

Mongara Harijan Vs. State of Orissa

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Court : Orissa

Decided On : Mar-16-2004

Reported in : 2004(I)OLR500

Judge : L. Mohapatra, J.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Sections 354, 376 and 451

Appeal No. : Cr. Rev No. 107 of 1995

Appellant : Mongara Harijan

Respondent : State of Orissa

Advocate for Def. : Addl. Standing Counsel

Advocate for Pet/Ap. : D.P. Dhal, S.K. Nayak-3, B.K. Panda and N.N. Mohapatra

Judgement :

L. Mohapatra, J.

1. The petitioner having been convicted for commission of offences under Sections 451 and 376 of the Penal Code has preferred this revision challenging the order of conviction and sentence.

2. The case of the prosecution is that on 24.5.1993 the parents of the victim had been to Nowrangpur Weekly Market in the morning. At about 11.00 A.M. the victim

after finishing her meal was taking rest along with her younger brother aged about 1 1/2 years by bolting the entrance door from inside. While the victim was asleep, she felt somebody's hand on her chest and found the petitioner sitting near her and squeezing her breasts. When the victim protested, the petitioner requested to sleep with him and having realised the intention of the petitioner, the victim tried to raise hulla. It is further alleged that the petitioner closed the mouth of the victim by putting his hands, dragged her to the corner of the room and committed rape on her. Though the victim resisted due to pain, she was helpless. It is also alleged that after commission of the act the petitioner left the victim and while he was trying to wear his half-pant and lungi, the victim came out of the room and locked the same from outside and called some co-villagers. She thereafter reported the incident before the co-villagers whereafter the room was opened and the petitioner was found inside the room. Being asked, the petitioner confessed before the villagers to have committed the offence and begged excuse. Thereafter, the petitioner was allowed to leave the place and the matter was reported to the parents of the victim after they returned from the market in the evening. Thereafter, the matter was again reported at the police station and investigation was taken up. On completion of investigation, charge sheet was submitted for commission of offences under Sections 451 and 376 of the Penal Code.

The defence plea is one of complete denial of the occurrence.

In order to bring home the charges, 13 witnesses were examined on behalf of the prosecution and several documents were exhibited whereas on behalf of the defence only one witness was examined. On consideration of the evidence placed before the Court, the learned Assistant Sessions Judge found the petitioner guilty of the charges and convicted and sentenced him to undergo R.I. for a period of seven years for commission of offence under Section 376 of the Penal Code and imposed a fine of Rs. 1000/- in default to undergo further R.I. for a period of four months and also sentenced him to undergo R.I. for a period of six months for commission of offence under Section 451 of the Penal Code and imposed a fine of Rs. 200/-, in default, to undergo further R.I. for a period of one month. It was directed that out of the fine amount, Rs. 500/- shall be paid to the victim towards compensation. The judgment and order was challenged in appeal before the

learned Sessions Judge, Koraput and the appeal having been dismissed, the present revision has been filed.

3. The learned counsel appearing for the petitioner challenged the findings of both the Courts below on the ground that there is no material on record to show that offence under Section 376 of the Penal Code has been committed and, therefore, the conviction for the said offence is illegal and should be set aside. According to the learned counsel, though there was specific allegation of commission of rape on a girl who was not habituated with the sexual intercourse, no injuries were found on the body of the victim or on her private parts and, therefore, the offence under Section 376 of the Penal Code is not made out. The learned counsel relied upon some decisions in support of such contention. The learned counsel for the State, on the other hand, submitted that the victim's statement is consistent with regard to commission of offence under Section 376 of the Penal Code and there is corroboration from other source. Therefore, in absence of any corroboration from the medical evidence also, the conviction can be sustained.

4. Keeping in mind the contention of the learned counsel appearing for both the parties, it is necessary to look into the evidence adduced before the Court. In exercise of revisional jurisdiction, this Court has hardly scope of reappreciating the evidence, but at the same time if it is found that on the existing evidence the conclusion as arrived at by the Courts below cannot be separated, in exercise of revisional jurisdiction also the Court can look into the evidence. The victim has been examined as P.W.1. She in her statement has stated that on 24.5.93 at about noon she was sleeping inside the room along with her younger brother as her parents were absent and had been to the Weekly Market. The door was closed from inside. While she was sleeping, she felt somebody squeezing her breasts and got up. She found the petitioner doing such act and protested. Thereafter the petitioner requested her for sexual intercourse and when she denied and tried to raise hulla, the petitioner pressed her mouth by his hands, dragged her to the corner of the room and after undressing himself committed rape on her. Though she was resisting due to pain and struggling to get out of the clutches of the petitioner, she could not do so. After the act was committed, while the petitioner was dressing himself, she came out of the room and closed the door

from outside. Hearing her hulla, some villagers came to the spot and she narrated the incident before them. Thereafter, one Tularam Harijan, P.W.7, opened the door and the petitioner was found inside the room. Being questioned by P.W.7, the petitioner admitted to have committed sexual intercourse and begged to be excused. The matter was thereafter reported to the parents of the victim and under advice of the villagers the F.I.R. was lodged. From the evidence of this witness, it appears that not only the statement of the victim is there with regard to commission of the offences but also there is evidence of extra judicial confession. So far as the evidence of the victim is concerned, it was contended by the learned counsel for the petitioner that the allegation of the victim is not corroborated by the medical evidence. P.W. 10 is the doctor, who examined the victim on 25th May, 1993. She did not find any external injury on the victim and also did not find any spermatozoa in the vaginal fluid of the victim. The doctor also found the victim to be aged about 18 years of age. Relying on this evidence, it was contended by the learned counsel for the petitioner that the victim is a young girl aged about 18 years and was not habituated with the sexual intercourse and in the event of forcible intercourse, injuries are likely to take place and in absence of any injury, it is difficult to accept the allegation of the victim that she was subjected to rape. Ext. 6 is the report of the doctor, P.W. 10. Her findings are as follows:

1. The girl is about 18 years of age.
2. Vaginal fluid does not reveal any spermatozoa.
3. No mark of violence on her body.
4. No foreign hair either on her body or on the pubic region.
5. Hymen is intact.
6. In the deposition of the victim (P.W.1) it is alleged by her that after undressing the petitioner lifted her gown, laid her on the ground, separated both her thighs and penetrated his penis inside the vagina. Out of pain she was resisting and struggling, but the petitioner forcibly committed sexual intercourse and got his discharge inside the vagina. This part of the evidence of the prosecutrix does not

get any support from the medical evidence. A young girl aged about 18 years of age does not habituate with sexual intercourse, if is forcibly subjected to rape, she has to suffer from injuries at least in her private parts. But from the medical report, it appears that the hymen was intact and though the victim alleged that there was discharge inside the vagina, no spermatozoa has been found by the doctor. It also appears from the evidence that the occurrence took place on 24th May, 1993 and she was examined on the next day. In view of such medical evidence, it is difficult to accept the allegation of the victim that there was forcible sexual intercourse.

Coming to the corroboration in this regard, the only evidence available on record is with regard to extra judicial confession. On examination of the evidence of all other witnesses who were present at the spot, it appears that after opening the door when the accused was found inside the room, witnesses asked him about the occurrence and it is alleged that he admitted to have committed sexual intercourse. On perusal of the evidence of the witnesses, it appears that the accused was put to threat and in view of such evidence, it cannot be said that the extra judicial confession made by the petitioner was voluntary and, therefore, such extra judicial confession cannot be accepted. I have not referred to the decisions cited by the learned counsel for the petitioner in considering the fact that such decisions relate to non-corroboration of medical evidence with that of the evidence of the prosecutrix as well as the evidentiary value of extra judicial confession, if made under threat. The position of law in this regard is clear and settled. Now the question that arises for consideration is whether any other offence the petitioner has committed. There is clear and cogent evidence to show that the petitioner had entered into the house of the victim and, therefore, the offence under Section 451 is clearly made out. So far as sexual intercourse is concerned, though commission of rape is not substantiated and the evidence of the prosecutrix in this regard is doubtful; the act of the petitioner in entering into the room of the victim and squeezing her breasts while she was sleeping clearly makes out an offence under Section 354 of the Penal Code.

7. I, therefore, set aside the order of conviction under Section 376 of the Penal Code and find the petitioner guilty of the offence under Section 354 of the Penal Code and sentence him to undergo rigorous imprisonment for a period of one year

and impose a fine of Rs. 1000/- in default, to undergo further R.I. for a period of four months. So far as conviction and sentence under Section 451 is concerned, the same stand confirmed. Both the sentences are to run concurrently. The period undergone shall be set off.

The Criminal Revision is allowed in part to the above extent.

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