

IN THE HIGH COURT OF ORISSA, CUTTACK

JCRLA No.10 OF 2017

From judgment and order dated 09.12.2016 passed by the Sessions Judge -cum- Special Judge, Kandhamal, Phulbani in S.T. Case No.25 of 2013.

Raghu Digal

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Appellant

-Versus-

State of Odisha

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Respondent

For Appellant:

Mr. Suryanarayan Biswal
Amicus Curiae

For Respondent:

Mr. Rajesh Tripathy
Addl. Standing Advocate

P R E S E N T:

THE HONOURABLE MR. JUSTICE S.K. SAHOO

Date of Hearing and Judgment: 12.10.2022

S.K. SAHOO, J. The appellant Raghu Digal faced trial in the Court of learned Sessions Judge -cum- Special Judge, Kandhamal, Phulbani in S.T. Case No.25 of 2013 for commission of offence punishable under section 376(2)(f) of the Indian Penal Code on the accusation that on 16.10.2012 in the morning hours, he

committed rape on the victim (P.W.1), who was a minor girl inside the jungle of Badagaon.

The learned trial Court vide impugned judgment and order dated 09.12.2016 found the appellant guilty of the offence charged and sentenced him to undergo R.I. for twelve years and further directed to pay a compensation of Rs.50,000/- (fifty thousand) to the victim under section 357(3) of Cr.P.C. and in default, to undergo further R.I. for a period of one year.

2. The prosecution case, as per the first information report lodged by Puspita Digal (P.W.2), the mother of the victim on 20.12.2012 before the Inspector in-charge of Baliguda police station is that the victim was three years old as on the date of occurrence which took place on 16.10.2012 and on that day, she (P.W.2) had been to the jungle along with her husband to collect fire wood and when they returned from the jungle, they noticed that the victim was not present in the house. She asked P.W.3 who is her mother-in-law the whereabouts of the victim. P.W.3 told her that she was playing with the victim and at that point of time, she went to the well to bring water and at that point of time, the appellant took the victim girl with him. It is the further prosecution case as per the first information report that P.W.2 heard the cries of the victim from the jungle and when she

reached near the victim, the latter disclosed before her that the appellant undressed her and committed rape on her. Both the informant (P.W.2) and her husband (P.W.4) took the victim to Baliguda hospital for treatment and then they took her back home. The matter was intimated to the village committee but the appellant did not obey the committee rather lodged a false case against the informant and her husband.

On the basis of such first information report lodged by P.W.2, Balliguda P.S. Case No.99 dated 20.10.2012 was registered under section 376(2)(f) of the Indian Penal Code against the appellant. After registration of the case, the Inspector in-charge of Baliguda police station directed P.W.10 Rashmita Lakra, the S.I. of police attached to the police station to investigate the matter.

P.W.10 took up investigation of the case and during course of investigation, she examined P.W.2, the informant and other material witnesses, seized the outdoor ticket (Ext.9) from the possession of the informant as per seizure list Ext.5/1, sent the victim for medical examination to M.K.C.G. Medical College and Hospital, Berhampur. The appellant was arrested on 22.10.2012 and he was sent for medical examination to S.D.H., Balliguda and his wearing apparels and biological samples were

collected as per seizure list Ext.11 and Ext.6 respectively and the appellant was forwarded to the Court on the very day. The victim's biological samples were also collected by the medical officer and seized by P.W.10. The statement of the informant was recorded under section 164 Cr.P.C. on the prayer of the Investigating Officer by the learned S.D.J.M., Balliguda as per direction of the learned Special Judge, Phulbani and the exhibits were forwarded to S.F.S.L., Rasulgarh, Bhubaneswar for chemical analysis through Court and the chemical examination report (Ext.17) was received. On 20.12.2012 P.W.10 handed over charge of investigation to the Inspector in-charge Ashutosh Mishra (P.W.9) of Balliguda police station who examined the scribe of the F.I.R. so also the doctor and received the medical examination report of the victim and on completion of investigation, he submitted charge sheet against the appellant under section 376(2)(f) of the Indian Penal Code and section 4 of the POCSO Act.

3. It appears that though initially the charge was framed under section 376(2)(f) of the Indian Penal Code on 20.11.2013 and section 4 of the POCSO Act on 30.07.2014 to which the appellant pleaded not guilty and claimed for trial, but as per the order dated 30.08.2016, the charge under section 4 of

the POCSO Act was deleted since the occurrence in question took place on 16.10.2012 i.e. before the POCSO Act came into force w.e.f. 14.11.2012.

4. The defence plea of the appellant is that the appellant had planted some trees on a piece of land and the informant and her husband cut the trees, for which there was dissention between them and the appellant lodged a first information report and just as a counter blast, a false case of rape has been foisted against him.

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

P.W.1 was the victim and she has supported the prosecution case and stated about the commission of rape on her by the appellant.

P.W.2 Puspita Digal is the mother of the victim and she is the informant in the case and she stated that on the date of occurrence, she had been to the jungle along with her husband to collect firewood and after they returned from the jungle, they came to know from the victim that the appellant committed rape on her. She along with her husband approached the ward member and one village meeting was convened regarding the incident but the appellant did not participate in the

meeting for a period of three days. She further stated about the seizure of wearing apparels of the victim by the I.O. as per seizure list Ext.3 and recording of her 164 Cr.P.C. statement by the Magistrate.

P.W.3 Lati Khageswar Digal was the mother-in-law of P.W.2 and she stated that on the date of occurrence, she had been to collect some water and the victim was alone in the house and when she returned home, the victim was found absent. She searched for the victim but could not trace her out. When P.W.2 returned home, she went in search of the victim and found the victim near a jungle and she brought the victim to the house and the victim disclosed about the incident before her mother.

P.W.4 Samsen Digal is the father of the victim and he stated about the disclosure made by the mother of the victim regarding commission of rape on the victim by the appellant.

P.W.5 Sanjukta Digal was the Home guard attached to Baliguda police station and also a witness to the seizure of two sealed bottles and one command certificate vide seizure list Ext.6.

P.W.6 Basanti Digal was the aunt of the victim and she stated that the victim was her niece and she came to know about the incident in the evening and on being asked, the victim

stated about the occurrence and also showed her private part to her. A village meeting was convened concerning the case and a criminal case was initiated against the appellant.

P.W.7 Dr. Sudeepa Das was the Associate Professor of M.K.C.G. Medical College and Hospital, Berhampur, who medically examined the victim (P.W.1) on police requisition and proved the medical examination report vide Ext.2/1.

P.W.8 Dr. Nilakanta Dey was the Padiatic Specialist and in charge of S.D.M.O., S.D.H., Balliguda and she stated that she received a written requisition from S.I. of police, Baliguda police station to examine the victim medically and he directed Dr. Smita Marandi to examine the victim. The said requisition is marked as Ext.8.

P.W.9 Asutosh Mishra was the Inspector in-charge of Balliguda police station who not only registered the F.I.R. but also on 04.01.2013, he took up charge of investigation of the case from S.I. of police Rasmita Lakra (P.W.10) as she was on maternity leave along with all connected papers and on completion of investigation, he submitted charge sheet.

P.W.10 Rasmita Lakra, S.I. of police, attached to Balliguda police station took up investigation of the case as per the direction of P.W.9 and during course of investigation, she

examined the witnesses, seized an outdoor ticket from the informant, sent the victim for medical examination to M.K.C.G. Medical College and Hospital, Berhampur, arrested the appellant, took steps for her medical examination, seized her wearing apparels and biological samples and handed over charge of investigation to P.W.9.

The prosecution exhibited seventeen numbers of documents. Ext.1 is the written report, Ext.2/1 is the medical examination report of the victim, Ext.3 is the seizure list in respect of seizure of wearing apparels of the victim, Ext.4 is the 164 Cr.P.C. statement of P.W.2, Exts.5/1, 6, 11, 12 are the seizure lists, Exts.7 and 8 are the medical requisitions for examination of the victim, Ext.9 is the outdoor ticket regarding examination of the victim on 17.10.2012 at S.D.H., Balliguda, Ext.10 is the query made by I.O. to S.D.M.O., S.D.H., Balliguda, Ext.13 is the command certificate, Ext.14 is the prayer for recording of statement of the informant, Ext.15 is the prayer for sending the seized articles to S.F.S.L., Bhubaneswar, Ext.16 is the forwarding report and Ext.17 is the chemical examination report.

6. The learned trial Court after analyzing the evidence on record came to hold that the evidence of the victim despite

her tender age, is unalloyed truth and there is nothing in her evidence to disbelieve her and to hold that she was deposing falsehood or had been tutored to depose so. The learned trial Court further held the evidence of the victim to be clear, consistent and trustworthy. It was further held that the prosecution has satisfactorily proved that the appellant committed sexual intercourse on the victim, a three years old girl child. It was further held that the appellant has failed to show that there was some dispute as to the cutting of a tree and therefore, it was held that the meetings were convened by the parents of the victim regarding the disgraceful act of the appellant and non-examination of any witness to the meeting is of no consequence. It was further held that the prosecution has successfully established the charge against the appellant.

7. When the matter was called, since the earlier engaged counsel for the appellant was not present, Mr. Suryanarayan Biswal, learned counsel was appointed as Amicus Curiae and he was supplied with the copy of the paper book and given time to prepare the case. He placed the evidence of the witnesses and also the impugned judgment.

Learned Amicus Curiae contended that even though it is mentioned in the first information report by the informant

(P.W.2) and also she deposed in Court that she got information from P.W.3 that it was the appellant who had taken away the victim, but the evidence of P.W.3 is completely silent in that respect and P.W.3 has stated that she herself searched for the victim but could not trace her out and not stated to have seen the appellant taking away the victim. Learned counsel further submitted that when P.W.3 herself was not aware as to who had taken the victim, she could not have disclosed before P.W.2 that the appellant took away the victim and therefore, this part of the prosecution case should not be accepted. The learned counsel further submitted that though it is the prosecution case that a meeting was convened in the village in connection with the offence committed by the appellant but no independent witnesses have been examined in that respect and therefore, the holding of the meeting is a doubtful feature and as such, the delay of four days in lodging the first information report has not been satisfactorily explained by the prosecution. Learned counsel for the appellant further submitted that the doctor (P.W.7) after examining the victim stated that there was no medical evidence to corroborate recent sexual act and however, an attempted act of penetration/sexual assault cannot be completely excluded from the physical finding. It is argued that in view of the medical

evidence, it cannot be said to be a case of rape on the victim but an attempt to commit rape and therefore, the appeal should be allowed.

Mr. Rajesh Tripathy, learned Addl. Standing Counsel appearing for the State of Odisha, on the other hand, supported the impugned judgment and submitted that the age of the victim is not only stated by the victim (P.W.1) herself but also by her father (P.W.4) and moreover, the doctor (P.W.7) has categorically stated on the basis of dental examination and radiological finding that the victim girl was aged in between three to four years as on the date of the occurrence. It is further submitted that the age of the victim has not been challenged by the defence. Learned counsel further submitted that the victim has categorically stated as to how the appellant committed rape on her and by gesture also she explained the same in the learned trial Court pointing out to her private part. It is further submitted that the conduct of the victim in disclosing about the commission of rape before her mother immediately after the occurrence is admissible as res gestae under section 6 of the Evidence Act and when the evidence has remained almost unshaken and the victim has ruled out any possibility of tutoring to her and number of injuries were also noticed on the person of

the victim when she was examined by the doctor (P.W.7) as per the medical examination report Ext.2/1, it cannot be said that there is any illegality or perversity in the finding of the learned trial Court in holding the appellant guilty under section 376(2)(f) of the Indian Penal Code and therefore, the appeal should be dismissed.

8. Adverting to the contention raised by the learned counsel for the respective parties, let me first take into account the evidence adduced by the prosecution relating to the age of the victim. The victim has categorically stated that her age to be three years and she further stated that she was going to Anganbadi and the defence has not challenged her age in the cross examination. The father of the victim has been examined as P.W.4 and he stated that his elder daughter was aged about ten years and his second child was aged about seven years and victim is the third child. The doctor (P.W.7) has categorically stated that physical finding, dental examination, radiological finding indicate that the age of the victim as on the date of her examination was in between three years to four years. No suggestion has been given to the doctor also disputing the assessment of the age and therefore, I am of the humble view

that the prosecution has successfully proved the age of the victim to be three to four years as on the date of occurrence.

Coming to the occurrence in question, it is correct that P.W.3 Sarojini Digal stated that on the occurrence day, she had been to collect water to the well and the victim was alone in the house and when she returned, the victim was found absent and she searched for the victim but could not trace her out and then the mother of the victim came and went to search for the victim and found the victim near the jungle and P.W.3 has not stated about noticing the appellant taking away the victim with him and therefore, the evidence of P.W.2 that she got information from P.W.3 that the appellant had taken away the victim is not acceptable, however, in view of the other materials available on record, the said discrepancy is not sufficient to discard the prosecution case.

On perusal of the evidence of the victim (P.W.1), it appears that to test her maturity in understanding questions and giving rational answers, the learned trial Court put some questions and found that the victim is answering the same correctly and therefore, the learned trial Court observed that P.W.1 has got sufficient maturity to give rational answers. Under section 118 of the Evidence Act, a child witness is a competent

witness provided that he is able to understand the questions put to him and give rational answers to such questions. If the particular child who has appeared in the witness box is intelligent enough to be able to understand as to what evidence he was giving and able to understand the questions and able to give rational answers, there is no infirmity in acting upon the evidence of a child witness.

The victim (P.W.1) has stated that on the date of occurrence, the appellant took her towards the forest after her parents had gone to the forest for collection of fire wood and then he undressed her, made her naked and spread a towel on the ground of the forest, laid her on the towel and committed sexual intercourse in her vagina. P.W.1 pointed her vagina and the action of sexual intercourse done by the appellant in the trial Court which the learned court has mentioned in the deposition sheet itself. The victim has further stated that the appellant left her inside the forest and while she was weeping, her mother (P.W.2) came there, rescued her and she came back home and she narrated the incident before her mother. She specifically stated that she also narrated the incident to the lady police officer. She was cross-examined at length and in the cross examination, she has specifically stated that nobody had tutored

her to say that the appellant committed sexual intercourse and she denied the suggestion of the defence that she was deposing in Court on being tutored by her parents. Nothing has been elicited in the cross examination of the victim to discard her evidence which appears to be clear, cogent, reliable and trustworthy. It has been held in the case of **Bhagwan Singh and Ors. -Vrs.- State of M.P. reported in (2003) 3 Supreme Court Cases 21** that if the case is based on evidence of child witness, the Court should seek corroboration from other evidence. Further, it was also held that if possibility of tutoring the child witness appears to the Court, it should be careful in accepting the evidence. In view of the evidence adduced by the victim, I have no hesitation to place reliance on it.

The mother of the victim having been examined as P.W.2 stated that while the victim was found absent in the house, she searched for the victim and noticed the victim weeping near a hill of the village and when she enquired about the incident from the victim, she narrated that the appellant undressed her and pounced over her and committed rape on her. Therefore, the evidence of P.W.1 gets corroboration from the evidence of P.W.2. Moreover, when the victim has immediately disclosed about the occurrence before P.W.2, it is admissible

under section 6 of the Evidence Act as res gestae. To form particular statement as part of the same transaction as required under section 6 of Evidence Act, it must be simultaneous with the incident or substantial contemporaneous that is made either during or immediately before or after the occurrence. In the case of **Gentela Vijayavardhan Rao -Vrs.-State of Andhra Pradesh reported in (1996) 6 Supreme Court Cases 241**, while discussing section 6 of the Evidence Act, the Hon'ble Supreme Court held that the principle or law embodied in section 6 of the Evidence Act is usually known as the rule of res gestae recognised in English Law. The essence of the doctrine is that fact which, though not in issue, is so connected with the fact in issue "as to form part of the same transaction" becomes relevant by itself. This rule is, roughly speaking, an exception to the general rule that hearsay evidence is not admissible. The rationale in making certain statement or fact admissible under section 6 of the Evidence Act is on account of the spontaneity and immediacy of such statement or fact in relation to the fact in issue. But it is necessary that such fact or statement must be part of the same transaction. In other words, such statement must have been made contemporaneous with the acts which constitute the offence or at least immediately thereafter. But if

there was an interval, however slight it may be, which was sufficient enough for fabrication then the statement is not part of res gestae.

Nothing has been elicited in the cross-examination of P.W.2 to disbelieve her statement rather it has been elicited that the appellant happened to be a relation of the victim as she is the brother of the uncle (father's sister's husband's younger brother) of the victim. P.W.2 has admitted in the cross-examination that the appellant initiated a criminal case in connection with cutting of trees but she has denied the suggestion given by the defence that on account of cutting of such trees, the case has been foisted. Admittedly, no first information report lodged by the appellant has been proved. Therefore, it is not known as to when that F.I.R. was lodged and when the alleged occurrence of cutting of trees took place.

P.W.3, P.W.4 and P.W.6 have also stated that the victim disclosed before them about commission of rape on her by the appellant.

Coming to the evidence of the doctor (P.W.7) who examined the victim on 23.10.2012 which was after seven days of the occurrence in the Department of F.M.T., M.K.C.G. Medical College and Hospital, Berhampur and proved the medical

examination report Ext.2/1, it clearly reveals that there were around five to six numbers of linear scratch abrasions present over the medial aspect of right leg situated parallel to each other, 3 cms. below the knee joint and a linear scratch abrasion of length 1 c.m. x 3.3 c.m. present over the medial aspect of right thigh. The doctor has further stated that there was no medical evidence to corroborate recent sexual act, however, an attempted act of penetration/sexual assault could not be completely excluded. The doctor denied the suggestion that self inflicted injury in the private part was seen on the person of the victim. She further stated that there would be no bleeding from the vagina of a girl when it is a case of attempt of penetrative sexual act. Therefore, the evidence of the victim gets corroboration from the medical evidence.

Thus the evidence of the star witness of the prosecution i.e. the victim has remained unshaken and it is corroborated by the evidence of other witnesses and also the doctor. The contention of the learned counsel for the appellant that it was just a case of attempt of commission of rape and not rape is not acceptable.

It is correct that the report was lodged four days after the occurrence but P.W.2 has stated that a village meeting

was convened regarding and the incident and accused did not participate in the meeting for a period of three days. P.W.4 has also stated that a village meeting was convened and twenty members of village attended in village meeting and he denied the suggestion that the village meeting was conducted concerning taking away the wood by him. P.W.6 has also stated about the convening of a village meeting in connection with this case. Moreover, in a case of this nature, delay in lodging of the first information report cannot be a factor to disbelieve the prosecution case, particularly when the family members used to take time to approach the police keeping in view the prestige of the family and the future of the victim girl. In the case of **State of Himachal Pradesh -Vrs.- Gian Chand reported in (2001) 6 Supreme Court Cases 71** which is also a case of rape of minor girl, the Hon'ble Court held that delay in lodging the F.I.R. cannot be used as a ritualistic formula for doubting the prosecution case and discarding the same solely on the ground of delay in lodging the first information report. Delay has the effect of putting the Court in its guard to search if any explanation has been offered for the delay, and if offered, whether it is satisfactory or not. If the prosecution fails to satisfactorily explain the delay and there is possibility of

embellishment in prosecution version on account of such delay, the delay would be fatal to the prosecution. However, if the delay is explained to the satisfaction of the Court, the delay cannot by itself be a ground for disbelieving and discarding the entire prosecution case.

In view of the evidence on record, I am of the humble view that the prosecution has satisfactorily explained the delay in lodging of the F.I.R.

9. In view of the foregoing discussions and the ocular evidence so also the medical evidence, I am of the humble view that the learned trial Court has rightly come to the conclusion that the prosecution has successfully established the charge under section 376(2)(f) of the Indian Penal Code against the appellant.

The minimum punishment prescribed for the offence under section 376(2)(f) of the Indian Penal Code is ten years. In view of passage of time and period of detention of the appellant, the sentence imposed under section 376(2)(f) of the Indian Penal Code by the learned trial Court is reduced from R.I. for a period of twelve years to R.I. for a period of ten years and though the compensation amount of Rs.50,000/- (fifty thousand) has been awarded to be paid by the appellant but in view of the

poor financial condition of the appellant, the payment of compensation amount by the appellant is set aside.

However, in view of the enactment of the Odisha Victim Compensation Scheme, 2012 which was revised by Odisha Victim Compensation (Amendment) Scheme, 2018 and keeping in view the age of the victim at the time of occurrence and the nature and gravity of the offence committed and the family background of the victim, I feel it necessary to recommend the case of the victim to District Legal Services Authority, Kandhamal, Phulbani to examine the case of the victim after conducting the necessary enquiry in accordance with law for grant of compensation under the aforesaid Schemes and the compensation is to be assessed taking into account the Odisha Victim Compensation Scheme and payment is to be made immediately to the victim within a period of two months from the date of receipt a copy of this judgment.

Let a copy of the judgment be sent to the District Legal Services Authority, Kandhamal, Phulbani for compliance.

With the aforesaid modification in sentence, the JCRLA stands dismissed.

Trial Court's record with a copy of this judgment be communicated to the concerned Court forthwith for information and necessary action.

Before parting with the case, I would like to put on record my appreciation to Mr. Suryanarayan Biswal, the learned Amicus Curiae for rendering his valuable help and assistance towards arriving at the decision above mentioned. The learned Amicus Curiae shall be entitled to his professional fees which is fixed at Rs.7,500/- (rupees seven thousand five hundred only).

Orissa High Court, Cuttack
The 12th October 2022/Pravakar

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S.K. Sahoo, J.

