

IN THE HIGH COURT OF ORISSA AT CUTTACK

CRLREV No. 247 of 2007

An application under Section 401 read with Section 389 of the Code of Criminal Procedure, 1973.

AFR **Gobardhan Gadaba @ Gadava** **Petitioner**

-Versus-

State of Odisha **Opp. Party**

Advocate(s) appeared in this case:-

For Petitioner : M/s. A. Mishra, B. Nayak,
S.A. Hafiz & S. Biswal,
Advocates

For Opp. Party : Mr. Sitikanta Mishra,
Addl. Standing Counsel

CORAM:

JUSTICE SASHIKANTA MISHRA

JUDGMENT

5th July, 2022

SASHIKANTA MISHRA, J.

The petitioner accused herein was convicted for the offence under Sections 363/376 IPC by the Chief Judicial Magistrate-cum-Asst. Sessions Judge, Jeypore in C.T. No. 63 of 2005 as per judgment passed on

03.02.2006 and was sentenced to undergo R.I. for seven years for the offence under Section 376 IPC and to pay a fine of Rs. 1,000/-, in default, to undergo S.I. for two months and to undergo R.I. for two years for the offence under Section 363 IPC and to pay fine of Rs.1,000/-, in default, to undergo S.I. for two months with both the sentences directed to run concurrently. The said judgment of conviction and sentence was confirmed by learned Additional Sessions Judge (Fast Track Court), Jeypore vide judgment dated 21.11.2006 passed in Criminal Appeal No. 78 of 2006.

Challenging such judgment of conviction and sentence and the order of its confirmation in appeal, the petitioner has approached this Court in the present revision.

2. The facts of the case in a nutshell are that on 30.01.2004 at about midnight when the victim was sleeping on her verandah, a boy, named, Sansai called her for which she opened the door and came outside but the petitioner, who was present outside, caught hold of her and forcibly dragged her to a vehicle parked nearby.

Thereafter he took the victim to an Akasia plantation in the vehicle and on reaching there, he dragged the victim out of the vehicle and took her into the plantation area and assaulted her. He thereafter forcibly removed her wearing apparel and committed sexual intercourse. The other accused, namely, Bansidhar Bisoi, who was sleeping in the vehicle, came and rescued the victim and thereafter they went away leaving the victim at the spot. The victim proceeded to a nearby village, named, Pakhanaguda and called one Balarama Gadava and narrated the incident before him and his wife and took shelter in his house. On the next morning the said Balaram Gadava went to the house of the victim at Bijarapalli and narrated the incident before her father. Accordingly, an FIR was lodged before the OIC of Mahila Police Station leading to registration of Jeypore Mahila Police Station Case No. 03 of 2004 corresponding to G.R. Case No. 73 of 2004 of the Court of learned S.D.J.M., Jeypore. Upon completion of investigation, charge sheet was submitted against the accused.

The accused took the plea of denial.

To prove its case, prosecution examined nine witnesses including the victim as P.W.-1. Basing on the clear and uncontroverted evidence of the victim, as corroborated by the evidence of her father (P.W.-2) and Balaram Gadava (P.W.-3), the trial court found that the charge under Sections 363 and 376 IPC was clearly made out. The trial court found the victim to be aged about 16 years on the basis of opinion of the doctor, who was examined as P.W.-4. Accordingly, the trial court convicted the petitioner for the aforementioned offences and sentenced him as aforesaid.

The petitioner carried the matter in appeal to the Court of Sessions, which was disposed of by learned Addl. Sessions Judge (Fast Track Court), Jeypore. Learned lower appellate court, after scanning the evidence on record independently in the light of the contentions raised by the defence, held that no case for interference had been made out. On the contrary, the appellate court found that there is clear evidence that the victim was subjected to sexual intercourse and semen was ejaculated in her genitals. Finding that the evidence of the victim (P.W.-1)

was amply corroborated by the evidence of P.W.-3 and the chemical analysis report, (Ext.-9), the lower appellate court dismissed the appeal.

Feeling further aggrieved, the petitioner has approached this Court in the present revision.

3. Heard Mr. A. Mishra, learned counsel for the petitioner and Mr. S. Mishra, learned Addl. Standing Counsel for the State.

4. Assailing the impugned judgments, Mr. Mishra has raised the following contentions:

- (i) The victim's version that she was dragged from her house to the vehicle, which was at a distance of 200 meters, is difficult to believe as there is no evidence that she had shouted for help during such time.
- (ii) In view of the evidence of the doctor that there were no bodily injuries on the victim and further that she was used to sexual intercourse strongly suggests that it was a case of consent and the FIR was lodged only to hide the deed.

(iii) The age of the victim must be held to be more than 18 years at the relevant time in view of the evidence of the doctor to the effect that the ossification test placed the same at 14-16 years.

5. Per Contra, Mr. S. Mishra, has argued that when the victim's testimony has not been rebutted or discredited in any manner whatsoever, there is no reason to disbelieve her. The contradictions and discrepancies in the prosecution evidence as pointed out by the defence are too minor to be taken note of and in any case, the same cannot demolish the clear and credible evidence of the victim herself. Even if it is proved that the victim was habituated to sexual intercourse, the same does not mean that the offence was not committed.

6. Before delving into the merits of the rival contentions, it would be apposite to observe that the law requires that the Courts must deal with cases of rape with utmost sensitivity by examining the broader probabilities of a case and not get swayed away by minor or insignificant discrepancies in the statement of the

prosecution which are not of a fatal nature. Reference in this regard may be had to the decision of the Apex Court in the case of **State of Punjab v. Gurmit Singh**, reported in **1996 (2) SCC 384**. In Paragraph-21 of the said judgment it has been held as follows:

“21. Of late, crime against women in general and rape in particular is on the increase. It is an irony that while we are celebrating woman's rights in all spheres, we show little or no concern for her honour. It is a sad reflection on the attitude of indifference of the society towards the violation of human dignity of the victims of sex crimes. We must remember that a rapist not only violates the victim's privacy and personal integrity, but inevitably causes serious psychological as well as physical harm in the process. Rape is not merely a physical assault — it is often destructive of the whole personality of the victim. A murderer destroys the physical body of his victim, a rapist degrades the very soul of the helpless female. The courts, therefore, shoulder a great responsibility while trying an accused on charges of rape. They must deal with such cases with utmost sensitivity. The courts should examine the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the statement of the prosecutrix, which are not of a fatal nature, to throw out an otherwise reliable prosecution case. If evidence of the prosecutrix inspires confidence, it must be relied upon without seeking corroboration of her statement in material particulars. If for some reason the court finds it difficult to place implicit reliance on her testimony, it may look for evidence which may lend assurance to her testimony, short of corroboration required in the case of an accomplice. The testimony of the prosecutrix must be appreciated in the background of the entire case and the trial court must be alive to its responsibility and be sensitive while dealing with cases involving sexual molestations.”

7. It is also trite that the victim of a rape is not an accomplice rather her position is like that of an injured witness. Ordinarily, the evidence of a prosecutrix should not be suspected and should be believed, and if the evidence is reliable, no corroboration is necessary. The conviction can be based on the sole testimony of a prosecutrix if it is implicitly reliable and there is a ring of truth in it. Thus the position of law is that the conviction can be based even on sole testimony of the prosecutrix provided it is natural, trustworthy and worth being relied upon.

It is not necessary to cite all the case laws in this respect.

8. Viewed in light of the above position of law, it is seen that the victim has testified about the occurrence in a clear and consistent manner. Though she was cross-examined at length, nothing significant was elicited from her mouth to even remotely discredit her version. Accordingly to the victim, she informed Balaram Gadava (P.W.-3) about the incident, who in turn informed her father (P.W.-2) on the next morning. Balaram Gadava

being examined as P.W.-3 has fully corroborated such statement of the victim and so also the victim's father (P.W.-2). As regards the occurrence, the victim has testified that the petitioner forcefully took her in a vehicle towards the village Hatakonga and stopped near *Akasia* plantation and dragged her inside the plantation. He then removed her wearing apparels forcibly and raped her. The accused also assaulted her when she protested and threatened her.

9. The contentions raised by the petitioner may now be considered. It is argued that the victim's version is difficult to believe as the vehicle in question was at a distance of 200 meters from her house and there were other houses in between and yet the victim did not raise any shout. In this regard, it was brought out in cross-examination that while dragging her, the accused was throttling her. No question was put to the victim as to whether she had raised any shout at that time. Therefore, even assuming that the victim was throttled by the accused while being dragged to the vehicle, no question having been put by the defence as to if she had raised any

shout in protest, the contention raised before this Court at this belated stage cannot be accepted.

10. It is argued that as per the evidence of the doctor bodily injuries were found on the victim, which falsifies her testimony that the accused had abused her, assaulted her causing injuries on her chest, back and chin. A reference to the medical examination report as well as the evidence of the doctor, who was examined as P.W.-4, it is seen that he has clearly testified that no injury was detected on her body or on her private part. This, according to Mr. Mishra, entirely falsifies the prosecution story. The above contention however cannot be accepted because it is well settled that injuries on the person of a rape victim are not even a *sine qua non* for proving the charge of rape. As such, absence of injury on the person of the victim is not necessarily an evidence of falsity of the allegation of rape or evidence of consent on the part of the prosecutrix. Reference in this regard may be had in the decision of the Apex Court in the case of ***Mukesh v. State (NCT of Delhi)***, reported in **(2017) 6 SCC 1**.

It has been further argued by Mr. Mishra that the doctor also testified that the victim was used to sexual intercourse as her hymen was ruptured and her vagina easily admitted two fingers. According to Mr. Mishra it suggests that the victim and the accused had a consensual sexual relationship. Firstly, it is observed that while cross-examining the victim, no such suggestion was given to her that she had a consensual sexual relationship with the petitioner accused. On the contrary, it was suggested that she had falsely implicated the petitioner because of a proposal of a marriage of the petitioner with some other girl was turned down. That apart, even assuming that the victim was habituated to sexual intercourse, the same does not grant a licence to the accused or any other person to exploit her sexually against her consent nor can it be said that the victim was a girl of easy virtue. For such reason therefore, this Court is unable to accept the contentions as above.

11. It is contended that the victim was aged more than 18 years at the relevant time in view of the fact that the doctor has placed her age between 14 to 16 years on

the basis of ossification test. According to Mr. Mishra, two years must be added to such age as per the settled position of law. On such basis, it is contended that learned courts below committed material illegality in treating the victim to be a girl under the age of 16 years only to brush aside the evidence suggesting her consent to the alleged occurrence. From a reading of the cross-examination of the victim it is seen that several questions were put to her regarding her age which she stated to be around 15 years. She admitted that she had attained puberty about four years back. According to Mr. Mishra, this would mean that she had attained puberty at the age 11 year, which is not medically possible. Therefore, according to him, the victim must be aged at least 14 years at the time of attaining puberty and therefore on such basis her age can be determined as 18 years. As it appears, the victim has admitted that she is an illiterate person and is unable to correctly state the age of any of her family members. Her statement that she was aged about 15 years at the relevant time cannot be construed strictly in view of her rustic background. In fact her father

being examined as P.W.-2 also could not correctly state her age. Under such circumstances, there is no other option than to fall back upon the results of the ossification test. As already stated, the ossification test report placed the age of the victim between 14 to 16 years. Though it is argued by Mr. Mishra that two years concession must be given but there is no law which mandates that in each and every case two years have to be added to the outer age limit determined by the ossification test. It would rather be prudent for the Court to accept the higher range of the age determined by the ossification report which, in the instant case is 16 years. The contention of Mr. Mishra is therefore not tenable in the eye of law. Even otherwise, the age of the victim would be relevant, had there been any evidence, even remotely, of she being a consenting party to the sexual intercourse. As has already been discussed hereinbefore there is no such evidence to support the theory of consensual sexual intercourse. In such view of the matter, even assuming for a moment that the victim was aged about 18 years at the

relevant time, the same shall not enure the benefit of the accused in any manner whatsoever.

12. From the foregoing discussion it is seen that none of the contentions raised by the petitioner to challenge the impugned judgments are valid so as to persuade this Court to take a different view. On the contrary, this Court after independently appreciating the evidence on record in light of the settled position of law, finds no illegality committed either by the trial court or by the lower appellate court so as to interfere.

13. In the result, the Revision fails and is therefore dismissed. The accused being on bail, his bail bonds stand cancelled. It is directed that petitioner shall surrender to custody forthwith to serve the remaining part of the sentence as imposed by the trial court.

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Sashikanta Mishra,
Judge

Orissa High Court, Cuttack,
The 5th July, 2022/ A.K. Rana