

(2024) 05 OHC CK 0061

Orissa High Court

Case No: Criminal Appeal No. 222 Of 2003

Ajamilla Bera @ Tika

APPELLANT

Vs

State Of Orissa

RESPONDENT

Date of Decision: May 1, 2024

Acts Referred:

- Code of Criminal Procedure, 1973 - Section 374
- Indian Penal Code, 1860 - Section 376, 457

Hon'ble Judges: D.Dash, J

Bench: Single Bench

Advocate: S. Ch. Padhi, J. K. Panda, P. K. Mohanty

Final Decision: Allowed

Judgement

D. Dash, J

1. The Appellant, by filing this Appeal, has assailed the judgment of conviction and order of sentence dated 16.11.2002, passed by the learned

Additional Sessions Judge, Balasore in S.T. Case No.50/112 of 2000, arising out of G.R. Case No.170 of 1998, corresponding to Singla P.S. Case

No.14 of 1998, pending on the file of the learned Sub-Divisional Judicial Magistrate (S.D.J.M.), Balasore.

By the impugned judgment of conviction and order of sentence, the Appellant as the sole accused faced the trial for commission of offence under

section 457 and 376 of the Indian Penal Code, 1860 (for short, "the IPC") and he has been sentenced to undergo rigorous imprisonment for two

(2) years and pay fine of Rs.500/- with the default stipulation to undergo rigorous imprisonment for three months for the offence under section 457 of

the IPC and undergo rigorous imprisonment for eight (8) years and fine of Rs.1000/- in default to undergo rigorous imprisonment for six months for the offence under section 376 of the IPC.

2. Prosecution case is that the victim (Informant-P.W.6) and the accused are the residents of one village having their houses nearby. The husband of the victim during a period of 10 years before the incident was unheard of. The victim (Informant- P.W.6) was residing with her minor daughter, mother-in-law and nephew (P.W.2). It is alleged that on 27/28.01.1998 midnight when the victim (Informant-P.W.1) was sleeping in her house, someone entered into the dwelling house by pushing the door. The victim (Informant- P.W.6) when woke up, she could identify that it was the accused, who had trespassed into her house. The identification was made with the help of the light of the lamp burning in the said house. It is further stated that the accused then suddenly embraced her (Informant-P.W.6) and making her naked committed rape upon her. It is also stated that the accused gagged the victim (Informant-P.W.6) by her wearing apparels and after discharge of semen left the place. The victim (Informant-P.W.6) finding nobody by her side, waited till arrival of her mother-in-law. On the next morning when the mother-in-law of the victim (Informant-P.W.6) arrived, she narrated the entire incident before her, who then called the villagers such as P.W.1, P.W.4 and P.W.7 to her house. Before them the victim (Informant-P.W.6) again narrated the incident and at that time, the accused had already gone inside the sea to catch the fish. So the co-villages of the victim (Informant-P.W.6) assured the victim that they would look into the matter after arrival of the accused. On 03.02.1998 evening, the accused returned home. The villagers then called a meeting and in that meeting the accused having remained present, admitted to have committed the offence upon the victim (Informant-P.W.6). He (accused) then requested the villagers to settle the matter. However, the villagers asked the victim (Informant-P.W.6) to report the matter at the police station.

3. On 06.02.1998 around 10 a.m. a report being lodged by the victim (Informant-P.W.6) with the Officer-in-Charge (OIC), Singla Police Station (P.W.8), the same was reduced into writing and being treated as F.I.R. (Ext.3), case was registered. Finally on completion of investigation, the Final

Form was submitted placing the accused to face the trial for commission of offence under sections 457/376 of the IPC. The case being then

committed, the trial ultimately came to be concluded in the Court of learned Additional Sessions Judge.

4. The Trial Court, upon examination of the prosecution witnesses (P.W.1 to P.W.8) and on careful scrutiny of the documentary evidence let in by the

prosecution and marked Exts.1 to Ext.5/1 has found the prosecution to have established the charges for the offences punishable under sections

457/376 of the IPC beyond reasonable doubt and the Appellant (accused) has been sentenced as afore-stated.

5. Learned counsel for the Appellant (accused) submitted that the prosecution case is based on the solitary testimony of P.W.6 when the witness

before whom the victim (Informant-P.W.6) had first narrated the incident, who is the mother-in-law of the victim having not been examined, instead

other witnesses have come to the witness box to depose as to what thereafter was stated by the victim (P.W.6) before them. Inviting the attention to

the deposition of P.W.6, he pointed out, all those improbabilities surfacing in her evidence which would be dealt later in course of discussion to follow.

He submitted that when the evidence of P.W.6 does not find corroboration from the medical evidence, the trial Court ought to have refused to accept

her version as the gospel truth so as to convict the Appellant (accused). According to him, the version of P.W.6 implicating this accused ought not to

have been accepted by the trial court as wholly reliable to fasten the guilt upon the accused. He submitted that the evidence of P.W.6 is not at all free

from suspicion and it cannot be said to be of sterling quality so as to form the sole basis for conviction. He, therefore, urged for acquittal of the

accused.

6. Learned Additional Standing Counsel for the Respondent-State while supporting the finding of guilt as against the accused as has been returned by

the Trial Court submitted that P.W.6 has narrated the incident in a quite natural manner. He further submitted that the evidence of P.W.6 being wholly

reliable and as there surfaces no such inherent improbability in her evidence, when she has gone to state against the accused inviting all the stigma

unto himself in an orthodox society like us, the Trial Court has rightly accepted her evidence in fastening the guilt upon the accused.

7. Keeping in view the submissions made, I have carefully read the impugned judgment of conviction and have also extensively travelled through the

depositions of the witnesses (P.Ws.1 to P.W.8) as also have perused the documentary evidence, Ext.1 to Ext.5.

8. Admittedly, the star witness for the prosecution here is P.W.6, who is the victim herself and she had lodged the FIR which had been admitted in

evidence and marked Ext.3. It has been stated in the FIR and on 12.01.1998, when she was alone in the house, she heard some sound of opening of

the bamboo gate of her house and, therefore, she lighted the lamp. It is further mentioned that with the help of that light of the lamp, she could identify

that person to have entered into the house as this accused. It is next stated that the accused then suddenly sat on her and gagged her by her wearing

apparels and thereafter having unrobed her, committed upon her for 5 to 10 minutes and having satisfied his sexual lust after discharge of semen, he

left the house. It is further narrated by P.W.6 in the FIR (Ext.3) that when her mother-in-law returned home in the morning, she said about the

incident who then had called the villagers and before them she (P.W.6) again narrated the incident which had taken place in the night. During

evidence, it has however not been stated by P.W.6 that she heard the sound of opening of the bamboo gate of her house and woke up. She states that

the accused had entered into the house in the night by breaking upon the door. When it is stated that she was then inside the house, the FIR reads that

by then she had gone for sleep. When it is said in the FIR that the accused seeing her sat on her and gagged her, it is not so stated by P.W.6 in her

evidence wherein she has stated that the accused lifted her saree and then entered his penis into her vagina and after discharge of the semen, left the

place. The narration of the incident especially as to the role of this accused as given in the FIR (Ext.3) greatly differs as to what have been deposed to

by P.W.6. Surprisingly enough, it is not stated by P.W.6 that she had ever attempted to resist, which is the normal human instinct and that is wholly

absent in the evidence of P.W.6 which is certainly a conduct standing as adverse. The action of the accused in gagging P.W.6 although is stated in the

FIR, that is not the version of P.W.6 while tendering her evidence during the trial. P.W.6 was then aged about 27/28 years and she had married in the

year about 1988 or so and was having a girl child of about 9 years old. The narration of the victim (P.W.6) as regards the incident when she was

examined in the trial gives an indication that she from the beginning had not objected to the entry of the accused into her house. The accused was

working under victim- P.W.6 prior to the incident. Although P.W.6 states that one Sushant Mandal, who happens to be her brother stays near his

house, the conduct of P.W.6 in not calling him again raises doubt in her version about the entry of the accused to the house of the victim without her

knowledge and that it was to her annoyance and that rather is suggestive of otherwise. During cross-examination when she had stated to have

struggled to escape from the custody of accused and in the process sustained injury, the Doctor (P.W.3), who had medically examined P.W.6 has in

clear terms stated to have noticed no injury or mark on any part of the body of the victim-P.W.6. Her evidence is also to the extent that there was no

sign of recent sexual intercourse. The mother-in-law of the victim before whom the victim has narrated the incident has not been examined whereas

other co-villagers who had come forward to state as to the narration about the incident by the victim when they had been called by mother-in-law to

the house. In the absence of the evidence of the person before whom this P.W.6 had first narrated the incident, the evidence of others who came to

the picture later cannot be taken as first hand corroboration.

The evidence of P.W.6 as discussed above, thus in my considered opinion suffers from inherent improbabilities which cannot be lightly brushed aside

and, therefore, it would not be safe to rely upon her evidence to hold that the accused had committed sexual intercourse upon her by force, that too

against her consent.

9. In that view of the matter the judgment of conviction and the order of sentence recorded against the accused which have been impugned in this

Appeal cannot thus sustained.

10. In the result, the Appeal stands allowed. The judgment of conviction and order of sentence dated 16.11.2002 passed by the learned Additional

Sessions Judge, Balasore in S.T. Case No.50/112 of 2000 are hereby set aside.

The Appellant (accused) since is on bail, his bail bonds shall stand discharged.

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