

State Vs. Dasru Kisan

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Court : Orissa

Decided On : Jan-29-1991

Reported in : 71(1991)CLT727; 1991(I)OLR396

Judge : S.C. Mohapatra, J.

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

Appeal No. : Govt. Appeal No. 46 of 1984

Appellant : State

Respondent : Dasru Kisan

Advocate for Def. : None

Advocate for Pet/Ap. : Government Adv.

Disposition : Appeal dismissed

Judgement :

S.C. Mohapatra, J.

1. Non-acceptance of evidence of prosecutrix by the appellate Court and consequently the prosecution case to acquit the accused who was convicted Under Section 376, I. P. C. is the cause for this appeal against acquittal

2. On 24-11-1980 prosecutrix (PW 1) orally reported to PW 8 who happened to come to her village that she was raped by the accused on 20-11-1980 at 10 A. M. in a ditch in the nearby jungle when she was collecting fire wood along with her elder brother and younger sister being dragged for a distance of about fifteen feet to the place of occurrence. Cause of delay in reporting was stated to be on account of absence of any other person as her father was dead and she was attending to the house- hold affairs. PW 8 reduced her version to writing which was treated as First Information Report.

3. Accused was tried and convicted but in appeal it was found that he was not properly represented. Accordingly, his conviction was set aside and in a fresh trial, he was again convicted to be acquitted in appeal.

4. Prosecution examined ten witnesses to prove the charge against the accused. PW 1 the victim girl and her younger sister (PW 2) are the eye witnesses. PWs 3 and 4 are aunt and grand-father of PW 1 to whom PWs 1 and 2 and their brother reported the incident at about noon. PW 6 is the Sarpanch of the Grama Panchayat to whom PWs 1, 3 and 4 reported the incident two days after on 22-11-1980 in the evening PW 8 is the Investigating Officer. PW 5 is a seizure witness, PW 9 is the doctor who gave opinion in respect of the prosecutrix (PW 1) and PW 10 is the lady doctor who examined PW 1 on 24-11-1980 with regard to rape and also injuries on her as well as on the accused. PW 7 is the Officer who submitted charge sheet.

5. Allegation against accused is that he had sexual intercourse with PW 1 a girl aged 16 years. without her consent. If the allegation is proved, it would come within the meaning of rape as stated in Section 375 sixthly. In case age of PW 1 is held to be above sixteen years, it is to be proved that sexual intercourse was without her consent. Therefore, prosecution is to prove that accused had sexual intercourse with PW 1 in the ditch on 20-11-1980 and she is aged 16 years of less or in case she is aged more than 16 years, such sexual intercourse is without her consent.

6. PW 9 who examined the X-ray photograph of PW 1 on 24-11-1980 gave the opinion that her age is about 16 years. In cross-examination, he stated that in case

of opinion of doctors regarding age, there is margin of, error of one year on either side. PW 1 while being examined on 14--1983 stated her age to be 20 years Court also assessed her age to be same. Both trial Court and appellate Court have come so the finding that on 20-11- 1980 she was aged about 16 years. Thus, as inference can safely be drawn that PW 1 was aged more than 16 years on 20-11-1980 and as such to bring home guilt to the accused, prosecution is to prove that accused had sexual intercourse with PW 1 without her consent on 20-11-1980 as alleged.

7. PW 10, the lady doctor who examined PW 1 on 24-11-1980 stated in her cross-examination that PW 1 was used to sexual intercourse. PW 1, however, in her cross-examination stated that previous to the incident she had no experience of sexual intercourse. PW 10 did not find any injury on PW 1 on account of forcible sexual intercourse. She did not find any material to give opinion about recent sexual intercourse. On account of this inconsistency either PW 10 is not to be accepted or PW 1 cannot be believed. Prosecution relied upon P. W. 10. Public Prosecutor made no attempt to harmonise the facts and opinions for consideration of the Court. Normally opinion is to give way to the ocular statement or personal experience, In case of unmarried girl in a society where premarital sexual relationship is shunned, her version of sexual assault is given importance since she invites the lowering her position in society by such act of another which in ordinary conduct one would not give out to bring home guilt to another for no benefit to her rather causing harm to self. However, duty of prosecutor and judge trying is onerous to see that criminal jurisprudence prevails even if an accused gets acquitted. Therefore, in spite of the fact that law does not require corroboration of evidence of a victim girl, Court on account of prudence searches for the same and prosecutor supplies it to Court.

8. In this case, grievance of prosecutor is that appellate Court did not appreciate corroboration by PW 2 younger sister of PW 1 and of conduct of PW 1 in immediately afterwards disclosing the incident to PWs 3 and 4 who are the persons normally to be reported about it.

9. Here comes the question of weighing materials to assess their acceptability. For the same, totality of evidence is to be taken note and not piecemeal evidence. First of all it is to be kept in mind that PWs 1, 2 and their elder brother constitute a family who have lost their father. Whether their mother is alive is not in record. If mother is there, the best person to be reported about the incident is the mother. Prosecution has not made any endeavour to bring this fact to record. PWs 1 and 2 stated that their elder brother also went with them to the Jungle to collect fire wood and he was collecting wood at a short distance of about 15 feet from them. Prosecution has not explained why the brother who is of more maturity than PW 2 has not been brought to the dock. He could have given a clear picture of pre and post incident facts. Immediate circumstances would be the best corroboration. Here prosecution has left a link missing That would not have been very material if the spot visited by PW 8 would have corroborated PW 1. It is a ditch with moorland ground PW 1 stated that on account of her resistance, she received injury on buttock and back. In medical examination, no such injury could be detected. At the place PW 8 found a broken piece of white plastic bangle indicating that bangle broke on account of resistance by 'PW 1'. Although PW 1 did not speak of such a fact, I might have given importance to it if PW 1 would have stated that she was wearing such a bangle, in cross-examination she stated that she was wearing bangles which were green in colour. How green became white is not known, if the broken piece would have been produced, I might have tried to examine if there was likelihood of fading of colour to look white. Prosecutor has not taken care to produce the bangle for examination by Court though seized.

10. PW 1 stated that both her brother and sister (PW 2) saw the sexual assault on her. Later she excluded the brother to have seen Accused is a Sean and thin man and in assessment of PW 1, she could have over- powered her. She had an axe. Her sister had an axe. Her brother also had an axe. Thus, there was every scope in normal circumstances for the three to overpower the accused before the act of rape was committed. It is not believable that on account of threat by accused that he would assault by his axe, PW 2 and her brother remained silent. improbability is writ large.

11. Information to PWs 3 and 4 is a strong circumstance to corroborate PW 1, PW 3 is the aunt. She was arranging meeting of accused and PW 1 in her house. She was a mediator giving proposal of their marriage. This indicates that PW3 is separate from family of PW 1. PW 1 stated that even after accused married, accused and she were meeting in house of PW 3. If meeting was so frequent and even after marriage it continued, there was no reason why accused found a ditch in the jungle in day time to have sexual intercourse with PW 1. Some incident prior to it must have happened which prosecution is not bringing to record. That incident would have disclosed whether implicating accused in sex offence falsely or sex offence committed by accused is more probable.

12. PW 3 is married and is aged about 45 years. She would have immediately reacted to such act of accused being a lady herself As PW 3 stated she was arranging meeting of accused and PW 1. It is true that she stated that she and PW 4 reported the incident to. PW 6 who while corroborating PWs 3 and 4 stated that in the evening of 22-11-1980 he was informed of the incident by PW 1 and PW 4. He does not speak about PW 3. In cross-examination, she stated that accused never came to her house which is believed by evidence of PW 1 that her house was the meeting place for her meeting with accused as arranged by PW 3. Even for a simple fact, she is not prepared to speak the truth. Her conduct and suppressions are such that no confidence can be reposed on her for accepting her statement.

13. PW 4, 'though grand-father, is not a member of family of PW 1. He stated that PW 3 was not there when PWs 1, 2 and their brother reached him. PW 3:stated that the three brother and sisters reported incident to her and PW 4 and they called and stated to younger brother of the accused who assured them that on return of wife of accused matter would be discussed. Presence of PW 3 being denied by PW 4 and PW 3 having claimed to be acting jointly with.. PW 4, both become non-acceptable. Added to it, PW 1 stated that on account of objection of PW4, her marriage with accused failed. PW 4 went half way to admit mixing of PW 1 with accused which he did not relish. He has not explained under what circumstances, he informed PW & in the evening of 22-11-1980, He told that PW 6 went to the police station. PW 6 stated that it is a police case and he has nothing

to do in the matter. In cross-examination, PW 6 stated that he has not reported the matter to police. He also, did not instruct PW. 1 and PW 4 to report at the police station. In this background, evidence of PW 4 that PW 1 came with her sister PW 2 and her brother and reported the incident is not acceptable.

14. Evidence of PWs 3 and 4 about immediate conduct of the victim girl (PW 1) not being acceptable, there is no corroboration to her statement or statement of PW 2 her sister about sexual intercourse.

15. Brother of accused has not been examined to support PWs 3 and 4 that they complained to him immediately about the conduct of accused. No evidence has been adduced to prove when wife of the accused returned and whether there was any discussion about the same after she returned. No explanation has been given by the prosecution as to why such discussion was abandoned if at all wife of the accused returned earlier. Information to younger brother of accused has not been intimated to PW 6 who does not speak about the same.

16. Information to PW 6 on the third day of occurrence as alleged creates a grave doubt that allegation against the accused might have been looked up by PW 4 the grand-father who on account of dominating position might have influenced PWs 1 and 2 to foist false allegation against accused which was the cause of delay to inform PW 6 and consequent delay in reporting to PW 8.

17. Though trial Court convicted accused, judgment itself shows that in respect of material facts, it also doubted prosecution story. But because of evidence of PW 1, accused was convicted. Appellate Court disbelieved PW 1. On independent discussion, I also agree with the conclusion reached by appellate Court since taking into totality of circumstances, as discussed by me, I do not find beyond reasonable doubt that accused is guilty.

18. In the result, there is no merit in this appeal which is dismissed.