

**Basudev Naik Vs. State**

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**SooperKanoon Citation :** [sooperkanoon.com/532922](http://sooperkanoon.com/532922)

**Court :** Orissa

**Decided On :** Sep-12-1990

**Reported in :** 71(1991)CLT146; 1991CriLJ1594

**Judge :** S.C. Mohapatra, J.

**Acts :** Indian Penal Code (IPC), 1865 - Sections 324, 354 and 376; Code of Criminal Procedure (CrPC) , 1974 - Sections 313

**Appeal No. :** Jail Criminal Appeal No. 157 of 1986

**Appellant :** Basudev Naik

**Respondent :** State

**Advocate for Def. :** Govt. Adv.

**Advocate for Pet/Ap. :** Mahadev Misra, Adv.

**Judgement :**

**S.C. Mohapatra, J.**

1. This is an appeal by the convict from Jail. He has been convicted u/ Sections 376 and 324, IPC and has been sentenced to undergo R.I. for seven years in respect of offence Under Section 376, IPC and one year in respect of offence Under Section 324, IPC. Both the sentences are directed to run concurrently.

Another accused has been acquitted and no appeal has been preferred against acquittal.

2. P.W. 5 is wife of P.W. 4. Prosecution case is that on 29-5-1985, they returned from Phulbani in bus and got down at G. Udayagiri at about 8 or 9 p.m. They left G. Udayagiri for their village which is at a distance of 4 K.m. only at about midnight. It was moonlit night. After some distance when they reached near a Bridge, both the accused approached them. Accused Basudev Naik who was known to P.W. 4 asked for a Bidi and getting reply in negative Basudev snatched away Rs. 50/- from him. Accused Basudev assaulted P.W. 4 with a knife and injured him. Removing a lungi from bag of P.W. 4 with assistance of the other accused tied him with that. Other accused guarded P.W. 4 when accused Basudev dragged P.W. 5 to a distance, took away her gold earrings, nose ring and making her naked, committed rape on her. When this was happening, P.W. 4 untied himself and ran away from the spot to village of P.W. 6. Immediately hearing the narration from P.W. 4, P.W. 6 and other villagers came to the spot. Finding P.W. 5 naked, they supplied a napkin to wrap her body. Both P.Ws. 4 and 5 were taken to Primary Health Centre in village of P.W. 6. Doctor of the Primary Health Centre reached at about 6 a.m. of 30-5-1985, P.W. 4 submitted a written report on basis of which investigation was conducted and charge-sheet was filed. Defence plea is one of denial.

3. Prosecution examined 9 witnesses. Of whom, P.Ws. 1 and 2 are Doctors. P.W. 1 the lady Assistant Surgeon of Phulbani in her evidence stated that she did not find any injury on P.W. 3. P.W. 2 is the doctor of Primary Health Centre who examined P.W. 4 and found several injuries some of which were incised. P.W. 3 is the Tahsildar who conducted the T.I. Parade. P.W. 4 is husband injured and P.W. 5 wife is the victim of rape. They narrate the incidents. P.W. 6 is the villager who on hearing from P.W. 4 proceeded with other villagers to the spot. P.W. 7 is a seizure witness. P.Ws. 8 and 9 are investigating Officers.

4. Learned Sessions Judge while acquitting other accused convicted the appellant Under Sections 376 and 324 IPC.

5. That P.Ws. 4 and 5 were proceeding to their village in mid-night of 29-5-1985 is clear from evidence of P.Ws. 4 and 5 and their evidence that some criminal acts were committed on them is also clear from their evidence corroborated by evidence of PW 6 material objects seized and the doctor PW 2. As has been rightly found by the learned Sessions Judge, story of prosecution is exaggerated I am satisfied that investigation by PWs 8 and 9 are perfunctory.

6. With the materials available, it is to be determined if appellant committed offence of rape on PW 5 and hurt by knife on PW 4.

7. Although explanation of appellant is that he is not involved in the crime, cross-examination by the State defence lawyer engaged for him is most unhappy. It may be on account of insincerity or lack of experience. Evidence of PW 4 that he knew the appellant earlier is not shaken. In the moonlit night when PW 4 clearly identified the appellant, there is no reason to disbelieve the same. No enmity or earlier ill feeling has been effectively suggested. There is also no explanation by the appellant to this effect in his statement under Section 313, Cr.P.C. Nature of injury is well related to have been committed by the knife seized. When PW 5 speaks of assault on PW 4 in her presence and PW 4 while speaking of assault identified Basudev and injury was found on him by PW 6 and PW 2 shortly thereafter, trial court is correct in convicting the appellant under Section 324, I.P.C.

8. So far as offence of rape committed by the appellant, even PW 5 does not speak of facts which constitute ingredients of offence of rape. In the circumstances, when from medical evidence ingredients to come to conclusion that offence of rape has been committed (sic) on the mere statement of PW 5 that appellant committed forcible sexual assault on her is not sufficient to draw an inference that offence of rape has been committed. Learned Public Prosecutor failed in his duty to get from the witness the facts from which inference of rape can be drawn. It is, however, clear that appellant dragged PW 5 to a distance, made her forcibly naked and committed some acts which are not clear, which may be assault in relation to sex. This would in the maximum amount to an offence of outraging modesty of a woman.

9. In disagreement with the learned Sessions Judge, I am satisfied that prosecution has not been able to bring home the guilt of accused in respect of offence under Section 376, I.P.C. However, outraging modesty of woman being a lesser offence than rape when from the facts proved such an inference can be drawn appellant shall not be prejudiced if he is convicted for the lesser offence under Section 354, I.P.C.

10. Coming to sentence, I am satisfied that the sentence for an offence under Section 324 is adequate. On account of the nature of facts as revealed from evidence, age of accused and time of occurrence, I am inclined to sentence the accused to rigorous imprisonment for two years which is the maximum sentence. On the facts proved, I am also inclined to hold that sentence imposed are to run consecutively and not concurrently.

11. In the result, appeal is allowed in part. Appellant is convicted under Sections 354 and 324, I.P.C. and is directed to undergo R.I. for two years under Section 354, I.P.C. and one year under Section 324, I.P.C. Sentences are to be undergone consecutively.