

# ORISSA HIGH COURT CUTTACK

## GOVERNMENT APPEAL NO.40 OF 1989

From an order dated 08.05.1989 passed by Sri K.C. Mahapatra, Sessions Judge, Sundargarh in Sessions Trial No.143 of 1988.

State  
Appellant

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.....

Versus

Mina Mahanandia

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Respondent

For appellant : Addl. Govt. Advocate

For respondent : Mr. Prasanta Kumar Mishra

**PRESENT :**

**THE HONOURABLE SHRI JUSTICE PRADIP MOHANTY**

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Date of hearing and judgment : 02.11.2006  
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**PRADIP MOHANTY, J.** This appeal is directed against the judgment and order dated 08.05.1989 passed by the learned Sessions Judge, Sundargarh in Sessions Trial No.143 of 1988 acquitting the respondent of the charge under Sections 457 and 376 IPC.

2. The case of the prosecution is that on 08.08.1988 mid night while the informant, in absence of her husband, was sleeping with her son aged about 17 years and unmarried daughter Sahebani aged about 14 years in a room of her house after closing the door from inside by putting a 'khidiki' (a cross-bar), the accused-respondent entered inside the room and committed sexual intercourse on her by raising her wearing clothes. When she raised hullah by catching hold of the accused-respondent, her son(P.W.6) got up, raised hullah and caught hold of the accused-respondent, who was trying to escape. Hearing such shout,

younger brother of the informant's husband (P.W.7) came. Thereafter, in presence of the witnesses accused-respondent was given to the custody of the Grama Rakhi, but later on he fled away from his custody. On 14.08.1988 the informant lodged FIR before the O.I.C., Lephripara P.S. whereafter law was set into motion. Ultimately, after completion of investigation charge sheet was laid against the accused-respondent under Sections 457 and 376 IPC.

3. The plea of the accused-respondent was complete denial of the allegation. His specific case was that he had not entered inside the house of the informant and since there was some land dispute between him and the witnesses, this false case has been instituted against him.

4. The prosecution, in order to prove its case, examined as many as 11 witnesses including the victim and the doctor and relied on eleven exhibits. Defence examined one witness in support of its plea. The learned Sessions Judge, Sundargarh, who tried the case, by his judgment dated 08.05.1989, acquitted the respondent of the above charges with the finding that the sexual intercourse on the victim without her consent is not believable.

5. Mr. Khuntia, learned Addl. Government Advocate, submits that there are ample materials against the accused-respondent to convict him under Section 376, IPC. According to him, prosecutrix's evidence alone is sufficient to convict the accused-respondent of such offence. He further submitted that the victim herself caught hold of the accused-respondent when he tried to escape from the spot. P.W.6, son of the victim, and P.W.7, uncle of her children, corroborated her evidence. He further submitted that P.W.5, the doctor, examined the victim six days after the occurrence, and, therefore, in absence of injuries on the victim lady, the trial court should not have drawn adverse inference against the prosecution.

6. Perused the impugned judgment and deposition of the witnesses as well as the exhibits. P.W.1 is the victim, who is a married lady aged about 35 years with grown up children. She has stated in her evidence that she was sleeping in the room with her son and daughter on three different cots and her husband was absent on that day. When she

got up in the night, she found the accused sleeping over her and committing ATACHYAR on her by raising her saya and saree and catching hold of her breast. There was full penetration inside her private part. Thereafter, there was ejaculation. When the accused got up after the sexual intercourse and was trying to escape, she caught hold of him. It transpires from the evidence of P.W.1 that she got up at the first instance of attempt to penetrate, which generally a lady would do if she is not a consenting party. But in that case, the lady could not have slept there till the accused completed the act. From the scanning of the evidence of P.W.1, it transpires that P.W.1 enjoyed as a passive partner and only after full satisfaction of the sexual lust, when the accused got up and was trying to escape from the room, she caught hold of him. Thus, from the statement of P.W.1, it can be inferred that there was consent on the part of the victim lady for sexual intercourse by the accused-respondent. It cannot be said that intercourse was committed without her consent. Once it is held that she was a consenting party to such act, evidence of other post-occurrence witnesses or other witnesses is of no avail to the prosecution.

7. Under ordinary circumstances, it is not possible for a single man to have sexual intercourse with a healthy woman in full possession of her senses against her will. The victim is expected to offer resistance, which would normally cause certain injuries on her body. According to the prosecution, two grown up children were sleeping inside the selfsame room where the victim had slept. Admittedly, the victim is a married lady. There were no injuries on her private part. There was no resistance by the victim at the time of raising of her saree and saya by the accused. There was also no resistance at the time of initial penetration and at the time of cohabitation in any manner whatsoever. It was only after completion of sexual intercourse, when the accused tried to escape, that she caught hold of him and her son raised hullah. It is also not the case of the prosecution that due to any threat given by the accused, the victim could not show any resistance. P.W.6, son of the prosecutrix aged about 17 years has stated in his evidence that when he got up he saw his mother catching hold of a man. Then he caught hold of the accused and noticed that the door was open. He specifically stated

that prior to their going to sleep, the door was closed by putting 'khidiki'. However, nothing has been brought on record as to how the door was opened. As discussed earlier, the evidence on record would lead to the irresistible conclusion that the victim lady was a consenting party to the sexual intercourse.

8. For the foregoing reasons, this Court is of the opinion that the trial court has rightly passed an order of acquittal and there is no scope to interfere with the same. The Government Appeal is devoid of any merit and is dismissed as such.

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**PRADIP MOHANTY, J.**

Orissa High Court, Cuttack  
November 2, 2006 / *Samal*