

**ORISSA HIGH COURT,
CUTTACK**

CRIMINAL APPEAL NO. 156 OF 1989

From the judgment dated 25.03.1989 passed by Sri R.C. Pattnaik, Addl. Sessions Judge, Parlakhemundi in S.T. Case No.2 of 1989/S.T. Case No.135 of 1988 GDC.

Limala Kamudu Appellant

Versus

State of Orissa Respondent

For appellant : M/s J. Patnaik & H.M. Dhal

For respondent : Mr. P.K. Pattnaik.
Addl. Government Advocate.

PRESENT :

THE HONOURABLE SHRI JUSTICE PRADIP MOHANTY

Date of hearing & judgment : 22.04.2009

PRADIP MOHANTY, J. This criminal appeal is directed against the judgment and order dated 25.03.1989 passed by the learned Addl. Sessions Judge, Parlakhemundi in S.T. Case No.2 of 1989/S.T. Case No.135 of 1988 GDC convicting the appellant under Section 376, IPC and sentencing him to undergo rigorous imprisonment for six years.

2. Case of the prosecution is that on the night of 23.06.1988, Misala Parama @ Parbati (P.W.1) was sleeping on the outer verandah of the house of P.W.2. At about 12.00 P.M., accused came to that place, removed

her clothings and forcibly cohabited with her. P.W.1 raised hullah, hearing which P.W.2 woke up and saw the accused fleeing away from the spot. Next morning, P.W.1 went to the house of the Sarpanch and told him about the incident. The Sarpanch called the accused, but he did not respond. The Sarpanch advised P.W.1 to report the matter to the police. Thereafter, P.W.1 lodged FIR before Kasinagar P.S., on receipt of which the case was registered and investigation commenced. On completion of investigation, final form was laid against the appellant for commission of offence under Section 376, IPC.

3. The plea of the appellant is complete denial of the allegation. His specific plea is that due to previous enmity he has been falsely implicated in the case.

4. In order to prove its case, prosecution examined as many as ten witnesses including the two doctors and the I.O. and exhibited 11 documents. Defence examined none.

5. The learned Addl. Sessions Judge, who tried the case, on consideration of the evidence and other materials on record, found the appellant guilty for commission of offence under Section 376, IPC, convicted him thereunder and sentenced him to undergo rigorous imprisonment for six years.

6. Learned counsel for the appellant assails the impugned judgment on the following grounds:

- (1) P.W.1 is not a believable witness in view of her conduct and admission in the evidence that at the time of penetration she did not resist.
- (2) P.W.6, who examined the victim, specifically stated that there was no injury on the private part of the victim. P.W.7, who examined the appellant, also stated that there was no external injury on the body of the appellant. Therefore,

there was no reason for the trial to believe the evidence of P.W.1 and convict the appellant under Section 376, IPC.

7. Mr. Pattnaik, learned Addl. Government Advocate supports the impugned judgment and vehemently contends that there are ample materials on record to show that the appellant is the author of the crime. Evidence of P.W.1 is clear and cogent with regard to rape. It is the settled principle of law that in a case of rape, evidence of the prosecutrix alone even without corroboration from medical evidence is sufficient to sustain conviction.

8. Perused the LCR. P.W.1 is the victim. She stated in her evidence that she woke up when the accused touched her body. The accused penetrated his penis into her vagina. When she raised hullah, the accused fled away. She and her Nananda (P.W.2) abused the accused. Thereafter, she narrated the incident to her father and brother. On the next day morning, she went to the house of the Sarpanch and told him about the incident. In her cross-examination, she admitted that she woke up when the accused penetrated his penis into her vagina. The accused did not remove her blouse. By the time accused penetrated his penis, her legs were straight and her face was upwards. There was space of about 9 to 12 inches between both the legs at the end. In para 6 she also admits that accused penetrated the entire penis into her vagina and thereafter she woke up. Accused had put his hands on her shoulders and his face was just near her face. Both the legs of the accused were over her legs and his entire body was over her. P.W.2, is the sister-in-law of the victim. She stated in her evidence that P.W.1 was sleeping on the verandah of their house along with her. P.W.1 raised hullah when accused troubled her and thereafter accused fled away. She woke up hearing the hullah made by P.W.1 and saw the accused going away. Thereafter, she and P.W.1 abused the accused. In her cross-examination she admitted that when she woke up, she found the

accused lying on P.W.1. At the same time, she admitted not to have seen the accused penetrating his penis into the vagina of P.W.1. and stated to have heard this fact from P.W.1. P.Ws.3, 4 and 5 are seizure witnesses. P.W.6 is the doctor who examined the victim and opined that no spermatozoa was found in the vaginal fluid and no mark of injury was found on the penetration of the penis to the vagina. P.W.7 is another doctor who examined the accused. He stated that there was no external injury or scratch mark on the body, penis, scrotum or thighs of the accused. He also stated that he did not find any matting of pubic hair with sperm fluid. P.W.8 is the brother of the victim. He stated that when he heard hullah of his sister, he came to that place and his sister told him about the incident of rape. When he asked the accused as to why he did like that, the accused threatened to assault him. On the next day, they informed the matter to the Sarpanch. P.W.9 is the then A.S.I. of police attached to Kasinagar P.S. He had registered the case in absence of the O.I.C. P.W.10 is the I.O. who investigated the matter, examined the witnesses and ultimately filed the charge-sheet.

9. On scrutiny of evidence, it appears that P.W.1, the victim, has changed her version from stage to stage. In the FIR she had not stated about penetration whereas in her deposition before court she stated about the same. In the FIR she stated that she woke up when the accused touched her whereas in her deposition she stated that she woke up when accused penetrated into her vagina. She also admitted that the accused did not remove her blouse. The posture of the victim, as described in her cross-examination, coupled with the medical evidence clearly reveals that it is a clear case of sexual cohabitation with her consent. P.W.2 does not whisper a single line about raising of any hullah at the time of rape. She in her cross-examination admitted that when she woke up, she found the accused lying on P.W.1. At the same time, she admitted that she had not seen the accused penetrating his penis into the vagina of P.W.1. P.W.7, the doctor, who examined the accused, did not find any external injury or scratch mark

on the body, penis, scrotum or thighs of the accused. From the above evidence, it is crystal clear that P.W.1 is not a reliable witness. Once the evidence of P.W.1 is discarded, there is nothing on record to convict the appellant for having committed an offence under section 376, IPC.

10. For the reasons indicated above, the appeal is allowed and the impugned judgment and order of conviction passed by the learned Addl. Sessions Judge is set aside.

It is submitted by the learned counsel for the appellant that in view of recall of the bail order on 28.03.2006, the appellant was arrested and is now in jail custody. If that is so, he be set at liberty forthwith, unless his detention is required in any other case.

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PRADIP MOHANTY, J.

Orissa High Court, Cuttack
April 22, 2009/ **G.D. Samal**