

MRS. ARUNA SURESH, J.

CRLA. NOS.311, 269 OF 2007 (Decided on 25.11.2010)

LOKANATH SUBUDHI & ANR.

..... Appellants.

.Vrs.

STATE OF ORISSA

..... Respondent.

PENAL CODE, 1860 (ACT NO.45 OF 1860) – SECS. 366 & 376.

For Appellant - M/s. D.P.Dhal & B.s.Mohapatra
For Respondent - Miss. Samapika Mishra
Addl. Standing Counsel

MRS. ARUNA SURESH, J. Impugned in this appeal is the judgment of conviction and order of sentence dated 1st May, 2007 of the Additional Sessions Judge, Bhubaneswar whereby appellants were convicted for offences under Section 376(2) (g) I.P.C. and 366 I.P.C. and sentenced to undergo rigorous imprisonment for 10 years and fine of Rs.5,000/- rigorous imprisonment for one year and fine of Rs.2500/- each respectively. Both the sentences were ordered to run concurrently and benefit under Section 428 Cr.P.C. was also given to the appellants.

2. In short, the prosecution story is that during the intervening night of 30/31.5.1997, the prosecutrix came out of the house at about 1 A.M. for urination. The accused persons gagged her mouth and forcibly lifted her. They took her to village Benapanjari where she was kept in a house and was allegedly raped by the appellants. From there, she was taken to a lodge at Balugaon where she was kept for one and a half month and was gang raped by both the appellants 4-5 times. Informant Gobardhan Barik woke up at night and on seeing the almirah and the backdoor of the house open, he searched the almirah and found Rs.10,000/- in cash and other jewellery missing from the almirah. He accordingly lodged a report in the concerned police station.

3. After about one and half months of the incident, prosecutrix's paternal grandfather lodged a complaint at Jatni Police Station resulting in to registration of F.I.R. No.115 (2)/ 1987 under Section 366/109 I.P.C. The prosecutrix recovered on 2.8.1997 and was got medically examined. After completion of the investigation, charge-sheet was filed in the Court.

4. Mr. D.P.Dhal, learned counsel for the appellants has submitted that the trial court did not properly appreciate the statement of the witnesses examined by the prosecution in support of its case. He has argued that from the statement of the prosecutrix and admissions made by her, it is obvious that she was a consenting party and run away from the house taking cash and jewellery with the appellants and she maintained physical relationship with appellant Kabu @ Basanta @ Lokanath Subudhi of her own free will and consent, as she was in love with him for few years since before the alleged incident. He further submitted that prosecutrix knew that Kabu was married to another woman for about two years before the date of incident and knowing it well that she would not be able to marry him, she chose to run away with him from her house.

5. As regards appellant Lingaraj Baral, it is argued that he was acquainted with the family of the prosecutrix and was on visiting terms with them. It is pointed out by him that there is no specific allegation of rape against appellant Lingaraj Baral. He has also referred to the medical examination report of the prosecutrix to emphasize that the prosecutrix was not raped by any of the appellants. He has prayed that under the circumstances of the case, the impugned judgment and order of sentence of the Additional Sessions Judge be set aside.

6. Miss Samapika Mishra, learned Addl. Standing Counsel appearing on behalf of the State has submitted that since prosecutrix was examined after about two months of the alleged incident, the doctor could not give any clear report, if the prosecutrix was ravished by the appellants. She further submitted that prosecutrix, as P.W.5 has clearly deposed that she was lifted by the appellants when she went out of her house at mid-night for urination and was taken to different places, kept in a lodge and was raped 3 to 4 times by the appellants. She has submitted that the trial Court rightly convicted the appellants for the offences under Section 366/376 2(g) IPC.

7. As per the ossification report, age of the prosecutrix was found to be between 17 to 19 years. Given the benefit of marginal error of 2 years age of the prosecutrix can be fairly assessed as 19 years at the time of the incident. She was, therefore, a major and was capable of giving her consent to the appellants for her physical relationship with them.

8. Prosecutrix had left her home during intervening night of 30/31.5.1997 when her parents and other family members were asleep. Before leaving the house she removed Rs.10,000/- in cash and gold ornaments weighing about two and half Bharris and rupa ornaments weighing 10 Bharris. P.W.1 & P.W.2 are the parents of the prosecutrix. They have in categorical terms deposed that when Gopabandhu Barik, (P.W.1) got up at night for urination, he found the doors of the almirah and the doors of the house open. On search, both the witnesses found ornaments and cash of Rs.10,000/- missing from the almirah. It is pertinent that P.W.5, the prosecutrix has admitted that she had paid Rs.10,000/- in cash and a pair of gold rings to appellant Loknath Subudhi @ Kabu to meet the expenses. It goes unexplained on the record as to why prosecutrix removed gold ornaments and cash from the almirah if she had left the house for urination. This clearly indicates that she left her house with cash and ornaments with a view to elope with Kabu. Admittedly, she was in love with Kabu for about 7.8 years before the date of incident. It has come in evidence that Labu had got married. Knowing it well that Kabu could not marry her being a married man, prosecutrix chose to run away with him with cash and Jewellery. As per the statement of the prosecutrix herself, she was taken to a house at village Benapanjari where both the appellants had sexual relationship with her. Thereafter, she was taken to another house at Baghamari and on the following day, she was taken to Balugaon by bus where she was kept in a lodge for about 1 & ½ months. She has further deposed that from Balugaon, she was taken to village Nuagaon where she was kept in a room.

9. Admittedly, as per the cross-examination, she did not wake up any member of the family while going for urination. She did not struggle to release herself from the clutches of the appellants when they lifted her and took her to village Benapanjari which was at the distance of about 4 to 5 kms from her village. She walked on foot with the appellants for about half kilometer and, thereafter, she hired a auto-rickshaw. As per her cross-

examination, she was not man-handled or misbehaved by the appellants in any manner. She did not raise any hulla nor resisted or complained to any one while traveling in the auto-rickshaw for her rescue. She also did not make any complaint to the driver of the auto-rickshaw that she was being forcibly taken away by the appellants. It is not in dispute that many vehicles were plying on the road at the time when she was traveling in the auto-rickshaw. There were shops and cabins also on the way. She did find some trucks parked on the road and drivers eating in the Dhaba. However, she did not take any steps to attract the attention of the truck drivers for her rescue by raising shouts or alarm for help.

10. It is pertinent that during her stay at the lodge for one and half months, may be more, she did not complain to any of the persons who stayed in the lodge regarding the conduct of the appellants. She washed out her blood-stained clothes and did not make any effort to run away from Gajendra lodge or free herself from the clutches of the appellants. She walked to village Nuagaon in the accompany of the appellants on foot and she came across many people on the way but she did not make any complaint about her confinement by the appellants to anyone. She did not make any efforts to run away through she had the opportunity to escape from the company of the appellants.

11. Thus, it is clear that since prosecutrix was in love with the appellant, Kabu for about 7 years and Kabu had got married about 2 years of the incident, they decided to run away from the house. Conduct of the prosecutrix in leaving her house with ornaments and cash, living with the appellants for about two months before her recovery, having sexual relationship without any resistance, her staying with the appellants without making any effort to run away or seek assistance of the people, whom she saw while driving from place to place or at the lodge for her rescue, clearly indicate that prosecutrix was a consenting party when she maintained physical relationship with the appellants. She was neither kidnapped nor was forcibly taken away by the appellants. Rather she of her own free will left her parents house with cash and jewellery to join the company of the appellants.

12. The trial Court, in my view did not properly appreciate the statement of the prosecutrix, which in clear terms spelt out the consent of the prosecutrix in the entire episode.

13. The other independent witnesses of the prosecution P.W.3, Jayanti Pradhan, P.W.4, Anusuya Barik, P.W.7 Gagan Bihari Behera, P.W.8, Litu Badajena, P.W.9, Suryakanti Biswal have turned hostile and they have not supported the prosecution case. P.W.6 Tunibala Barik did not support the prosecution in her statement in chief, but when cross-examined by the public prosecutor for the State, she stated that prosecutrix was recovered from Village Balugaon in her presence. Regarding the factum of alleged rape by the appellants on the prosecutrix, her statement is based on what the prosecutrix had told her. In other words, what she has deposed in her cross-examination is based on hearsay. Her testimony becomes doubtful especially when none of the other independent witnesses have supported her. As discussed about the prosecutrix's own statement, does not fully support the prosecution case.

14. Dr. Prabhas Chandra, P.W.10 had examined the prosecutrix. On her examination, he did not find any fresh injury marked over the margin of hymen and hymen was found absent. He did not find any evidence of sexual intercourse. He did not find any evidence of spermatozoa living or dead in the vaginal swab of the prosecutrix. Hence, his testimony is also of no help to the case of the prosecution.

15. In view of my discussion as above, it is concluded that prosecution has failed to prove that prosecutrix was kidnapped and gang raped by the appellants. The prosecution has failed to bring home the guilt of the appellants beyond shadow of any reasonable doubt. Hence, the judgment and sentence dated 1.5.2007 of the Additional Sessions Judge, Bhubenswar is hereby set aside.

The appellants are hereby acquitted of the offences under Section 366/376 (2) (g) of the I.P.C. Their Bail-bond and Surety Bond are of hereby discharged. They be released forthwith, if not wanted in any other case.

Attested copy of this order be sent to the Superintendent Jail through special messenger immediately for compliance. Trial Court record be returned back.

Appeal allowed.