

(2016) 02 OHC CK 0054

ORISSA HIGH COURT

Case No: CRLA No. 434 of 2011

Subash Pradhan

APPELLANT

Vs

State of Orissa

RESPONDENT

Date of Decision: Feb. 18, 2016

Acts Referred:

- Evidence Act, 1872 - Section 114-A, Section 4
- Penal Code, 1860 (IPC) - Section 376

Hon'ble Judges: S.K. Sahoo, J.

Bench: Single Bench

Advocate: C. Kasturi, for the Appellant; Jyoti Prakash Patra, Addl. Standing Counsel, for the Respondent

Final Decision: Allowed

Judgement

S.K. Sahoo, J.

1. The appellant Subash Pradhan faced trial in the Court of the learned Sessions Judge, Sambalpur in S.T. Case No. 76 of 2010 for the offence punishable under section 376 of the Indian Penal Code for committing rape on the victim "KP" on 15.12.2009 in between 12.00 Noon to 1.00 p.m. at village Lipinda under Jujumura Police Station in the district of Sambalpur.

The learned Trial Court vide impugned judgment and order dated 26.05.2011 found the appellant guilty under section 376 of the Indian Penal Code and sentenced him to undergo rigorous imprisonment for eight years and to pay a fine of Rs. 5000/- (rupees five thousand), in default, to undergo further rigorous imprisonment for six months.

2. The prosecution case as per the First Information Report lodged by the victim on 17.12.2009 before the Inspector-in-Charge, Jujumura Police Station is that on 14.12.2009 at about 3.00 p.m. she had come to stay in the Short Stay Home at Lipinda and took permission of Damayanti Didi, Superintendent of the Short Stay

Home. During the night on 14.12.2009 the victim stayed in the Short Stay Home and slept with Damayanti Didi. On the next day morning at about 8 o' Clock, Damayanti Didi left for Rairakhol to attend her duty. The appellant, who was working in the Short Stay Home came around noon and committed rape on the victim and left to Charmal. In the evening hours, when Damayanti Didi returned to the Short Stay Home, the victim disclosed about the incident before her who assured her to look into the matter and asked her to stay there. On 16.12.2009 in the night, Damayanti Didi put blame on the victim and asked her to leave the Short Stay Home.

On 17.12.2009 at about 11.30 a.m. P.W.1 Sabitarani Panda, who was working as the Prosecuting Inspector of the Vigilance Department attached to the Court of Special Judge (Vigilance), Sambalpur found the victim crying inside the campus of the Court building. On being enquired, the victim disclosed before her that while she was staying in the Short Stay Home at Lipinda, she was raped by the appellant on 15.12.2009. When the victim expressed her helplessness to scribe the FIR, P.W.1 instructed P.W.8 Sudhir Barla, who was the ASI of Vigilance in the office of the Superintendent of Police, (Vigilance), Sambalpur to scribe the FIR and accordingly, P.W.8 scribed the FIR and the same was read over and explained to the victim and finding the contents to be true, the victim put her signature. Thereafter, the victim was escorted by P.W.1 to the office of the Superintendent of Police, Sambalpur to present the FIR to the D.S.P.(Crime), Sambalpur namely Dinabandhu Patel. P.W.9 Kunjabihari Behera, who was A.S.I. of Jujumara Police Station received the petition of the victim on 17.12.2009 at about 2.00 p.m. which was forwarded by the S.P., Sambalpur to the I.I.C., Jujumara Police Station. In absence of the I.I.C., Jujumara Police Station, P.W.9 Kunjabihari Behera registered Jujumara P.S. Case No. 95 of 2009 for the offence punishable under Section 376 of Indian Penal Code and took up charge of the investigation.

3. After registering the case, P.W.9 came to Sambalpur with a lady constable and on reaching at the District Police Office, he examined the victim and sent her to the District Headquarters Hospital, Sambalpur for medical examination with constable Gayatri Jagadal (P.W.4). P.W.9 then examined the Prosecuting Inspector of Vigilance Department, Sambalpur, viz. Sabitarani Panda (P.W.1) and Sudhir Barla (P.W.8), who scribed the F.I.R. On that day, the victim could not be medically examined as it was late. P.W.9 searched for the appellant and arrested him at Charmal and the appellant was sent for medical examination to the District Headquarters Hospital, Sambalpur through a constable. P.W.9 then visited the Short Stay Home at Lipinda and prepared spot map (Ext. 9). He examined Damayanti Patra, who was the organizer of the Short Stay Home and one Rabi Majhi (D.W.1), watchman of the said Short Stay Home. The victim was medically examined at the District Headquarters Hospital, Sambalpur. Wearing apparels of the victim, i.e. black colour saya and printed polyester saree were seized under seizure List (Ext. 1) and wearing apparels of the appellant, i.e. a light green check lungi and a check full shirt were also seized under seizure list (Ext. 5). The Havildar as well as a constable produced four small

glass vials containing the blood sample, semen, pubic hair and saliva of the appellant in sealed condition which were seized under seizure list Ext. 10. The Investigating Officer also seized two small glass vials containing vaginal swab and pubic hair of the victim on production by the constable Gayatri Jagdal (P.W.4) under the seizure list (Ext. 3). On 19.12.2009 the appellant was forwarded to the Court and on 22.12.2009 P.W.9 handed over the charge of investigation of the case to Sri Sangram Keshari Behera (P.W.10), who was the I.I.C. of Jujumura Police Station.

P.W.10 after taking over charge of investigation from P.W.9, revisited the spot and re-examined the victim and other witnesses. He received the medical examination report of the victim and the accused from the concerned Medical Officers and he also received the material objects such as one black colour saya, one blue colour saree, one sealed packet containing sample pubic hair of the victim, one sealed bottle containing vaginal swab of the victim, one check lungi of the accused, one check full shirt of the accused, one sealed bottle containing blood sample of the accused, one sealed bottle containing sample pubic hair of the accused, one sealed bottle containing saliva of the accused and one sealed bottle containing semen of the accused and sent those articles to R.F.S.L., Sambalpur for chemical examination. On 16.04.2010, the Investigating Officer (P.W.10) on completion of investigation submitted charge sheet against the appellant for commission of offence under section 376 of the Indian Penal Code.

4. After submission of charge sheet, the case was committed to the Court of Session for trial after observing due committal procedure where the learned Trial Court framed charge under section 376 of the Indian Penal Code against the appellant on 6.8.2010 and since the appellant refuted the charge, pleaded not guilty and claimed to be tried, the sessions trial procedure was resorted to prosecute him and establish his guilt.

5. During the course of trial, in order to prove its case, the prosecution examined ten witnesses.

P.W.1 Sabitarani Panda was working as Prosecuting Inspector of Vigilance Department and she stated about the instruction given by her to P.W.8 Sudhir Barla, A.S.I. of Vigilance to scribe the F.I.R. as per the version of the victim.

P.W.2 Miss Kumudini Panda was working as Superintendent of Dhankauda Ashraya Center and she stated about seizure of a black colour petticoat and one blue colour printed saree on production of the victim in her presence under the seizure list (Ext. 1).

P.W.3 is the victim as well as informant of the case and she has stated about the seizure of her wearing apparels under the seizure list (Ext. 1).

P.W.4 Gayatri Jagadal was working as the woman constable attached to Jujumura Police Station who escorted the victim to District Headquarters Hospital, Sambalpur

for medical examination. She also stated about seizure of wearing apparels (Ext. 1) of the victim in her presence at Dhankauda Ashram. She further stated that the police also seized bottles containing sample of vaginal swab, pubic hair, command certificate under seizure list Ext. 3.

P.W.5 Sushil Kumar Biswal was the Home Guard attached to Jujumura Police Station and he stated about the seizure of a check lungi, a full shirt under seizure list Ext. 5 on production by the appellant.

P.W.6 Dr. Syama Charan Guru examined the appellant on 18.12.2009 on police requisition at District Headquarters Hospital, Sambalpur and submitted his report (Ext. 6). He also conducted VDRL test of the appellant and found it to be non-reactive and submitted his report (Ext. 7).

P.W.7 Dr. Sujata Panda was working as Asst. Surgeon in the District Headquarters Hospital, Sambalpur who examined the victim on 18.12.2009 on police requisition and submitted the report (Ext. 8).

P.W.8 Sudhir Barla was working as A.S.I. of the Vigilance attached to office of the S.P.(Vigilance), Sambalpur who scribed the F.I.R. as per the version of the victim.

P.W.9 Kunja Bihari Behera was working as A.S.I. of Jujumura Police Station who not only registered Jujumura P.S. Case No. 95 of 2009 on receipt of the report of the victim from the office of the S.P., Sambalpur but also investigated the case from 17.12.2009 to 22.12.2009.

P.W.10 Sangram Keshari Behera, Inspector-in-charge of Jujumura Police Station took over the charge of investigation from P.W.9 and after completion of investigation submitted charge sheet on 16.04.2010.

The prosecution exhibited eleven documents. Ext. 1 is the seizure list, Ext. 2 is the written report of P.W.3, Ext. 3 is the seizure list, Ext. 4 is the command certificate, Ext. 5 is the seizure list, Ext. 6 is the medical examination report of P.W.6, Ext. 7 is the medical examination report of P.W.6, Ext. 8 is the medical examination report of P.W.7, Ext. 9 is the spot map, Ext. 10 is the seizure list, Ext. 11 is the carbon copy of the forwarding letter of sending material objects to R.F.S.L.

The prosecution has also proved four material objects. M.O.I is the petticoat, M.O.II is the blue colour printed saree, M.O.III is the check lungi and M.O.IV is the full shirt.

6. The defence plea is one of denial and it is pleaded that the victim had given proposal to the appellant for marriage previously but as the appellant was not inclined to such proposal, the victim has foisted the case.

The defence has examined one Rabi Majhi (D.W.1), who was the watchman of the Short Stay Home at Lipinda.

7. The learned Trial Court came to hold that the evidence of the victim is consistent with the medical evidence and it can be safely concluded that the appellant had sexual intercourse with the victim at the relevant time. It was further held that the defence has failed to rebut the statutory presumption under section 114-A of the Indian Evidence Act, 1872 arising out of the evidence of P.W.3 (victim herself) that she did not consent for sexual intercourse. It is further held that for lodging of the FIR two days after the incident, it cannot be said that there was inordinate delay so as to throw the entire prosecution case. The learned Trial Court has further held that in absence of any cogent and convincing evidence that the victim had ever approached the appellant for marriage, the defence contention that the victim foisted the case when the appellant refused to marry her cannot be accepted.

8. Ms. C. Kasturi, learned counsel for the appellant strenuously argued that there are no external injuries on the person of the victim as per her medical examination report which falsifies the case of forcible rape. She further contended that there is inordinate delay in lodging the FIR and the medical examination report of the appellant indicates there was no sign or symptom of recent sexual intercourse. Learned counsel further submitted that the evidence of the defence witness has not been taken into consideration by the Trial Court and two persons who were alleged to have seen the occurrence as per statement of the victim have not been examined during trial and the defence case that proposal was given by the victim for marriage and when the same was turned down by the appellant, the case has been foisted appears to be forthcoming from the evidence on record. Therefore, learned counsel urged that it is a fit case where benefit of doubt should be extended in favour of the appellant.

Mr. Jyoti Prakash Patra, learned Additional Standing Counsel for the State on the other hand submitted that the learned Trial Court has discussed the evidence of the victim as well as medical evidence which supports the commission of rape. He further contended that in case of rape, if the evidence of prosecutrix is accepted as trustworthy then even if there is no other corroboration, conviction can be sustained. In case of rape, delay in lodging F.I.R. is not a factor to throw away the prosecution case and particularly when due to helplessness, the victim could not lodge the F.I.R. promptly and she was given assurance by the Superintendent of the Short Stay Home to look after the matter, hence, delay in lodging the F.I.R. cannot be a ground to disbelieve her testimony.

9. Adverting to the contentions raised by learned counsels for the respective parties, since it is a case of rape, the evidence of the victim is most material. If her evidence is found to be creditworthy, it can be acted upon without any corroboration in material particulars. On the other hand if her evidence is found to be difficult to accept on its face value, the Court may search for direct or circumstantial evidence which would lend support to her testimony. The evidence of the victim and the surrounding circumstances should be taken into account in its totality and in case

the story projected by the prosecutrix is found to be improbable, the prosecutrix case becomes liable to be rejected. The evidence of a prosecutrix must be examined as that of an injured witness whose presence at the spot is probable and ordinarily no injured witness would tell a lie or implicate a person falsely but it can never be presumed that her statement should, without exception, be taken as the gospel truth.

Looking at the statement of the victim, it is noticed that she has stated in her evidence that on the previous day of occurrence around 3 p.m., she came to the Short Stay Home, Lipinda and requested Damayanti Didi to stay there and accordingly permission was granted to her. On 15.12.2009 morning when Damayanti Didi left for Rairakhol, at about noon, the appellant came there and asked the victim for co-habitation and when she refused to oblige, the appellant forcibly committed sexual intercourse on her and when people came to that place, the appellant left her and fled away. The victim has further stated that in the evening hours, the appellant again returned to the Short Stay Home along with Damayanti Didi and when the victim disclosed the entire episode to Damayanti Didi, she assured the victim to look into the matter in the meeting to be held on the next day but Damayanti Didi called the victim and her sister on the next day and scolded the victim and asked her to leave the Short Stay Home with her sister.

In the cross examination, the victim has stated that her sister was staying in the Short Stay Home at Lipinda and she used to visit that place sometimes. She has also stated that D.W.1 Rabi Majhi is the watchman in that Short Stay Home who was usually present near the gate. According to her, there were two rooms each on the side of the entrance of the building and one of the rooms near the entrance of the building was meant for the staff and used for the office whereas the right side room was meant for the inmates of the Ashram. It is her case that one Kunti was also staying in that Short Stay Home but she was mad. The victim has stated in the cross-examination that when she and the appellant were inside the room, one Niranjana Bag and Basanta Kumar Sahu, who were the employees of the Short Stay Home arrived there and they had seen her with the appellant inside the room. The investigating officers, i.e., P.Ws. 9 and 10 have also stated that Niranjana and Basanta are the witnesses to the occurrence. P.W. 10 stated that the victim had stated before him that those two persons had seen sexual assault on her by the appellant. However, the prosecution has not examined those two material witnesses, namely, Niranjana Bag and Basanta Sahu. The evidence on record indicates that it was a small Short Stay Home. When the watchman and other inmates and staff were there, during day time at about noon, it sounds improbable that such an incident would take place which would go unnoticed. The victim has not stated that she shouted or appellant closed her mouth or put her in any kind of fear. In ordinary course of nature, if she was not a consenting party, she could have raised shout to draw the attention of the watchman of the Short Stay Home, who is none else than D.W.1 and also other employees or the inmates of the Short Stay Home.

D.W. 1 has stated that the victim had never taken admission in the Short Stay Home nor she was residing in that home rather he had seen the victim requesting Damayanti Didi, Superintendent of the Short Stay Home to get her married with the appellant but Damayanti Didi told the victim that as it was her private affairs, she had nothing to do with it. D.W.1 has further stated that there was an altercation between the victim and the appellant relating to their marriage. The statement of the victim reveals that she and the appellant were together inside a room when they were seen by two persons of the Short Stay Home. In view of such evidence, the victim bringing false allegation against the appellant in order to save her skin cannot be altogether ruled out. Moreover when the victim gave proposal for marriage but the appellant turned down the same, the possibility of lodging false F.I.R. also cannot be ruled out.

The victim was a quite grown up lady and she was aged about 28 years. The doctor (P.W.7) who had examined her on 18.12.2009 found no external injury on her person though she found some internal injuries. P.W.7 has stated that the private part of the victim admitted two fingers and her opinion that there was sexual intercourse within 24 to 72 hours was based on the injuries on the internal organ of the victim.

At this stage, it would be profitable to indicate the evidence of P.W.6 Dr. S.C. Guru, who examined the appellant on 18.12.2009 and found no external injury on the body of the appellant and no sign or symptom of sexual intercourse on his private part as well as on the external part of the body. The victim has stated that she had struggled with the appellant when he was committing intercourse and at that time she was lying on a cot made up of plank. Therefore, in such a situation, injuries were expected on her person in case of resistance. Since the victim was a grown up lady, in case of resistance to any sexual assault by the appellant, in all probability the injuries would have also been caused on the appellant. In absence of such external injuries either on the appellant or on the victim and taking into account the statement of the victim that when they were together inside the room, they were seen by two of the employees of the Short Stay Home makes out a case that the victim was a consenting party and being seen in a comprising position with the appellant inside the room, in all probability she had foisted the case in order to save her skin.

The wearing apparels of the victim and that of the appellant were seized and those were sent for chemical examination but no chemical examination report is available on record.

Section 114-A of the Evidence Act deals with presumption as to absence of consent in certain prosecution for rape. The section envisages under what circumstances the Court shall presume that the victim did not consent to the sexual intercourse committed by the accused. Section 4 of the Evidence Act states that in the Evidence Act wherever it is directed that the Court shall presume a fact, it shall regard such fact as proved, unless and until it is disproved. Thus it is the first requirement before

raising a mandatory presumption that the prosecution must prove the sexual intercourse by the accused. The evidence of the victim must indicate that she had no consent to such sexual intercourse. The surrounding circumstances should also exclude the consenting aspect of the victim. The Court cannot shut its eyes to the surrounding circumstances, the improbability features in the evidence of the victim, the medical evidence etc. while adjudicating a case of rape.

In case of *Deepak v. State of Haryana* reported in , (2015) 61 Orissa Criminal Reports (SC) 279, it is held as follows:--

"25. In order to enable the Court to draw presumption as contained in Section 114-A against the accused, it is necessary to first prove the commission of sexual intercourse by the accused on the prosecutrix and second, it should be proved that it was done without the consent of the prosecutrix. Once the prosecutrix states in her evidence that she did not consent to act of sexual intercourse done by the accused on her which, as per her statement, was committed by the accused against her will and the accused failed to give any satisfactory explanation in his defence evidence on this issue, the Court will be entitled to draw the presumption Under Section 114-A of the Indian Evidence Act against the accused holding that he committed the act of sexual intercourse on the prosecutrix against her will and without her consent. The question as to whether the sexual intercourse was done with or without consent being a question of fact has to be proved by the evidence in every case before invoking the rigour of Section 114-A of the Indian Evidence Act."

10. In view of the aforesaid discussion and on a careful analysis of the statement of the victim and the surrounding circumstances, I am of the view that the evidence of the victim is not reliable, creditworthy and suffers from infirmity and blemish. The material witnesses who could have lent support or corroboration to her evidence have been withheld by the prosecution. The evidence of watchman (D.W.1) creates suspicion on the truthfulness of the testimony of the victim. The medical examination reports of the appellant and the victim are the other factors which go against the prosecution case and therefore no credence can be given to the prosecution case that rape was committed on the victim by the appellant on 15.12.2009 at about noon inside the Short Stay Home and therefore, it deserves to be discarded.

Accordingly, the impugned judgment and order of conviction of the appellant under section 376 of the Indian Penal Code passed by the learned Sessions Judge, Sambalpur dated 26.05.2011 in S.T. Case No. 76 of 2010 and imposition of sentence of rigorous imprisonment for eight years and to pay a fine of Rs. 5000/- (rupees five thousand), in default, to undergo further rigorous imprisonment for six months is hereby set aside. The appellant is acquitted of the charge under section 376 of the Indian Penal Code.

11. It appears that the appellant is in jail custody since 19.12.2009. He shall be set at liberty forthwith, if his detention is not otherwise required in any other case.

Lower Court Records along with copy of the judgment be sent down forthwith to the learned Trial Court for necessary action.

12. Accordingly, the Criminal Appeal is allowed.