

IN THE HIGH COURT OF ORISSA AT CUTTACK
JCRLA No. 05 of 2017

From judgment and order dated 17.11.2016 passed by the Sessions Judge-cum-Special Judge, Nayagarh in T.R. No. 12 of 2015.

Bapi@Jayakrushna Pradhan Appellant

-Versus-

State of Odisha **Respondent**

Advocate(s) appeared in this case:-

For Appellant : M/s. S. Dwibedi, R.K. Mohanta,
N. Hota & D.J. Sahoo, Advocates

For Respondent : Mr. B.P. Tripathy,
Addl. Standing Counsel

CORAM:

JUSTICE SASHIKANTA MISHRA

J U D G M E N T
17th November, 2022

SASHIKANTA MISHRA, J.

The appellant questions the correctness of the judgment passed by learned Sessions Judge-cum-Special Judge, Nayagarh on 17.11.2016 whereby he was convicted for the offence under Sections 363 and 376 of IPC and Section 6 of the POCSO Act and further was sentenced to undergo R.I. for three years and to pay fine

of Rs.1,000/-, in default, to undergo R.I. for period of fifteen days for commission of the offence under Section 363 of IPC; R.I. for ten years and to pay fine of Rs.10,000/-, in default to undergo R.I. for one month for the offence under Section 6 of the POCSO Act. No separate sentence was passed for the offence under Section 376 of IPC in view of the sentence passed under Section 6 of the POCSO Act. It was further directed that the sentences as above shall run concurrently.

2. The prosecution case, in brief, is as follows:

The accused appellant used to reside in his maternal uncle's house at village Champatipur who had a sugarcane crushing unit. The victim used to visit the said crushing unit with her father at times and met the accused there. One day, when the victim had been to attend call of nature, the accused caught hold of her hand and when the victim raised hulla, he left her. On the next day, around 12 O'clock the victim had been to the crusher unit to crush sugarcane. The accused proposed to marry her and elope with her. The victim did not agree and returned home. On the next day, she accompanied her

elder sister with the intention of purchasing medicines at Itamati. The elder sister of the victim was a student of Itamati College who asked her to purchase the medicines and return home. Later, when the elder sister returned home, she did not find the victim for which she searched for her in the Itamati market by inquiring from different shopkeepers. Since the victim was unable to be traced out, the mother of the victim went to the police station and lodged a report. Four days later, the victim's mother came to know from the maternal uncle of the accused that he had taken her to Bhubaneswar, whereupon the matter was informed to police. On the next day, the parents of the victim went to Bhubaneswar along with police, where they rescued the victim and the accused was arrested. The report before the police is said to have been lodged on 29.12.2014 leading to registration of Itamati P.S. Case No.117 of 2014 under Section 363 of IPC. Upon completion of investigation, charge sheet was submitted against the accused under Sections 363/376/323/506 of IPC read with Section 6 of the POCSO Act.

3. The defence plea, apart from denial was, the victim was in love with the accused and that she had voluntarily accompanied him to Bhubaneswar where she stayed for two weeks and that a false case of kidnapping was subsequently instituted.

4. To prove its case, prosecution examined eight witnesses and exhibited six documents. Defence did not lead any evidence, either oral or documentary.

5. Learned court below considered the oral evidence on record in detail. After analyzing the evidence of the victim (P.W.3), her elder sister (P.W.1) and her mother (P.W.2), learned court below found that the victim had been to Bhubaneswar with the accused voluntarily by boarding a bus and had sexual intercourse with the accused with her consent. Such finding was rendered considering the fact that had it been a case of kidnapping, the victim would have protested or shouted for help while travelling in a bus full of passengers. Therefore, from the conduct of the victim, learned court below held that she had voluntarily moved with the accused and had sexual intercourse with him with her consent. Learned court

below held that the victim being born on 19.02.2002 was a minor at the time of occurrence being 13 years of age. Since the victim was a minor, her consent was immaterial being covered under the Sixth Explanation to Section 375 of IPC. On the above findings, learned court below convicted the accused and sentenced him as already stated hereinbefore.

6. Heard Mr. Suryakanta Dwibedi, learned counsel for the appellant and Mr. Priyabrata Tripathy, learned Additional Standing Counsel for the State.

7. Assailing the impugned judgment, Mr. Dwibedi would argue that firstly, the entire case of the prosecution is doubtful in view of the fact that the FIR that was acted upon was lodged subsequent to the FIR said to have been originally lodged by the informant (P.W.2) on the date of occurrence. This, according to Mr. Dwibedi, suggests that the FIR was manipulated and utilized only to build up a case against the appellant.

It is further argued by Mr. Dwibedi that the age of the victim was not conclusively proved inasmuch as neither any valid certificate showing her date of birth was

produced nor any effort made to have an ossification test done. In the absence of clear proof regarding age of the victim, the finding of the court below that she was a minor becomes open to challenge.

Mr. Dwibedi further argues that the conduct of the victim has been lost sight of by the court below to the extent that she refused to undergo any medical examination. This, by itself creates a doubt in the prosecution story. It is further argued by Mr. Dwibedi that in the statement of the victim recorded under Section 164 of Cr.PC., she had not whispered even a word as regards the sexual offence and therefore, her testimony before the court has to be treated as an improvement from her earlier version with the intent of building up the case against the accused.

8. Per contra, Mr. P. Tripathy argues that as per settled position of law, the sole testimony of the prosecutrix is enough to bring home the guilt against the accused. Referring to the evidence of the victim Mr. Tripathy contends that she has stated in clear terms as to how she was sexually abused by the accused on multiple

occasions. As regards the so called doubt regarding her date of birth, Mr. Tripathy submits that the school admission register being valid proof of age of the student cannot simply be discarded, more so in the absence of any justified reason to doubt its authenticity. It is further argued by Mr. Tripathy that refusal for medical examination does not necessarily falsify the victim's version and in any case the alleged offence having been committed over a period of two months, the medical examination, if any, may not have revealed any positive sign of the same.

Regarding the contradiction in the version of the victim vis-à-vis her statement under Section 164 of Cr.P.C., it is submitted by Mr. Tripathy that the same does not have any relevance as what the victim deposes in Court is only relevant and admissible.

9. It is the fundamental principle of criminal jurisprudence that prosecution case against the accused must be established beyond reasonable doubt. It is well settled that minor discrepancies, variations, inconsistencies, embellishments in the version of the

witnesses need not always be treated as fatal to the prosecution case, so long as the broader probabilities point at guilt of the accused. But when the very foundation of the prosecution case is found to be shaky, it would be a different story altogether.

10. Viewed in light of the aforementioned legal principles, the fact of the case reveals that the accused allegedly kidnapped the victim, who was a minor girl at the relevant time and took her to Bhubaneswar where he sexually assaulted her continuously till she was rescued by the police. This, more or less is the case of the prosecution. Much has been argued regarding the so called discrepancy in evidence relating to lodging of FIR. The FIR marked Exhibit-1 shows that the same was lodged by the mother of the victim (P.W.2) on 29.12.2014 and was received at the police station at 9.00 A.M.. The informant (P.W.2) however, testified that she had lodged FIR about missing of the victim on the same night (22.12.2014) around 9.00 P.M.. This version of P.W.2 finds support from her elder daughter (P.W.1) who also stated in cross-examination that she and her mother

proceeded to police station on the same day (22.12.2014) and reported the matter in writing around 9.00 P.M.. P.W.4 testified that he lodged the FIR at Itamati P.S. at 9.30 P.M. on the same day (22.12.2014) and also stated that the FIR was signed by the wife. Significantly, the I.O. (P.W.7) stated that on 29.12.2014 at 9.00 A.M., he registered P.S. Case No.117 of 2014 on the written report of the complainant. In cross-examination, he denied that such FIR was not lodged on 29.12.2014 and that he had antedated (sic. post-dated) the FIR. He also admitted that on the date of occurrence (22.12.2014), the mother of the victim had lodged a missing report.

It is evident that neither the informant nor P.W.1 or P.W.4 whispered a word about lodging the FIR on 29.12.2014. This raises a question as to how the I.O. could register an FIR on 29.12.20214 (Ext.1). This is a serious gap which has gone unexplained but has a material bearing on the case inasmuch as it strikes at the very basis of the prosecution case. To amplify, if a missing report was submitted by the informant on the date of occurrence as stated by the I.O. (P.W.7) and not a formal

FIR, then there is no reason why she herself would not say so before the Court. Moreover, if she had lodged another FIR on 29.12.2014, which was registered and acted upon then she could have also said so in her evidence. On the contrary, P.W.2 has categorically stated about lodging of only one FIR that too on the date of occurrence at 9.00 P.M. which is fully supported by the version of P.W.1 and P.W.4. The above creates reasonable doubt in the mind as regards the authenticity and sanctity of the FIR marked Exhibit-1.

11. The prosecution case is, the victim was rescued from Bhubaneswar. All the witnesses have consistently said so. They have also stated that she was kidnapped by the accused. P.W.1 stated that they came to know about the kidnapping two days after the occurrence. P.W.2 states that it was four days after but most surprisingly P.W.4 gives a completely different version by stating that one and half month after registration of the case, he was called to the police station and informed that his daughter had been detected at Bhubaneswar. He also said that he and his wife accompanied the police to Bhubaneswar and

the victim was rescued. The I.O., on the other hand, stated that he conducted raid in the house of Laxmi Sahu on 12.03.2015 and rescued the victim who had been detained there. Thus, according to the I.O., such rescue was nearly three and half months after the occurrence. The victim herself stated that she informed her elder sister (P.W.1) over phone one and half months after the occurrence and was rescued on the next morning. These inconsistent statements create further doubt regarding the veracity of the prosecution case.

12. The victim categorically deposed that she managed to intimate her sister through a mobile phone and told her about her address and location. Firstly, she has herself not stated anything about her address and location. That apart, her sister (P.W.1) has not whispered a word about being informed by the victim over phone regarding her captivities. P.W.2 also does not say anything in this regard nor does P.W.4. This is yet another discrepancy in the evidence that has gone and explained.

13. Another important aspect noticed is, the I.O. claims to have examined one Laxmi Sahu in whose house

the accused had detained the victim and five of her neighbours. Surprisingly, none of them were examined during trial as witnesses. Since the entire case of the prosecution rests on the allegation of the victim being kidnapped and kept at Bhubaneswar in the house of Laxmi Sahu till she was rescued, it was incumbent upon it to have examined the aforementioned witnesses to fortify such allegation.

14. This Court is conscious of the proposition of law that ordinarily in a case of rape the victim's version is sufficient to bring home the charge. It is however, equally well settled that the sole testimony of the victim can be accepted provided it is natural, trustworthy and worth being relied upon. Reference may be had to the decisions of the Apex Court in the case of **Raja and others vs. State of Karnataka**, reported in 2017 1 SCC (Cr1.) 158, **State of Hemachal Pradesh vs. Gian Chand**, reported in (2001) 6 SCC 71 and **State of Rajasthan vs. N.K.**, reported in (2000) 5 SCC 30. The victim's version may now be considered in the above background.

A reading of the evidence of the victim reveals that most of the facts stated by her before the Court were improvement upon her earlier version before the police as also in her statement recorded under Section 164 of Cr. P.C. Her statements that when the accused made her sit inside the auto she wanted to raise hulla but he pressed her mouth to prevent her from doing so and that while keeping her in the house where she was first taken the accused forcibly had sex with her, and the accused while keeping her at different houses in Bhubaneswar by changing houses after four to five days was regularly having sex with her and was assaulting her on her protest have all been proven to be improvements over her earlier version as admitted by the I.O. himself in his cross-examination. On a reading of the version of the victim as a whole, it appears she has hidden more than she has revealed as regard the alleged occurrence, which creates serious doubt as regards her credibility. In this context, the refusal of the victim to be medically by examined after her rescue becomes highly significant and raises a reasonable doubt in the mind of the Court.

15. Thus, on a conspectus of the analysis of the evidence made hereinbefore, this Court is of the considered view that the victim's version does not inspire confidence so as to be believed and accepted. Moreover, the very foundation of the case rests on slippery ground. The trial court has disbelieved the allegation of kidnapping and forcible rape to hold that the entire affair was consensual in nature, but the victim being a minor, her consent is inconsequential. On such findings the trial court convicted the accused. However, in view of what has been discussed hereinbefore in detail, this Court finds the very basis of the case to be doubtful and so also the evidence led by prosecution in support of its case which, to say the least lacks credibility.

16. For the foregoing reasons therefore, this Court holds that the impugned judgment of conviction and sentence cannot be sustained in the eye of law. The appeal is therefore, allowed. The impugned judgment of conviction and sentence are hereby set aside. The appellant stands acquitted from the charges and

discharged from his bail bond. LCR be sent back forthwith.

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Sashikanta Mishra,
Judge

*Orissa High Court, Cuttack,
The 17th November, 2022/ B.C. Tudu*

