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Kubera Mahanta Vs. State

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Court : Orissa

Decided On : Feb-27-1991

Reported in : 71(1991)CLT641; 1991(II)OLR83

Judge : J.M. Mahapatra, J.

Acts : Indian Penal Code (IPC), 1860 - Sections 376

Appeal No. : Criminal Appeal No. 205 of 1989

Appellant : Kubera Mahanta

Respondent : State

Advocate for Def. : G.K. Mohanty, Addl. Standing Counsel

Advocate for Pet/Ap. : G.S. Namtour, Adv.

Disposition : Appeal allowed

Judgement :

J.M. Mahapatra, J.

1. The appeal is directed against the judgment and order dated 30-6-1989 of the learned Sessions Judge, Keonjhar convicting the appellant Under Section 376, I. P. C. and sentencing him to undergo rigorous imprisonment for five years.

2. Put briefly, prosecution case may be stated thus. The parties belong to village Kundalpani under Harichandrapur Police Station in the district of Keonjhar. On 16-1-198B the informant (PW 1), husband of the victim lady (PW 5) had been to village Guniadiha, while his wife, PW 5 had been to Sola field to watch the crop. It is alleged that while PW 5 was watching the field, sitting inside the hutment (Palla), the appellant suddenly went there and made PW 5 lie down on the ground and committed rape on her. The victim could not extricate herself from the clutches of the appellant. After the appellant left the place, the victim came back to the village and reported the incident to the ward member, PW 2 as also the Grama Rakhi. A Panchayat was convened in the village which was attended by the appellant, the victim lady as also others. The appellant denied the incident there. Thereafter being advised by the ward member and others, PW 1, the husband of the victim lady lodged F. I. R., Ext. 1 at. Harichandrapur Police Station'. The Officer-in-charge of the Police Station recorded the F. I. R., registered a case and took up investigation, on completion of which he submitted charge sheet against the appellant,

3. The plea of the appellant - at the trial was one of total denial. It is specifically pleaded that on account of previous land dispute between PW 1 and the father of the appellant, he had been falsely roped in I his case.

4. In support of its case, prosecution has examined as many as nine witnesses, of whom PW 1 is the husband of the prosecutrix, PW 2 the ward member, PW 3 teacher of the school and Panchayat member, PW 4 a seizure witness, PW 5 the victim lady, PW 6 the medical officer, Harichandrapur government dispensary who had examined the prosecutrix as also the appellant, PW 7 the medical officer of the District Jail Hospital, Keonjhar who on the consent of the appellant drew some sample of saliva for chemical examination and serological test, PW 8 a seizure witness and PW 9 the Investigating Officer. Learned trial Judge, relying mainly on the ocular testimony of the orosecutrix PW 5 and some other items of evidence, namely the medical evidence of PW 6, the evidence of PWs 2 and 3 who were told about the incident by PW 5 and the seroloical report showing stain of semen of human origin on the Sari of PW 5, has accepted the prosecution case and convicted the appelant as stated earlier. He was alive to the situation that there

was no eye-witness to the alleged occurrence.

5. Mr. G. S. Namtour the learned counsel for the appellant has strongly urged before me that on the materials on record the conviction of the appellant is not sustainable. The learned Additional Standing Counsel however, supported the impugned judgment. I was taken through the impugned judgment and the material evidence on record. It is specifically urged that apart from the solitary evidence of the prosecutrix, PW 5, even the 'evidence of the Medical Officer, PW 6 does not fully support the prosecution case Having regard to the rival contentions ;made before me, propose to discuss the evidence of the doctor, PW 6 before taking up ocular testimony of. PW 5, the prosecutrix.

6. PW 6, the medical officer who examined PW 5 on 17-1-1988 found no injury on the breast, back, chin and vagina of the victim who was aged about 35 years. Not a dead or living spetmatozoa was also detected in her vagina. In cross-examination, the doctor has stated that he did not find any injury on the person of PW 5, and he has further opined that there is possibility of injuries on the victim if forcible sexual their course is committed particularly on the paddy field or open field. The doctor, PW 6 also found no injury on the person of the appellant, particularly on the penis. He found a thin layer of smegma present on glans penis covered by foreskin. He found no sign of recent sexual intercourse.

7. Coming to the evidence of PW 5, she has stated that while she was watching the Sola field sitting inside the Pala he appellant came inside, and made her lie on the ground, removed her wearing cloth and forcibly committed sexual intercourse. She protested and shouted but accused-appellant pressed her neck, and so she could not shout. After the incident was over, she reported the matter to the ward member, PW 2, the Grama Rakhi and her husband. According to her, the police seized the Saree worn by her and the Saree contained semen of the accused. In cross examination it is elicited from her that she sustained no injury on her person at the time of commission of rape, nor did she make any nail scratch on the person of the accused. It is further elicited that she did not shout when the appellant committed sexual intercourse, but she shouted when the appellant ran away after committing rape, and that she tried to escape from the clutches of the appellant,

but the appellant twisted her hands. She was trying to give kicks on the accused but the accused pressed her thigh and so she could not give kick blows to the accused.

8. Even if from the evidence of PW 5, the overt act committed by the accused is believed, her evidence coupled with the evidence of the doctor leads me to the reasonable inference that PW 5 was a consenting party to the sexual intercourse committed by the appellant. For this I rely on the authority of the leading decision of the Supreme Court in the case of Pratap Misra and Ors. v. State of Orissa, AIR 1977 S. C. 1307. The evidence of PWs 5 and 6, read as a whole, do not indicate that PW 5 made any effort to extricate herself from the clutches of the appellant. She did not make any struggle, nor did she make any effort to injure or assault the appellant by nail scratches or bites. The prosecotrix herself even did not sustain any injury on her back or on any part of her person like breast, chin face and even the genitals. The prosecutrix is the wife of PW 1 and is aged about 35 years in Court's estimate and it is quite natural to expect that the prosecutrix had been accustomed to sexual intercourse, In fact the doctor found the vaginal space admitting three fingers easily.

9. From the foregoing, discussions I am unable to hold that the appellant committed sexual intercourse forcibly or against the will of consent of PW 5. The leading decision of the Supreme, Court (supra) fully supports the principle as to under what circumstances the presence of consent on the part of a lady is deducible. Almost all those facts and circumstances have been brought out in the present case which I have discussed in the preceding paragraph. The victim having been habituated to sexual intercourse, absence of any material evidence to show that she offered resistance would clearly indicate that she was a consenting party to the sexual intercourse committed on her. In such state of affairs, the ingredients of the offence of rape as defined in Section 375 I. P. C cannot be said to have been established.

Mr. Mohanty, learned Additional Standing Counsel appearing for the State relying on a decision of the Supreme Court in the case of Rafiq v. State of Uttar Pradesh, AIR 1981 S. C. 559 has contended that absence of injuries on the person of the

victim is not fatal to the prosecution. Having perused the said decision, I would say with respects that it is clearly distinguishable on facts from the tn9tant case.

10. In the light of my discussions in the foregoing paragraphs, I would hold that prosecution has failed to bring home the charge against the appellant beyond all reasonable doubt. As the ingredients of the offence of rape have not been brought home to the appellant beyond all reasonable doubt, the appellant is entitled to acquittal.

11. In the result, the appeal is allowed, and the conviction and sentence of the appellant are set aside. The appellant be set liberty forthwith.

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