

IN THE HIGH COURT OF ORISSA AT CUTTACK

CRLA No.590 of 2017 : (A)

AND

CRLA No.619 of 2017 : (B)

From the judgment of conviction and order of sentence dated 8th June, 2017 passed by the learned Additional Sessions Judge-Cum-Special Judge, Sundergarh in Special G.R. Case No.1299 of 2013.

Pradeep Kishan & Another ***Appellants***
(In CRLA No.590 of 2017)

Manga Kujur & Another
(In CRLA No.619 of 2017)

-versus-

State of Orissa ***Respondent***
(In CRLA Nos.590 & 619 of 2017)

Appeared in this case by Hybrid Arrangement
(Virtual/Physical Mode):

For Appellants - Mr.A.K. Budhia
(Advocate in CRLA No.590/2017)
Mr.Biswajit Nayak
(Advocate in CRLA No.619/2017)

For Respondent - Mr.S.K.Nayak,
Addl. Government Advocate

CORAM:

MR. JUSTICE D.DASH

MR. JUSTICE SASHIKANTA MISHRA

Date of Hearing : 15.12.2022 : Date of Judgment:23.12.2022

D.Dash,J. Since in both these Appeals, the judgment of conviction and order of sentence dated 8th June, 2017 passed by the learned Additional

Sessions Judge-Cum-Special Judge, Sundergarh in Special G.R. Case No.1299 of 2013 is under challenge; those having been heard together, are being disposed of by this common judgment.

All the four number of Appellants (accused persons) of both the Appeals as at (A) & (B) have been convicted for commission of offences under section 341/323/34, section 379/34 and section 376(D) read with section 376(2)(i) of the Indian Penal Code, 1860 (for short, 'the IPC') and section 6 of Protection of Children from Sexual Offence, 2012 (in short, 'the POCSO Act') and each of them have been sentenced to pay fine of Rs.500/- (Rupees Five Hundred) with the default stipulation of simple imprisonment for a period of one month on each of the counts of the offences under section 341 and 323 IPC; rigorous imprisonment for one year for the offence under section 379 IPC and imprisonment for life with fine of Rs.50,000/- (Rupees Fifty Thousand) in default to undergo rigorous imprisonment for three years for the offence under section 376(D) IPC read with section 376(2)(i) IPC and section 6 of POCSO Act with further stipulation that the substantive sentences would run concurrently.

It be stated here that Appellant No.1, namely, Manga Kujur of Appeal as at (B), having died in the meantime, the Appeal stood abated in respect of him and, therefore, said Appeal now stands only at the instance of Appellant No.2, namely, Aitu Toppo.

It be also stated here that all these above Appellants (accused persons) stood charged for the offence 341/323/379 read with section 34 and section 376(2)(g) IPC and section 4 of POCSO Act.

2. Prosecution Case:-

On 08.06.2013 at about 11.00 am, when the victim (P.W.4), who happens to be the minor daughter of the Informant (P.W.3), sharing with other passengers, was returning home in a Tempo and on the way, the passengers from the Tempo got down and thereafter near Chhadri Chhak, two other persons stopped said Tempo. They then directed the driver of the Tempo to move towards Villager-Baniguni. The driver when refused, he was assaulted by them. In this situation, the victim (P.W.4) had to get down from the Tempo. But then those two persons forcibly took her in the said Tempo towards Dumerjore Jungle where three others person were on wait. Then those three persons, seeing the victim (P.W.4) in the Tempo, assaulted the driver and snatched away his mobile phone set. The driver, under the circumstance, managed to fled away with the Tempo.

It is alleged that the accused persons assaulted the victim (P.W.4), forcibly undressed her for taking video shoot and took away the cash that she was carrying. Thereafter, the victim (P.W.4) somehow got herself freed from their clutch and concealed her presence in the Jungle. After some time, when the accused persons went away, the victim (P.W.4) went to a pond and met some girls and returned to Chhadri Chhak wherefrom she boarded the bus and came home.

The father of the victim (P.W.3), presented a written report informing all these above at Kuanrmunda Police Out Post under Biramitrapur Police Station on 08.06.2013. The Assistant Sub-Inspector of Police (ASI), namely, T. Buda, who was then attached to the Police Out Post, receiving the same, sent it to the Inspector-in-Charge (IIC) of the Biramitrapur Police Station for registration of the case and that being

treated as FIR (Ext.2) as the narrations revealed commission of cognizable offences, the IIC registered Biramitrapur P.S. Case No.86 of 2003 and directed the Sub-Inspector of Police (P.W.19) to investigate into the same.

3. In course of investigation, the Investigating Officer (P.W.19) examined the father of the victim, visited the spot being identified by the father of the victim (P.W.3). He prepared the spot maps (Exts.18 & 19). Search for the culprits being made in the locality by P.W.19, it bore no fruit. The victim (P.W.4) in the meantime was sent for medical examination. She being examined by the Doctor (P.W.16), injury report came to be received.

Since, the victim was not in a good mental condition, she was examined on 10.6.2013. The mother of the victim and her cousin brother too have been examined in course of investigation. Materials in support of the rape being committed upon the victim (P.W.4) to be collected, on completion of the investigation, final form was submitted placing the accused persons for trial for commission of offences under section 341/323/379/ 376(2)(g) read with section 34 IPC and section 4 of POCSO Act.

It be further stated that those accused persons had been placed in Test Identification (T.I) Parade on the prayer of the S.I of Police (P.W.19) for their identification by the victim (P.W.4) and P.W.8. Besides the above accused persons, one Yakub Kissan, who was a juvenile in conflict with law, was also found to have the involvement, his case was accordingly dealt with as provided in law. The incriminating articles, which had been seized in course of investigation,

had been sent for chemical examination through the Court. To ascertain the age of the victim (P.W.4), the admission register of the Girls' High School where she was reading, had been seized under the seizure list (Ext.12). Pursuant to the disclosure statement of accused Aitu Toppo while he was in custody, another motorcycle used by accused persons had also been seized under the seizure list (Ext.16).

4. Receiving the final form, learned Sub-Divisional Judicial Magistrate, Sundergarh took cognizance of said offences and after observing all the formalities, committed the case to the Court of Sessions. That is how the trial commenced against these accused persons by framing the charge for the above mentioned offences.

5. The plea of the defence is that of complete denial and false implication.

6. The prosecution, during trial, in total has examined twenty (20) witnesses. Out of whom, as already stated, the victim is (P.W.4) and P.W.3 is her father whereas P.W.2 is the mother of the victim. P.W.8 is the maternal uncle's son of the victim, who had accompanied the deceased in her trip back home for some time up to the place where initially the incident happened. The Head Mistress of the School wherefrom the School Admission Register has been seized, has been examined as P.W.11. P.W.16 is the Doctor, who had examined P.W.4, the victim. The Investigating Officer has come to the witness box at the end as P.W.19. The Magistrate who had conducted the TI Parade has also been examined during trial as P.W.20.

The prosecution, besides leading the evidence through the above witnesses, has also proved FIR as Ext.2, statement of the victim recorded under section 164 Cr.P.C. i.e. Ext.4, the medical report of P.W.4 as Ext.3/1 and the T.I. Parade report has been admitted in evidence and marked as Ext. 27.

7. The plea of the defence is that of complete denial and false implication. However, they have not tendered any evidence during trial in support of their defence.

8. The Trial Court, upon examination of the evidence both oral and documentary, as piloted by the prosecution, has found the accused persons guilty for commission of the offence under section 341/323/379/34 read with section 376(D) and 376(2)(i) IPC and section 6 of POCSO Act and accordingly, they have been sentenced, as aforestated, which are impugned in these Appeals.

9. Learned counsels for the Appellants (accused persons) submitted that the finding of the Trial court holding the accused persons guilty for the above offences is not the outcome of just and proper appreciation of evidence. Inviting the attention of the Court to the evidence of the victim (P.W.4), they submitted that such a finding of guilt returned by the Trial Court is not at all justifiable as nothing has been stated by the victim (P.W.4) pointing at the complicity of these accused persons in any manner whatsoever. They further submitted that when the victim (P.W.4) and others have not identified these accused persons in Court in saying that they had played any role in any manner either directly or indirectly in the said incident, the finding holding these accused persons

guilty of the charges cannot sustain with the evidence as available on record, conviction for any of the offences can be recorded as against the accused persons.

10. Mr.S.K.Nayak, learned counsel for the Respondent-State submitted all in favour of the findings returned by the Trial Court. According to him, P.W.4 and others, having identified these accused persons in the T.I. Parade held in course of the investigation in presence of the Magistrate, describing their respective roles and that having been proved in the Court, the victim (P.W.4) and others, having not identified the accused persons in the trial, is of no fatal consequence so as to discard the evidence of the victim (P.W.4) and P.W.8 on that aspect of identification of the accused persons.

11. Keeping in view the submissions made, We have carefully gone through the impugned judgment passed by the Trial Court. We have also extensively travelled through the depositions of the prosecution witnesses (P.W.1 to P.W.20) and have perused the documents such as Ext.1 to Ext.27.

12. The star witness for the prosecution here is the victim (P.W.4). She has stated her age to be 18 years at the time of her examination in Court. In her evidence, she has denied to have known these accused persons, who were then standing in the dock. She has also stated to have never seen them earlier. As regards the incident on that day, she has gone to state that after the dance class was over, she was returning home with her brother (P.W.8) on a scooty and on the way, they stopped and took some water. She then states that there at the place, her brother

(P.W.8) was talking using his mobile phone when two youths appeared and snatched away his mobile phone and then misbehaved her. She has further stated that one of them dragged her into the jungle and two others guarded her brother. Inside the jungle, when that boy, was asking her as to where they had come, had also attempted to pull her wearing apparels when another boy arrived and took her to the deep jungle and there, forcibly removing her wearing apparels, sexually assaulted her. She states that besides the above three, another boy came there and he also sexually assaulted her and some time thereafter, she could manage to escape from their clutch and conceal her presence in the deep jungle whereafter, she having heard the voice of her brother (P.W.8) that those culprits have left the place, she came out and returned home. She also states that to have narrated the incident to her parents two days after the occurrence. She has, however, admitted that during the T.I. Parade held in Circle Jail, she and her brother (P.W.8) had identified all the accused persons as their assailants. Having said so, her evidence again stands that in view of the lapse of time, the facial appearances of the culprits, being no more fresh, in her memory, she cannot to recollect their faces. During cross-examination, the victim (P.W.4) has again stated that police had brought her to the jail by a vehicle and during the journey, the police had shown her some photographs and by posing her a threat, instructed her to memorize the same and accordingly, identify them in the T.I. Parade.

The father of the victim, i.e., P.W.3 has also not identified the accused persons in Court during examination in Court. His evidence on the score is that P.W.4, on her return, was found weeping and there was little bleeding on her forehead and being asked repeatedly, she told that

on the way, four to five youths have indecently assaulted her. This witness, then again has gone to say that after P.W.4 returned from T.I. Parade, she told him that police had instructed her to say before the Magistrate so that the case would be stronger.

Now, the evidence of the brother of the victim (P.W.8) being examined; it is seen that he has identified accused Mangu Kujur (since dead) and accused Bipin Topo to have approached them when he and the victim stopped on the way to drink water and he then has to state that those two accused persons manhandled P.W.4 and thereafter when she protested, they assaulted them by giving slaps and thereafter accused Mangu Kujur (since dead) dragged him to a few distance when accused Aitu Toppo appeared at the scene. He has stated that accused person then took P.W.4 to the jungle when some of them guarded him. When this witness to some extent is identifying the accused persons to have played certain role in the said incident at the place where they had got down from the scooty for drinking water, the victim (P.W.4), who is the most important witness for the prosecution, is not identifying any of these accused persons as to have played any role in the entire incident either in respect of P.W.8 or with her. Thus, We are unable to place any reliance upon the evidence of P.W.8.

Above being the evidence of P.Ws.4 & 8; the evidence of the Magistrate, who held the T.I. Parade cannot stand as the substitute. In such state of affairs in the evidence, on the face of the settled position of law that the evidence as to the prior identification of the accused in course of investigation during T.I. Parade is not the substantive evidence and that only stand to corroborate the evidence as to identification when so tendered in the trial. the identification of these accused persons by the

victim and P.W.8 in course of the investigation in the T.I. Parade held inside the jail in presence of the learned Magistrate (P.W.20) who has so deposed in Court is of no aid to the prosecution case and cannot be taken to conclude that these accused persons had played any such role as had been stated by P.W.4 and P.W.8 during the said T.I. Parade. In that view of the matter, We find that the prosecution has failed to establish the complicity of these accused persons in the entire incident.

For all the aforesaid discussion and reasons, We find that the impugned judgment of conviction, in concluding that the prosecution has proved the charges against these accused persons beyond reasonable doubt and holding them to be the perpetrators of the crime cannot sustain in the eye of law.

13. In the result the Appeals are allowed. The judgment of conviction and order of sentence dated 8th June, 2017 passed by the learned Additional Sessions Judge-Cum-Special Judge, Sundergarh in Special G.R. Case No.1299 of 2013 are hereby set aside.

The Appellants (Accused persons), namely, Pradeep Kishan, Bipin Toppo @ Chepa and Aitu Toppo, who are in jail custody be set at liberty forthwith, if their detention is not required in connection with any other case.

(D. Dash)
Judge.

Sashikanta Mishra I agree.

(Sashikanta Mishra)
Judge.

Basu