 is the victim aged about four years. While she was produced before the Court for examination, she kept mum (could not open her mouth) in spite of best efforts and the circumstances have been mentioned in the deposition. P.W. 2 is the mother of the victim. She has stated in her evidence that the victim had gone to the shop of the appellant to bring some sweet Pudia. After ten minutes, she came back and told her that her pant was wet. She further stated that when she asked her daughter (victim) as to what happened, she told her that when she asked for a sweet Pudia, the appellant called her inside and opened her pant and did something by a finger making her pant wet. Thereafter, P.W. 2 saw some stain-like-substance on the pant and over a portion of her frock. Nothing has been elicited from P.W. 2, the mother of the victim, in cross-examination to disbelieve her evidence. P.W. 3 is the aunt of the victim. In her evidence, she stated that she enquired from the child about the occurrence and the child stated that she had been to the shop of the appellant to bring chocolate. The appellant called her inside and took her in his lap and did something as a result of which her dress was wet. This witness also saw some stain-like-substance and her dress was set. There is no material to disbelieve the evidence of this witness. P.W. 4 is another aunt of the victim. She has corroborated the statement of P.W. 3. P.W. 5 is the father of the victim. He also corroborated the statement of his wife (P.W. 2). He immediately called his wife (P.W. 2) and found stains on the pant of the victim. He also detected that the private part of the victim was reddish and swollen. Thereafter, he went to the police station along with the victim and his wife and lodged report before the police station. There is no reason to disbelieve the evidence of P.W. 5 as nothing has been elicited from him during cross-examination by the defence. P.W. 6 is a seizure witness in presence of whom the Chadi of the victim was seized. P.W. 7 is an adjacent neighbour of

the appellant. He stated that the victim told him that she had been to the shop of the accused. The accused called her inside and embraced her and did something resulting her pant wet. From the above, he could know that the accused had committed rape on the victim. P.W. 8 is another seizure witness. P.W. 9 is the doctor who examined the accused. P.W. 10 is the Investigating Officer.

9. The trial Court has convicted the appellant under Sections 376/511, IPC. In order to arrive at the correct conclusion as to whether the conviction of the appellant under Sections 376/511, IPC is sustainable, it is appropriate to examine the basic ingredients of Section 375, IPC punishable u/s 376, IPC. The most important ingredient of the offence u/s 375, IPC is penetration of male organ into the private part of the female with or without any emission of semen. Even an attempt of penetration into the private part of the victim completely, partially or slightly would be enough to constitute the offence u/s 375, IPC. In the instant case, there is no material to show that any attempt was made by the appellant to commit rape or intercourse. Even there is no material that the appellant had undressed himself and any attempt was made by him to undress the victim. On careful analysis of the prosecution evidence and documents on record, the appellant cannot be held guilty for committing an offence punishable under Sections 376/511, IPC.

10. According to the version of the prosecution, the victim had gone to the shop of the appellant to bring some sweet Pudia. After ten minutes, she came back and told her mother that when she asked for a sweet Pudia, the appellant called her inside and opened her pant and did something by a finger making her pant wet. In this view of the matter, it has to be seen whether the act of the appellant falls within the four corners of any other provisions incorporated in the Indian Penal Code relating to outraging the modesty of a woman/ girl. Section 354, IPC reads thus:

354. Assault or criminal force to woman with intent to outrage her modesty - Whoever assaults or uses criminal force to any woman, intending to outrage or knowing it to be likely that he will thereby outrage her modesty, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

From a bare reading of the above provision it would be manifest that so far as the offence u/s 354, IPC is concerned, intention to outrage the modesty of the woman or knowledge that the act of the accused would result in outraging her modesty is the gravamen of the offence. The essence of a woman's modesty is her sex. The culpable intention of the accused is the crux of the matter. The reaction of the woman is very relevant, but its absence is not always decisive. This principle has been laid down by the apex Court in the case of Tarkeshwar Sahu v. State of Bihar 2006 (10) SBR 326. In the case at hand, the victim girl was four years of age. Her age does not permit for reaction. Therefore, the appellant is liable to be convicted u/s 354, IPC.

11. In the result, the appeal is allowed in part. The conviction of the appellant u/s 376/511, IPC is altered to one u/s 354, IPC and he is sentenced to undergo rigorous imprisonment for two years and to pay a fine of Rs. 10,000/- (ten thousand), in default to undergo rigorous imprisonment for six months more. The fine amount, if realized, shall be disbursed to the victim.