

**Dasarathi Sahukar Vs. State**

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**SooperKanoon Citation :** [sooperkanoon.com/533952](http://sooperkanoon.com/533952)

**Court :** Orissa

**Decided On :** May-16-2007

**Reported in :** 2007CriLJ3445

**Judge :** A.K. Ganguly, C.J. and; I. Mahanty, J.

**Appellant :** Dasarathi Sahukar

**Respondent :** State

**Advocate for Pet/Ap. :** Sri. Das

**Judgement :**

**I. Mahanty, J.**

1. The present appeal under Section 374 of the Code of Criminal Procedure has been filed challenging the order of conviction passed on 26-7-1993 by the learned Special Judge-cum-Sessions Judge, Koraput, Jeypore in Sessions Case No. 148 of 1992 who found the accused guilty under Section 376, IPC read with Section 3(2)(v) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 (in short 'the Act') and having convicted appellant thereunder, sentenced him to undergo rigorous imprisonment for life in view of Section 3(2)(v) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989.

2. The prosecution case in brief is that, on 11-3-1992 at about 7.00 p.m. the victim had been to attend the call of nature and while she was returning home by road the accused appellant came behind her and forcibly lifted her to his thrashing floor and committed rape on her. At the time of commission of rape she shouted and hearing her hue and cry Himirika Singaru and Kadraka (P.Ws. 2 and 3 respectively) rushed to the spot and saw the accused committing rape on the victim girl and seeing them the accused went away from the spot. She narrated the incident before P.Ws. 2 and 3 as well as her mother. There was panchayati for the next two days, but as the accused was not found in the village and thereafter FIR was lodged before the police station and investigation was taken up and on completion of investigation charge-sheet was submitted.

3. The defence plea is one of complete denial of the occurrence. Pleading innocence, the accused has stated in his statement under Section 313, Cr. P.C. that he has been falsely implicated in this case by the villagers out of previous grudge.

4. The trial Court found two points for consideration.

(i) Whether the accused committed rape on the victim on 11 -3-1992 at about 7 p.m.?

(ii) Whether the victim is a member of Scheduled Tribe?

5. The trial Court, on consideration of the evidence on record, such as evidence of nine witnesses adduced by the prosecution as well as other testimonial evidence, medical evidence, seizure witness, eye-witness, report of the medical examination and investigation report made by the Investigating Officer, came to the conclusion that the evidence of P.Ws. 1, 2 and 3 well proved that rape was committed on the victim girl (P.W. 1) by the accused. The next point for consideration was whether the victim girl was a member of the Scheduled Tribe community and there existed no dispute that the accused is not a member of Scheduled Tribe or Scheduled Caste community, and as such the learned trial Court came to a conclusion that the victim is a member of scheduled tribe being 'Kondho' by caste.

6. Sri S.K. Das, learned Counsel appearing for the appellant at the outset contended that since the investigation in the present case had been carried out by the Officer -in-Charge of Narayanpatna Police Station, the same violates Rule 7(1) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Rules, 1995 (in short 'the Rules'). Rule 7(1) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Rules, 1995 read as follows:

An offence committed under the Act shall be investigated by a police officer not below the rank of a Deputy Superintendent of Police. The investigating officer shall be appointed by the State Government/Director General of Police/Superintendent of Police after taking into account his past experience, sense of ability and justice to perceive the implications of the case and investigate it along with right lines within the shortest possible time.

7. Sri Das, submitted that since the investigation had been carried out by the O.I.C. of the local police station who admittedly is below the rank of Deputy Superintendent of Police as provided under the statute, it vitiated the entire investigation in this case. Consequently the criminal proceeding would stand vitiated because of non-compliance of the statutory provision as has been done in the instant case. This contention of the learned Counsel for the appellant though at the outset seem to be sound, yet clearly it is not applicable to the present case, The 'offence' investigated into in the present case is an offence under Section 376 of the Indian Penal Code and no allegation is made out in the FIR regarding commission of any offence under Section 3(1) of the Act. Therefore, since no offence as such has been alleged to have been committed under the Act, no question of applicability of Rule 7(1) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Rules, 1995 can be brought into force.

8. In the present case, the learned Special Judge-cum-Sessions Judge, Koraput at Jeypore applied Section 3(2)(v) of the said Act. The trial Court held that the accused has committed an offence under Section 376 of the Indian Penal Code. which is punishable with imprisonment up to a term of ten years on the ground that such victim is a member of Scheduled Tribe. Section 3(2)(v) of the Act is a provision for enhancement of punishment imposable by the trial Court to life

imprisonment in the event an accused is found to have committed offence against a member of Scheduled Caste or Scheduled Tribe under the Indian Penal Code, which is punishable with imprisonment for a term of ten years or more.

9. In the present case the accused-appellant faced trial for an offence under Section 376, IPC which is punishable with imprisonment of either description for a term which shall be less than seven years or for a term which may extend to ten years. The learned trial Court clearly reached a finding that the victim was a member of Scheduled Tribe being 'Kandho' community. Therefore, Section 3(2) of the Act was applied since the victim was found to belong to a Scheduled Tribe community.

10. We are of the considered view that since the offence complained of in the FIR and as investigated into by the Investigating Officer and as charge sheeted was not an 'offence' under any of the provisions of Section 3(1) of the Act, Rule 7 of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Rules, 1995 requires that the investigations into the offence committed under the Act do not come into operation. Hence the contention advanced on behalf of the appellant is rejected.

11. Sri Das, learned Counsel for the appellant strongly urged that there are apparent contradictions in the oral testimony of the victim girl P.W. 1 inasmuch as she has stated in her cross-examination that she could not recognize the person who lifted her as it was a dark night. But, learned trial Court in course of cross-examination put a question to the victim girl P.W. 1 and the said witness in clear and categorical terms stated that she recognized the accused at the time of occurrence and that she named the accused before P.Ws. 2 and 3 as well as her mother and in the Panchayati also named the accused in person who had committed rape on her. The trial Court also took into account that in cross-examination the victim girl had stated that she did not recognize the culprit, as it was a dark night. She had been later declared hostile by the prosecution. We are of the view that the trial Court was also correct in assessing the evidence of P.W. 1 since it is evident from the trial Court record that P.W. 1 is an illiterate girl and obviously she might have been perturbed on the question put by the defence

counsel. But on consideration of the entire evidence, P.W. 1's evidence obviously cannot be thrown out, and it needs to be scrutinized with due care and caution.

12. The evidence of P.W. 1 finds corroboration from the evidence of P.Ws. 2 and 3, who have categorically stated that they had been to tank side for easing purpose and while returning they heard the shouts of P.W. 1 coming from the thrashing floor of the accused and they rushed to the spot and found the accused committing rape on P.W. 1. Both P.Ws. 2 and 3 stated that on seeing them the accused fled away from the spot and thereafter the victim came to them and stated that she has been lifted forcibly by the accused to the thrashing floor where she was raped by the accused. P.W. 4 who had convened the Panchayati on the next day also corroborates the evidence of P.Ws. 1, 2 and 3 that P.Ws. 1, 2, 3 and the mother of P.W. 1 came to the house of P.W. 4 on the night of occurrence and narrated the incident before him. P.W. 4 specifically stated that P.W. 1 told him that accused had lifted her to the thrashing floor and committed rape. He further stated that P.Ws. 2 and 3 on the date of Panchayati told that they had seen the accused to have committed rape on P.W. 1. It is clear from the evidence recorded by the trial Court that the accused absconded immediately after the occurrence for two or three days for which nothing could be done at the Panchayati held at the behest of P.W. 4.

13. Although the learned Counsel for the appellant strongly urged not to rely upon the evidence of P.Ws. 2 and 3 on the ground that due to previous dispute between the parties, they have foisted the charge on the accused falsely in this case. While P.W. 1 the victim girl has categorically stated in her cross-examination that three years back P.Ws. 2 and 3 told her to file a case and after that they have not told her any thing more. Since the occurrence took place on 11-3-92 and P.W. 1 deposed on 18-1-1993, there is no substance on the allegation made by the learned Counsel for the appellant and therefore, it cannot be presumed that P.Ws. 2 and 3 have falsely implicated the accused.

14. Apart from the above it is very important to take note the evidence of D.W. 1 and in para 3 of his examination in chief he has stated that a Panchayati had been convened and when P.Ws. 2 and 3 namely, Himirika Singuru and Kadarka Viranna

respectively were asked about the occurrence, they told that the culprit had caught hold of the hand of the victim in the night and seeing them the culprit fled away. Thereafter P.Ws. 2 and 3 showed us the spot of occurrence, which is the thrashing floor of Damodar. The accused is the son of Damodar. Further in the cross-examination D.W. 1 also admits that P.W. 4 has convened the Panchayati where P.Ws. 1, 2 and 3 were present in the said Panchayati and that D.W. 1 had learnt the next morning that accused Dasarathi committed rape on P.W. 1.

15. We are of the view that this evidence of D.W. 1 also corroborates the case of the prosecution inasmuch as D.W. 1 affirmed about holding of Panchayati on the next day of the occurrence. He also corroborates the evidence of P.Ws. 2 and 3 to the extent of place of occurrence and also corroborates the evidence of P.Ws. 1, 2 and 3 that Panchayati was held immediately after the occurrence. In view of this evidence there is no justification to accept the contention of the appellant for not placing any reliance upon the evidence of P.Ws. 2 and 3.

16. The evidence of P.W. 5, the doctor who examined the victim girl is also extremely important. In her evidence the doctor has stated that the approximate age of the victim girl was 15 to 17 years and there was no sign of recent sexual intercourse. In the cross-examination of this witness she stated that rape cannot be excluded. In this respect it is important to take note of the fact that the incident took place on 11-3-1992 and the examination of the victim by the P.W. 6 was conducted on 15-3-1992 and the doctor (P.W. 6) opined that there was no sign of recent sexual intercourse. In her opinion report vide Exhibit-4/1 doctor (P.W. 6) opined that the healed tears as described in the report Exhibit 3 indicated violation of hymen about one week before her examination by the P.W. 6, and to the Court she responded by stating that violation of hymen may be due to rape and in the cross-examination she clarified that there was no sign of 'recent' sexual intercourse. 'Recent' means within 24 hours. The doctor P.W. 6 examined the victim on 25-3-1992 whereas the occurrence is said to have been occurred on 11-3-1992. The statement of the doctor is to be considered in such context. Therefore, from the evidence of the doctor P.W. 6 it is clear that there is violation of hymen of the victim due to rape. In so far as P.W. 7 is concerned, he conducted the x-ray examination and opined that the victim was in between 14 to 16 1/2 years

of age at the time of occurrence. The appellant was also examined by P.W. 8 on 19-3-1992 and Exhibit-6 is the report submitted by him.

17. Sri Das, learned Counsel for the appellant further submitted that the evidence of P.W. 1 has contradicted her own version as stated in her examination in chief. Therefore, it is to be held that P.W. 1 does not appear to be a truthful witness and her evidence should not have been taken into consideration for any conviction. Therefore, such testimony of P.W. 1 cannot be sustained and in this regard the defence counsel placed reliance on the judgment in the case of Bhaga Goudas alias Vainra v. State reported in 1988 (2) OLR 120, but the learned Special Judge-cum-Sessions Judge held that the same is not applicable to the present case since only P.W. 1 the victim girl identified the accused as the person who committed rape on her and she disclosed the name of the accused before the witnesses. In this case P.W. 1 is not a solitary eye-witness, P.Ws. 2 and 3 are also eye-witnesses to the occurrence and it is stated that the prosecution has declared P.W. 1 to be hostile after her cross-examination yet, the testimony of P.W. 1 cannot be discarded. In view of Section 154 of the Evidence Act (1872) credibility of the evidence of hostile witness cannot be discarded in toto, but so much of the evidence which is corroborated by other evidence can be accepted. This provision of the Evidence Act is also reiterated in the case of Madho Ram Shakya v. State of U.P. reported in Crimes 1984 (1) 629 : 1984 All LJ 275 in which the Hon'ble Court answered the following question:

Can the prosecution place reliance on the testimony of witnesses who have turned hostile (Yes)

The Hon'ble Court has answered the question in positive and held even in a criminal case, prosecution place reliance when a witness is cross-examined and contradicted by the party calling him, his evidence cannot as a matter of law be treated as washed off the record. It is for the Judge of fact to decide whether the witness stands thoroughly discredited or can still be believed in regard to a part of his testimony.

18. In view of the serious question that arises in the present case on account of prevarication of evidence of P.W. 1 in the present appeal, the evidence of such

witness has to be gone through minutely. The examination in chief of P.W. 1 was conducted on 18-1-1993 and in her examination in-chief the victim clearly stated that she knew the accused Dasarathi and that on the date of occurrence while she was returning after attending the call of nature, accused came to her from behind and lifted her to the thrashing floor and forcibly committed rape on her. She (P.W. 1) further stated that the accused tore my blouse and undressed her by removing her sari as well as the loin-cloth (used as under-wear). Though she was shouting, the accused forcibly committed sexual intercourse on her. Hearing the shout, P.Ws. 2 and 3 came to the spot and seeing them accused fled away from the spot. Thereafter she narrated the incident before P.Ws. 2 and 3 as well as her mother on the same night. P.W. 1 further stated that in the same night she and her mother reported the matter to the Ward member Ganganna (P.W. 4). The accused was found absent in the village on Thursday and Friday. The Ward member sent for the accused but the accused was not available and she reported the matter on Saturday at the police Station. P.W. 1 stated that she along with her mother and P.Ws. 2, 3 and 4 went to the police station. The victim further states that on the date of occurrence she had worn some glass bangles which got broken at the time of occurrence and were lying at the spot and identified such broken pieces of her bangles to the police and also handed over the bangles from her hand which were not broken and her wearing apparels including loin cloth to the police. In her cross-examination she stated that she know the accused prior to the date of occurrence, but she had not talked with him. Though the accused is a co-villager, but his house is in a different street. P.W. 1 thereafter stated in her cross-examination in para 9 that she could not identify who lifted her.

19. On the face of such confusing statement, the Court put the following question to P.W. 1 on the following effect.

(The question put by the Court)

Question - You are telling that you could recognize the accused at the time of occurrence and also telling that you could not recognise him. Which of the version is true?

Answer - My version that I recognized the accused at the time of occurrence is true.

Thereafter P.W. 1 on further cross-examination in para 13 has stated that she could not recognize the culprit at the time of occurrence. At that time the learned Public Prosecutor was permitted to put questions under Section 154 of the Evidence Act. On the said question, P.W. 3, in her statement recorded during trial, has stated that the accused committed rape on her and she did recognize the accused when the accused lifted her to his thrashing floor and committed rape.

20. In the light of aforesaid evidence even if there are some minor contradictions, yet the learned Special Judge-cum-Sessions Judge, Koraput-Jeypore in our view has correctly assessed the evidence on record, and since the evidence of the victim girl still remains admissible and clear and therefore can be believed and relied upon when corroborated by other reliable evidence. Seeing the rustic and illiterate background of the victim as well as her tender age. we are of the view that evidence given by her which is corroborated by the evidence of P.Ws. 2, 3, 4 and 6 coupled with the medical evidence and evidence of the Investigating Officer, there is nothing to disturb the finding of guilt arrived at by the trial Court.

21. After having reached the conclusion as noted above, the next question that arises for consideration is whether the finding reached by the Trial Court that the victim is a member of Scheduled Tribe is based on the evidence on record. The finding reached by the trial Court that the victim (P.W. 1) was a member of the Scheduled Tribe being Kondho by caste. We find that defence has strenuously urged that there is no convincing evidence on record that the accused belongs to the Scheduled Tribe. No doubt, it is correct that P.W. 1 in her evidence has stated that she is a member of the Scheduled Tribe being Kondho by caste. But, in the cross-examination at para 7 she states that she is 'Telugulu' by caste and that she has no certificate showing her caste, i.e., 'Telugulu' as Kondho. The Investigating Officer has also stated that he had ascertained from the victim that she belongs to Scheduled Tribes.-Learned trial Court has thereafter proceeded on the basis of the aforesaid evidence and held that 'since there is no rebuttal evidence that the victim is not a member of the scheduled tribe', it was held that she belongs to Kondho by

caste.

It is extremely important to take note of the fact that P.W. 1 herself in her cross-examination has categorically stated that she is 'Telugulu' by caste and that she has no caste certificate with her showing her caste as Kondho. It is correct that though the Investigating Officer has in his evidence in chief stated that the victim is a member of the scheduled tribe, yet in cross-examination he admits that he ascertained from the victim that she belongs to Scheduled Tribe and that he had not mentioned in the case diary about the same. He further states that it is not a fact that the victim is not an Adivasi and she is Telugulu by caste.

22. In view of the aforesaid contradictory evidence and in view of the admission on the part of the victim that she is Telugulu by caste and that she does not possess any certificate showing her caste as Kondho, we are of the view that the finding reached by the trial Court in this respect is not legally acceptable. We are, therefore, of the view that during trial of the case it has not been proved by positive evidence that the victim was a member of a Scheduled Tribe being Kondho by caste.

23. In view of the aforesaid finding, Section 3(2)(v) of the S.C. and S. T. (Prevention of Atrocities) Act, 1989 would not come into play and therefore having found the appellant guilty of the offence of rape we have to reconsider the sentence imposed by the trial Court. Section 376, IPC stipulates that whoever, except in the cases provided for by subsection (2), commits rape shall be punished with imprisonment of either description which shall not be less than seven years but which may be for life or for a term which may extend to ten years and shall also be liable to fine provided that the Court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than seven years.

24. Considering the fact that the occurrence took place in the year 1992 and the present Jail Criminal Appeal is pending in this Court since 1993, i.e. more than fourteen years, we are of the view that this is a fit case where rigorous imprisonment for a period of seven years would meet the ends of justice.

25. We find from the order dated 16-5-1996 passed by this Court that the appellant has been released on bail in S.T. case No. 148 of 1992. The bail order stands cancelled and the appellant is directed to immediately surrender before the learned Special Judge-cum-Sessions Judge, Koraput in S.T. Case No. 148 of 1992 to serve out the remaining period of sentence imposed against him.

Accordingly, the Jail Criminal Appeal is partly allowed and is disposed of in terms of the directions noted hereinabove.

A.K. Ganguly, C.J.

26. I agree.

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