

Dolgobinda Rath Vs. the State

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Court : Orissa

Decided On : Jan-29-1958

Reported in : AIR1958Ori224; 1958CriLJ1211

Judge : G.C. Das, J.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Sections 361, 366 and 374

Appeal No. : Criminal Appeal No. 176 of 1956

Appellant : Dolgobinda Rath

Respondent : The State

Advocate for Def. : A.K. Tripathi, Adv. for ;Govt. Adv.

Advocate for Pet/Ap. : A.K. Das, Adv.

Judgement :

G.C. Das, J.

1. This is an appeal against the judgment of the learned Additional Assistant Sessions Judge, Cuttack, dated 16-11-56 convicting the appellant under Sections 366 and 376, Indian Penal Code, and sentencing him to undergo rigorous imprisonment for five years on each count, the sentence to run concurrently.

2. The prosecution case was that the appellant who is a co-villager of one Gokhei Sahu, P. W. 8, was living at a short distance from his house. Admittedly, the accused was a bachelor and he was a solitary member of his house, his brother having remained elsewhere. The accused was the 'Dharmaputra' of P. W. 8. Sometime before the occurrence, Achuta Rath, the uncle of the accused, and Suna Dibya his father's sister, used to persuade Sashi Dei, P. W. 3, to marry the accused and to live happily in his house. The prosecution case, further, was that the accused himself used to persuade P. W. 3 and made certain presents of gold and silver ornaments and some Sarees to the girl.

On 1-11-1955, P. W. 3 was going to a shop at about noon and while she was passing near the house of the accused, the accused called her and she went inside his house. Therein, the accused also persuaded her to marry him, but P. W. 3 expressed her unwillingness, when the accused pulled her inside his bed room and after shutting the front door, put her on his bedstead, gagged her mouth and then forcibly co-habited with her in spite of some resistance offered by her. After the incident, the accused, it is alleged, gave a threat to the girl that he would kill her if she would speak about it to anybody. The next day, that is on 12-1-1955, at about two Ghadis before sunset, P. W. 3 was sitting on the verandah of the house of her adjacent neighbour, Mukta Dibya (P. W. 10).

The accused came there and called her to his house to winnow some rice. Since the accused pressed her hard, P. W. 3 agreed and went inside the house of the accused. While she was winnowing rice P. W. 10 also came there to borrow some rice from the accused. It was dark by that time. P. W. 8, the father of the girl, (P. W. 3) finding her absent after night-fall went out in search of her and came inside the house of the accused and found his daughter, P. W. 3 there. To his query as to why she had not returned home, the accused said that Sashi would return with Mukta after finishing the winnowing.

Accordingly P. W. 8 came back home. Sometime after Mukta also went back, but Sashi was further detained by the accused on the plea that she would kindle the woven and pound some condiments. As it was getting late, P. W. 8 again came there and scolded his daughter for not returning home till that hour. The accused, it

is alleged, then stated that she would go after finishing some odd jobs. P. W. 8, however, sat near the front-door of the house of the accused. In the meantime Sashi was sent by the accused to the house of Suna Dibya, his father's sister, on some plea without the knowledge of P. W. 8. P. W. 3 was kept detained inside the house of Suna Dibya. P. W. 8 was subsequently informed by the accused that Sashi had gone home already, and so P. W. 8 came back home; but finding his daughter still absent, he again went out and made searches for the girl without any result.

It is alleged by the prosecution that on the next day, P. W. 8 came to know that his daughter was staying in the house of the accused, and he alone with his wife and some neighbours went there to get back Sashi, but she refused to come back. When P. W. 8 and his wife tried to drag out Sashi, the accused snubbed them by pushing them aside and also by asserting that he would marry the girl and would not allow her to leave his house. Thereafter, P. W. 8 and others were compelled to leave the place.

The accused kept Sashi in his house till Monday next and during this period he used to cohabit with her. On Monday the accused leaving the key of his house with Sashi went away to Jajpur and in the meantime P. W. 8 having fallen ill there was some delay in lodging the first information, which in fact, was lodged on 18-1-1955. The Senior Sub-inspector of the Jajpur Police Station after recording the first information report, proceeded to the spot and found the girl residing alone in the house of the accused. The girl at first refused to come away from the house of the accused, but on some threat given by the police officer, she at last came out. The ornaments and the other things presented to the girl by the accused were seized by the police from inside a suitcase in the exclusive use of Sasni Dei and lying in her father's house.

She was later examined by the lady assistant surgeon of Jajpur after which the accused was charge-sheeted and ultimately was committed to the court of sessions where he stood his trial.

3. The defence of the accused was a complete denial of the offence. He also denied having made the presents to Sashi and also pleaded ignorance of the fact

that Sashi was rescued from his house by the Police. His whole case was that there being enmity with the villagers, this false case was started against him.

4. In view of the offence charged under Section 366 for kidnapping and under Section 376 for rape, it is necessary to find out the age of the girl under Section 361, the female on the relevant date must be under 18 years of age whereas under Section 375, she must be below 16. P. W. 3 was examined by the Lady Assistant Surgeon of Jajpur Sub-Divisional Hospital, P. W. 1, on 19-1-1955. Besides the evidence of the lady doctor, there is the evidence of P. W. 3 herself, her father, P. W. 8 and her neighbour P. W. 9, and the familyastrologer, P. W. 6.

5. Mr. J. P. Modi in his Medical Jurisprudence and Toxicology, 12th Edition, p. 28, has stated that:

'The principal means which enable one to form a fairly accurate opinion about the age of an individual, especially in earlier years, are teeth,height and weight, ossification of bones and minorsigns.'

As regards the teeth, the learned author has stated:

'The estimation of age from the teeth with some amount of certainty is only possible up to 22 to 25 years of age; beyond that it is merely guess work.'

The permanent teeth, according to Mr. Modi, 'erupt at first in the lower jaw and after short intervals in the upper jaw, but are not always regular in their appearance. In a few cases they may appear earlier than the average period. The time of eruption of the third molar teeth or wisdom teeth is more uncertain. After the eruption of the second molar teeth, the body of the jaw grows posteriorly and the ramus is elongated to make room for the appearance of the third molar teeth.

Hence, during the examination of a minor for determination of his age, a note should always be made as to whether there was a space in the jaw behind the second molar teeth, if the third molars were absent. These teeth are usually cut between 17 and 25 years of age, but I have seen the left lower third molar tooth in a Mohammadan boy and a mohammadan girl, aged 14 years respectively, and in a Hindu boy of 15 years. I have also found the lower third molar teeth in a Hindu

boy of 16 years. Sahay found three third molar teeth in a Bawari boy, aged between 15 and 16 years. Lall and Town-send found one third molar tooth between the ages of 15 and 16 years, two third molar teeth between the ages of 16 and 17 years and three third molar teeth between 17 and 18 years of age in a majority of 125 girls examined in Lucknow.'

The lady doctor, P. W. 1, while fixing the age of P. W. 3 took into consideration the growth of the teeth, growth of pubic and axillary hairs, growth of the breasts, the height and weight of the girl and came to the definite opinion that Sashi was 13 to 14 years of age on the date of the examination, that is, 19-1-1955. Some objection was taken regarding the formation of the space for the third molar teeth. According to P. W. 2, the medical officer-in-charge of Jajpur Sub-Divisional Hospital, the first molars come between 22 to 25 and the second molars appear between 18 to 20 years. In the present case it is an undisputed fact that the second molar of Sashi was there on the date of the examination.

I have referred to the passage dealing with the formation of this space for the third molar teeth and the cutting of it as has been stated by Mr. Modi. Mr. Modi has also given a table showing the average period for eruption of temporary and permanent teeth at page 28 of his book. It is evident from that table that the second molars appear between the 12th and 14th year and the third molars between the 17th and the 25th year. Therefore, the statement made by P. W. 2 that the second molars appear between 18 and 20 years cannot be accepted. Before the committing Court, however, P. W. 1 stated that there was formation of space for the third molar teeth whereas at the trial she stated that there was no space formed for the third molars. The learned trial judge, after referring to the passages mentioned above in Mr. Modi's Medical Jurisprudence observed that:

'The mere fact that she made no note at all in her report about the formation of space behind the second molars, would suffice to show that there was no such space there.'

However, the only basis for the fixation of the age was not the formation of the teeth, but as I have stated earlier, P. W. 1 took into consideration various other factors such as growth of teeth, growth of pubic and axillary hairs, growth of the

breasts, height and weight of the girl. If the defence version that the girl was about 20 years or more is accepted, then one would not normally expect only a few axillary hairs or a few sparse dark hairs in the pubic region as was found by P. W. 1. P. W. 1 in her cross-examination had made it clear that after the age of 17 or 18 all the spaces of the axillary and pubic region will be covered with hairs which would also be bigger in length and darker in colour. Evidently such was not the case with Sashi when she was examined by P. W. 1.

Thus, the actual appearance and formation of the hairs in the pubic region and the axilla, would be completely irreconcilable with the assumption that the age of the girl was 20 years or more at the time of the examination by P. W. 1. In *Anam Swain v. The State*. 19 Gut LT 14: (AIR 1954 Orissa 33) (A) which was a case of similar nature, this Court had held:

'The doctor's evidence shows that she had 28 permanent teeth and no wisdom teeth. He estimated her age from the development of her breasts, height and weight and the appearance of pubic hair. The ossification test, to which the learned Judge refers is no doubt a surer test for determining age. But I am not aware of any such tests having been conducted anywhere in India, particularly in Orissa. Nonetheless Courts have acted on the opinion of the doctors, arrived at without conducting any ossification tests and based on other factors as indicated above.'

I respectfully agree with the above decision and hold that there is no reason why the evidence of the lady doctor who had fixed the age of Sashi at 13 or 14 years only should not be accepted. Mr. A. K. Das, learned counsel for the appellant, conceded that the father of the girl would be more competent to speak regarding the age of his daughter, P. W. 3. P. W. 3 has given her age at the trial to be of 15 years. P. W. 8, the father of P. W. 3 has also stated the age of P. W. 3 to be 15 years.

Nothing has been brought out in his cross-examination to discard the evidence of this witness. The learned trial Judge in my opinion has rightly believed the evidence of P. W. 8. P. W. 9 is a neighbour who had estimated the age of P. W. 3 to be 13 years by the time of the occurrence. Mr. Das sought to rely upon the

evidence of P. W. 11 who was declared hostile and made a voluntary statement that her son whose age is 20 to 22 years was born at the time when Sashi was born. Reading her evidence as a whole, it would appear that she was making a confusion regarding the age of P. W. 3, and has been rightly discarded by the learned Assistant Sessions Judge. In view of the statements made by P. W. 6 it is very difficult to believe him. Thus, the sum total of the evidence comes to this that the age of the girl, at the time of the occurrence, must have been between 13 and 14 years.

6. Now with regard to the offence under Section 366, I. P. C., the fact that stands out significantly is that the girl, P. W. 3, was rescued from the house of the accused by the investigating officer, P. W. 12, on 19-1-1955. P. W. 12 in his deposition at the trial had stated that the girl was living in the house of the accused. There is abundant evidence on record to show that Sashi was living in the house of the accused for about a week prior to 19-1-1955. P. W. 4 who was working under the accused for sometime, had stated that on the day the accused left for Jaipur, Sashi was living in his house and she gave him some paddy to be husked which he took to the mill.

Similarly, P.W. 7, the Daffadar of the village also saw Sashi putting up in the house of the accused on January, 16 and 17, 1955. He had further stated that on January 16, in accordance with, the request of P. W. 8, he interceded with the accused to let go the girl to which the accused replied that he would marry the girl. P. Ws. 8, 9 and 10 all speak about the fact that P.W. 3 was surprisingly missed while working in the house of the accused in the evening hours.

They have also stated as to how there were searches made in the night to trace out the girl, but to no effect. P. W. 3 in her deposition had stated regarding the occurrence on January 12, 1955, as also of the previous day. With regard to the offence of kidnapping, P.W. 3 had stated that the accused sent her to the house of Suna Dibya to get some match sticks. According to her, as soon as she went inside her room, Achut Rath shut the door of the room from outside. Suna persuaded her in winning words to stay in their house. At the time the accused came to the house of Suna Dibya and asked Suna not to talk aloud.

The accused also told the girl that her father would soon come there in search of her, and that he would be told that she was not there in his house. She was detained in Suna's house for that night where she was watched by her throughout the night and on the next morning Jagu Kar, the brother-in-law of the accused scolded Suna for having kept her in the house at which Suna brought her and left her in the house of the accused. From that day until she was rescued by the police she remained in the house of the accused and according to her deposition, the accused used to co-habit with her. 'Kidnapping' has been defined in Section 361, which states that :

'Whoever takes or entices any minor under sixteen years of age if a male, or under eighteen years of age if a female, or any person of unsound-mind, out of the keeping of the lawful guardian of such minor or person of unsound mind, without the consent of such guardian, is said to kidnap such minor or person from lawful guardianship.'

In the instant case there is evidence on record that there was some amount of consent on the part of P.W. 3 as she was in the habit of going to the house of the accused since one year prior to the date of occurrence when she attained puberty. But on the date of occurrence, as would be sufficiently clear from the evidence on record, the accused took P.W. 3 to his house out of the keeping of the lawful guardianship of the minor. Undoubtedly, P.W. 3, at the earlier stage had stated that she was driven out of the house by her mother, but that does not mean that she had permanently went out of the protection of her guardians.

Reliance was sought to be placed on a case reported in *R.W. Valliant v. H. Eleazer*, AIR 1926 Cal 407 (B), where the learned Judges held that the mere fact that the minor leaves the protection of her guardian does not put her out of the guardian's keeping. But if the minor abandons her guardian with no intention of returning she cannot be held to continue in the guardian's keeping. In this case there is no evidence that Sashi abandoned her parents with the intention of not returning to her house. Similarly in a case reported in *Shaheebali v. Emperor*, AIR 1933 Cal 718 (CJ, Mr. Justice Lort Williams held that :

'The expression 'seduced to illicit intercourse' in Section 386 is not intended to be restricted to inducing a girl to surrender her chastity for the first time. It is used to indicate a distinction between 'seduction' in the popular, usual or ordinary sense. 'Seduced to illicit intercourse' means 'induced to surrender or abandon a condition of purity from unlawful sexual intercourse'.

Thus, in the instant case, it is evident that the accused induced the girl by presentations of gold and silver ornaments, clothes, and words of persuasion to abandon a condition of purity and indulge in unlawful sexual intercourse. There is abundant evidence also that she was persuaded to leave the lawful guardianship of her parents.

Even if she had consented, that would not help the accused since she was below 18 years of age at the time of the occurrence. Hence, it is clear that the prosecution has proved beyond all reasonable doubt that the accused had committed the offence under Section 366, I. P. C.

7. Coming next to the offence under Section 378, the evidence of the prosecutrix, P.W. 3 was that on January 11, the accused called her into his house, and as soon as she went there he renewed his proposal to marry her, and when she refused, the accused shut the door of his house and pulled the girl inside to his bed-room and made her lie down on his bedstead and forcibly raped her. P.W. 3 also deposed that she felt some pain and there was bleeding as a result of the forcible intercourse. The lady doctor, P.W. 1, stated that the hymen of the girl was found to bear marks of recent rupture, and her vaginal orifice was tender and white discharge was present in the orifice.

In her cross-examination, she stated to have found some injury in the vaginal orifice and said that the recent rupture of the hymen constituted the injury. The absence of any other mark of violence on the person of the girl may support the theory that the girl was a consenting party to some of these operations. However, the fact being that the age of the girl was not more than 14 years even the consent of the girl does not make any material difference and the act of co-habitation would constitute the offence under Section 375, Indian Penal Code. Some argument was sought to be advanced that P.W. 3 did not say anything about the occurrence at

the first instance before the police, nor did she inform her parents about the occurrence that took place on January 11. The explanation is not far to seek. She was an unmarried girl of very tenderage and naturally she would have been very bashful to admit the fact either before the police or before her parents. One fact that stands out prominently is that Sashi lived in the house of the accused from the date of the occurrence, that is, January 12, 1955 till January 19, when the police rescued her from the house of the accused.

According to the statement of P.W. 3 the accused had cohabited with her several times and she stands supported by the medical evidence in this respect. It was next contended that the accused should not be convicted on the sole testimony of the girl, and reliance was sought to be placed on a case reported in *Nura v. Rex*, AIR 1949 All 710 (D), where a learned single Judge of the Allahabad High Court held that in a charge of rape the uncorroborated testimony of the girl alone should not be accepted as a sufficient foundation for convicting the accused. The unripe age of the girl, the immaturity of her mind and its amenability to diverse influences are matters which make it highly impolitic that her testimony, in the absence of some corroborative evidence should be accepted. But the same High Court in a later decision reported in *Bhagwat Prakash v. The State*, AIR 1956 All 22 (E), held that the cases of rape, involving bad reputation on the family of the victim herself, frequently are not brought to Court, and, if brought, are with the greatest reluctance, and therefore, if a girl does come forward and alleges that she has been raped her evidence should carry more weight than the evidence of an ordinary witness.

The Supreme Court in the case of *Rameshwar Kalyan Singh v. State of Rajasthan*, AIR 1952 SC 54 (F), relying upon the case of *R. v. Baskerville* (1916) 2 KB 658 (G) at p. 664, held that the corroboration is required when it is not considered safe to dispense with it. Lord Reading in *Baskerville's* case (G) had laid down :

'Secondly, the independent evidence must not only make it safe to believe that the crime was committed but must in some way reasonably connect or tend to connect the accused with it by confirming in some material particular the testimony of the

accomplice or complainant that the accused committed the crime.'

This decision was relied upon by this Court in the case of Dushasan Padhan v. The State, 23 Cut LT 57 (H). Thus, in the present case I find that P.W. S's evidence reasonably connects the accused with the commission of the offence. Further, when she stands corroborated by the evidence of P.W. 1, there is no escape from the conclusion that the accused had committed the offence under Section 376, I. P. C. Accordingly, I would confirm the conviction of the appellant under Sections 366 and 376, Indian Penal Code, as passed by the learned Assistant Sessions Judge, Cuttack; but taking all the facts and the circumstances into consideration I find that the sentence of five years' rigorous imprisonment is rather much too severe.

The appellant, I am informed at the Bar, is now undergoing imprisonment from the date of the order, that is, 16-11-56, and prior to that he was in jail as an undertrial prisoner. Thus, while maintaining the conviction of the appellant under Sections 366 and 376, Indian Penal Code, I would reduce the sentence to the period already undergone; and accordingly direct that the accused be released forthwith. Except for the above modification in the sentence, the appeal is dismissed.

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