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Patra Mirgan Vs. the State

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Court : Orissa

Decided On : Jul-20-1993

Reported in : 1993(II)OLR302

Judge : L. Rath, J.

Acts : Code of Criminal Procedure (CrPC) , 1973 - Sections 154, 200, 210 and 465

Appeal No. : Jail Criminal Appeal No. 300 of 1990

Appellant : Patra Mirgan

Respondent : The State

Advocate for Def. : C.R. Das, A.S.C.

Advocate for Pet/Ap. : R.N. Acharya, Adv.

Disposition : Appeal allowed

Judgement :

L. Rath, J.

1. Conviction Under Section 376, IPC and sentence to RI of 10 years as also Under Section 354, IPC and sentence to RI of 2 years in Sessions Case No. 33/30 have made the appellant prefer this appeal from jail. The skeletogenous facts are

that the victim lady PW 1 is the wife of the appellant's wife's brother's son. The appellant married the sister of PW 1's father-in-law, was his domesticated son-in-law, and was residing in a separate house in the same compound of PW 1's house. In the village there are two groups, one of Mirgans and the other of Bhotras. PW 1, who was a Bhotra girl, had married PW 5 who was a Mirgan boy. The appellant who was a Bhotra had married the paternal aunt of PW 5. The occurrence alleged against the appellant happened on two days, i. e. on 25-12-1989 and 27-12- 1989. 25-12-1989 was Monday. It is the prosecution case that on the first day of the occurrence the appellant entered inside the house of PW 1 during the absence of her husband, husband's brother, his wife and son. PW 1 who had stood up on hearing the sounds of forcible breaking open of the bamboo door, was caught hold of by the appellant and he also pulled out the Saree from her rendering her naked and attempted to cohabit with her. PW 1 resisted such attempt and pushing the appellant, escaped through the back door of the house to the house of a neighbour PW 3 and thereafter they all came to the house. Seeing them the appellant ran away. She informed the matter to her husband next morning and a Panch was convened in the village. In the Panch the appellant admitted his guilt saying that his objectionable behaviour was because of his having been drunk and begged to be excused. Again on 27-12-1989 evening when PW 1 had gone out to ease, the appellant caught hold of her from her back near a tamarind tree and forcibly made her lie down. When she raised protest, the appellant who had a knife in his hand, threatened her with dire consequences. He removed her Saree and under-garment, also removed his own clothes and forcibly cohabited with her. Hearing the sounds of PW 1, PWs 3 and 4 and one Santo Mirgan carne there and discovered the appellant on PW 1, both in a naked condition, and seeing them he ran away naked taking his knife and Lungi with him The bangles of PW 1 had been broken and she had also sustained injury on her right wrist. She narrated the incident to her husband on his return and on the next day she along with her husband (PW 6), and PWs 3 and 4 went to the Out-post and made oral report but no action was taken. Since the police did not take any action, she lodged the complaint before the SDJM on 29-1-1990 who took cognizance in the matter and committed the case to the Court of Session.

2. At the trial PW 1 in support of her case examined besides herself PWs 3 and 4 as the immediate post-occurrence witnesses and PW 5 to whom she narrated the incident PW 2 deposed that he had seen the appellant as running away at a distance. The appellant examined the Ward Member of the village, Deenu Bhotra as DW 1.

3. Reading the evidence of PWs 1, 3 and 4 it is apparent that their evidence is wholly consistent and that the witnesses have stuck to the case as was revealed in the complaint petition. Mr. Acharya, the learned counsel for the appellant does not dispute such fact except pointing out some discrepancies which are minor in nature. But the main plank of his submission is the improbability of the case and the gross delay in filing the complaint without any explanation for the same. Certain admitted features as appear from the prosecution case are that in the village there were two groups as has been seen earlier. The appellant admittedly belonged to Bhotra group whereas PW 1 though a Bhotra girl had been married to a Mirgan man. There was also dispute between the appellant and PW Vs husband. DW 1 was the leader of the Bhotra group. There was assault between PW 1's father-in-law and Bhotra people and hence there was misunderstanding between Bhotras and Mirgans. Admittedly PWs 3 and 4 are Mirgans. Another feature is that even though a Panch meeting was held on 26-12-1989 yet none of the Panch members have been examined. The complaint having been made little more than a month after the occurrence, there was no medical examination of PW 1 or of the appellant. The only evidence regarding the physical violation of PW 1 is the oral evidence of PWs 1. 3, 4 and 5. It is in this background Mr. Acharya submits that in view of the admitted enmity between the parties not only between different groups but also personally between PW 5 and the appellant, it was improbable that the appellant would attempt to commit rape upon PW 1 and accomplish it on the next day even after her complaint before the Panch and that the story on the contrary is a got-up and cooked up one so as to falsely implicate the appellant.

4. In this background of facts, the delay filing the complaint becomes extremely significant. In the complaint petition PW 1 stated that the matter was reported to the police on 28-12-1989 at about 11 AM and that even though a month has

passed no action was taken by the police. Similar was her statement before the learned Sessions Judge. Even so absolutely no steps were taken to call for the records from the police to substantiate such allegation as to whether actually a report had been made to the police and if so whether that had been registered as an FIR, whether investigation had been taken up and report Under Section 173, Cr. PC had been submitted.

5. In criminal trial one of the cardinal principles for the Court is to look for plausible explanation for the delay in lodging the report. It is for the reason that delay affords opportunity to the complainant to make deliberation upon the complaint and to make embellishment or even make fabrications. Delay defeats the chance of the unsoiled and untarnished version of the case to be made before the Court at the earliest instance. That is why if there is delay in either coming before the police or before the Court, the Courts always view the allegations with suspicion and look for satisfactory explanation, if no such satisfaction is formed, the delay is treated as fatal to the prosecution case. In AIR 1973 SC 501 (Thulia Kali v. The State of TimilNadu) the exposition of law in the matter was made by the Supreme Court saying that the delay in lodging the first information report quite often results in embellishment which is a creature of afterthought. On account of delay, the report not only gets bereft of the advantage of spontaneity, but also danger creeps in of the introduction of coloured version, exaggerated account or concocted story as a result of deliberation and consultation. In AIR 1974 SC 606 (Ram Jag and Ors. v. The State of U. P.) the position was explained that whether the delay is so long as to throw a cloud of suspicion on the seeds of the prosecution case must depend upon a variety of factors which would vary from case to case. Even a long delay can be condoned if the witnesses have no motive for implicating the accused. On the other hand, prompt filing of the report is not an unmistakable guarantee of the truthfulness of the version of the prosecution. The test being applied to the present case, it is seen that there was sufficient motive in the prosecution witnesses to have alleged falsely against the appellant because of the enmity between the parties.

5. It is to be seen as to whether the delay in the present case could be said to be fatal to the prosecution. The prosecution has attempted to explain the delay by

stating that the matter was reported to the police on 28-12-1989 at about 11 A. M. but that the police did not take any action. Such statement can hardly be taken to have explained the delay. It is the simplest of things to contend that the police, though report had been lodged with it, had not taken any steps. But it has to be established by calling for the necessary records from the police to substantiate that in fact a report with the police had been lodged and that the police failed to take up the case. The principle has been statutorily recognised in Section 210 of the Code of Criminal Procedure which enjoins upon the Magistrate, when it is made to appear before him either during the inquiry or the trial of a complaint, that a complaint before the police is pending investigation in the same matter, he is to stop the proceeding in the complaint case and is to call for a report from the police, After the report is received from the police, he is to take up the matter together and if cognizance has been taken on the police report, he is to try the complaint case along with the G. R. Case as if both the cases are instituted upon police report. The aim of the provision is to safeguard the interest of the accused from unnecessary harassment. The provisions of v. 210, Cr PC, are mandatory in nature as has been held in (1993) 6 OCR 438 (Santosh Kumar Sahu v. M. Prakash Dora and Ors.) and Criminal Revision No. 296 of 1990 (Bhupendra Singh and Ors. v. Mandeep Kour and Anr.) (decided on 13-7-1993). It may be true that non-compliance of the provisions of Section 210, Cr PC, is not ipso facto fatal to the prosecution because of the provision of Section 465. Cr PC, unless error, omission or irregularity has also caused the failure of justice and in determining the fact whether there is a failure of justice the Court shall have regard to the fact whether the objection could and should have been raised at an earlier stage in the proceedings. I am not expressing any opinion here in that regard. But even applying the very same principles it is seen that in fact the appellant was in fact prejudiced because of the non-production of the records from the police. That delay in filing the complaint because of police inaction has to be explained by calling for the records from the police was explained by the Apex Court in AIR 1971 SC 66 (Khedu Mohton and Ors. v. State of Bihar) where the Court took exception to the facts the complaint lodged with the police had not been summoned or proved, no satisfactory proof of any such complaint had been adduced before the Court, and none of the documents as would have become

available Under Section 173, Cr PC had also been brought on record.

7. In that view of the matter, I am constrained to hold in the background of the case that delay in the present case has fatally affected the prosecution and hence the prosecution has to be thrown out as not genuine.

8. In the result, the appeal is allowed. The judgment of conviction and sentence passed against the appellant is set aside. The appellant be set at liberty forthwith.

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