

**ORISSA HIGH COURT
CUTTACK**

CRLA No.228 of 2009

From the dated 7.4.2009 passed by the learned Ad hoc Additional Sessions Judge, Fast Track Court Padampur in Criminal Trial No.195/53 of 2008 .

Rajendra Patel

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Appellant

-Versus-

State of Orissa

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Respondent

For Appellant : Mr. Prasanta Kumar Das

For Respondent : Standing Counsel

Date of Judgment: 27.02.2013

P R E S E N T:

THE HONOURABLE KUMARI JUSTICE SANJU PANDA

S. Panda, J. The appellant has filed this criminal appeal challenging the order of conviction and sentence dated 7.4.2009 passed by the learned Ad hoc Additional Sessions Judge, Fast Track Court Padampur in Criminal Trial No.195/53 of 2008 convicting him for commission of offence under Sections 366/376 IPC and sentencing him to undergo R.I for five years and to pay a fine of Rs.5000/- and in default to undergo simple imprisonment for six months for commission of offence under Section 366 IPC and to undergo R.I for ten years and to pay a fine of Rs.5000/- and in default to undergo simple imprisonment for six months for commission of offence under Section 376 IPC. The trial court directed that the sentences shall be run concurrently and further directed that in the event of fine amount is realized, the same shall be given to the victim on proper identification.

2. The facts narrated briefly are as follows; on 20.6.2008 the informant, who is the father of the victim, lodged an FIR before the Melchhamunda Police Station alleging that on the pretext of imparting nourishment to the elder mother of the accused, the victim girl had gone with the accused to his house. The accused kept the victim at his house for some days and raped her. The father of the victim on getting information that the victim was at the house of the accused, informed the police. The

police rescued her, examined the witnesses and recorded their statements. Police sent the victim and the accused for medical examination. Police seized the school admission register to ascertain the age of the victim and gave the same to the zima of the school teacher. The investigating agency submitted the charge sheet before the learned J.M.F.C., Sohela for commission of offence under Section 366/376 IPC. The learned Magistrate after taking cognizance committed the matter to the Court of Session.

3. The plea of the accused is complete denial and false implication.

4. The trial court found the incident, as alleged, is proved. In the opinion of the trial court, the testimony of the prosecutrix has inspired confidence. Though there was delay in lodging the FIR, it was satisfactorily explained. Accordingly, the accused was found guilty of the aforesaid offences and sentenced as above.

5. Learned counsel for the appellant submitted that the age of the prosecutrix, as per the medical report furnished by the doctors (P.Ws.5 and 6), was aged about 16 years at the time of occurrence. In case two years is added to that, in that event she will be 18 years and it cannot be held that she was a minor. Moreover, the evidence of prosecutrix who was examined as P.W.11 clearly reveals that she was a consenting party. Therefore, the order of conviction and sentence passed by the trial court is liable to be set aside. In support of his contention, he has cited a decision of this Court in the case of State of Orissa v. Meleka Luku reported in **103 (2007) CLT 93** and the decisions of the apex Court in the case of Shyam and another v. State of Maharashtra reported in **AIR 1995 SC 2169** and Jinish Lal Sha v. State of Bihar reported in **AIR 2003 SC 2081**.

6. Learned Standing Counsel for the State while supporting the order of conviction and sentence submitted that the prosecutrix was a minor on the date of occurrence and in the given facts and circumstances, there is no doubt in the prosecution case. Hence, a lenient view may not be taken in the present case. Therefore, the order of conviction and sentence deserves to be confirmed.

7. From the rival submissions of the learned counsel for the parties and after going through the records, it appears that the occurrence took place on 6.3.2008. The father of the victim lodged the FIR on 20.6.2008. The victim is the cousin sister of the appellant (daughter of maternal uncle). From the statement of the prosecutrix, it transpires that on a deceptive way, i.e. to serve the ailing elder mother of the appellant, the accused took her and threatening with dire consequence committed the

offence and consoled her giving assurance of marriage. She did not agree for that as she was below the marriageable age. Her father searched her as she did not return from her sister's house. After thorough search, her father rescued her. On being rescued, she narrated the incident in detail immediately to her father who thereafter lodged the FIR. The informant who was examined as P.W.8 has also corroborated the testimony of the prosecutrix. The prosecution has also explained the delay in lodging the FIR. Soon after the victim was rescued, she was sent for medical examination and it was found that she was carrying 14 weeks of pregnancy.

8. Learned counsel for the appellant has filed an affidavit of one Kunja Patel, uncle of the appellant, on 9.12.2012 wherein it is stated that the father of the appellant and other gentlemen of the village has taken a decision regarding acceptance of the victim girl as the daughter-in-law of the house and the appellant has also given his consent for marriage and agreed to such proposal. Accordingly, a report was called for from the Presiding Officer, Lok Adalat, Bargarh District where the prosecutrix was present on 28th January, 2013 and the inquiry was conducted out of sight and audition of the police personnel who produced the victim for inquiry. From the report dated 30.1.2013, it appears that the victim is not willing to marry the appellant.

9. From the evidence on record, it transpires that the prosecution has successfully proved its case beyond all reasonable doubt.

Rape is not merely a physical assault. It is often destructive of the whole personality of the victim and degrade the very soul of the helpless female.

10. In Shyam's case (supra), the apex Court has held that as the prosecutrix was a willing party to go with the accused on her own, the culpability of the accused is not established. Therefore, the decision cited by the learned counsel for the appellant is not applicable to the facts of the present case.

11. The apex Court in Jinish Lal Sha's case (supra), taking into consideration the fact that the father of the victim was examined as a witness and he himself stated in the FIR that the prosecutrix went away by taking clothes, gold chain and some cash showing that there was no threat or inducement, has held that there was consent of the prosecutrix. Law is well settled that the testimony of the prosecutrix must be appreciated in the background of the entire case. The trial court must be alive of its responsibility and be sensitive while dealing with cases involving sexual molestation. In this type of offence, a conviction can be founded on the testimony of

the prosecutrix alone and evidence of the prosecutrix is more reliable than that of an injured witness.

12. This Court in the case of *Sribatcha Khamari v. State of Orissa* reported in **77 (1994) CLT 711** has held that the variation of age according to Modi's Medical Jurisprudence is upto three years on this way or that way. The ossification test is not a surer test for ascertainment of age. In the case of criminal charges, benefits should always go to the accused.

13. In the case of *Jaya Mala v. Home Department, Government of Jammu & Kashmir and others* reported in **AIR 1982 SC 1297**, the apex Court has held that it is notorious and one can take judicial notice that the margin of error in age ascertained by radiological examination is two years on either side.

In view of the above position, in the present case the age of the victim was beyond 16 years.

14. The apex Court in the case of *State of Rajasthan v. N.K* The accused reported in **(2000) 5 SCC 30** has taken into consideration that a prosecutrix complaining of having been a victim of the offence of rape is not an accomplice after the crime. There is no rule of law that her testimony cannot be acted without corroboration in material particulars. Her testimony has to be appreciated on the principle of probabilities just as the testimony of any other witness; a high degree of probability having been shown to exist in view of the subject-matter being a criminal charge. However, if the court of facts may find it difficult to accept the version of the prosecutrix on its face value, it may search for evidence, direct or circumstantial, which would lend assurance to her testimony. The statement of the father of the prosecutrix is admissible in evidence and relevant under Section 157 as her former statement corroborating her testimony as also under Section 8 of the Evidence Act as evidence of her conduct. The testimony of the father of the prosecutrix was trustworthy and unembellished. The prosecutrix and her father had both been subjected to lengthy cross-examination. The trial court found both the witnesses reliable. There is no reason to disbelieve their testimony.No person should be allowed to escape unpunished once guilt against him is proved. Assessment of, made by a doctor on the basis of X-ray of left elbow and arm of a rape victim and no evidence available, merely on the basis of X-ray plates it cannot be positively stated that the girl was aged below 16 years. Delay in filing the FIR itself is not fatal to the prosecution case, if the delay is explained to the satisfaction of the Court. The apex

Court, taking into consideration the above facts, has held that the period of remission for which he would have been entitled and the time which has elapsed from the date of commission of the offence, the accused-respondent need not now be sent to jail and modified the sentence to the period already undergone by him and to a fine of Rs.2000/- with further simple imprisonment of one year and nine months in default of payment of fine as passed by the trial court.

15. In the case of **Adu Ram v. Mukna and others** reported in **(2005) 30 OCR (SC) 412**, the apex Court has held that in operating the sentencing system, law should adopt the corrective machinery or the deterrence based on factual matrix. By deft modulation sentencing process be stern where it should be, and tempered with mercy where it warrants to be. The facts and given circumstances in each case, the nature of the crime, the manner in which it was planned and committed, the motive for commission of the crime, the conduct of the accused, the nature of weapons used and all other attending circumstances were relevant facts which would enter into the area of consideration. Therefore, undue sympathy to impose inadequate sentence would do more harm to the justice system to undermine the public confidence in the efficacy of law and society could not long endure under such serious threats. It is, therefore, the duty of every Court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed etc. The criminal law adheres in general to the principle of proportionality in prescribing liability according to the culpability of each kind of criminal conduct. It ordinarily allows some significant discretion to the Judge in arriving at a sentence in each case, presumably to permit sentences that reflect more subtle considerations of culpability that are raised by the special facts of each case.

16. In view of the above settled position of law and the reasons given in the above paragraphs, the finding of the trial court is confirmed except the age of the victim girl and the sentence is modified to the extent that accused-appellant is sentenced to undergo imprisonment for the period already undergone by him and to pay a fine of Rs.50,000/- (rupees fifty thousand), which is to be paid to the victim on proper identification. The accused-appellant is allowed time to deposit the fine amount by the end of March, 2013, in default, to undergo simple imprisonment for six months.

The Criminal Appeal is partly allowed.

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Sanju Panda, J.

High Court of Orissa, Cuttack
Dated 27th February, 2013/Pradeep