

State Vs. Musa and anr.

State Vs. Musa and anr.

SooperKanoon Citation : sooperkanoon.com/536117

Court : Orissa

Decided On : Feb-13-1991

Reported in : 1991CriLJ2168

Judge : S.C. Mohapatra, J.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Sections 354, 375 and 376; ;Code of Criminal Procedure (CrPC) , 1974 - Sections 235(2) and 313

Appeal No. : Govt. Appeal No. 43 of 1985

Appellant : State

Respondent : Musa and anr.

Advocate for Def. : S.C. Sahoo and ;R.K. Patnaik, Advs.

Advocate for Pet/Ap. : Addl. Standing Counsel

Judgement :

S.C. Mohapatra, J.

1. Acquittal of two accused persons from charge Under section 376, IPC for having committed rape on a married woman in her house is subject matter of this appeal.
2. Victim lady is aged about 22 years. She lives with her young son, husband and mother-in-law. Accused persons aged about 40 and 45 years are their co-villagers.

3. Prosecution case is that on 16-3-1984, at about 7 p.m. both the accused persons came to house of P.W. 6 and persuaded him for assistance in cooking the meat of a fowl brought by them. They sent P.W. 6 to collect balance amount from Babru Behera (not examined) to whom more money than price of fowl was paid. At that time mother-in-law of P.W. 7 was in a room. P.W. 7 was doing some work and for that was standing on the outer varandah of their house. After P.W. 6 left, both the accused persons called P.W. 7 to go inside for finding out tamarind. When P.W. 7 declined, both accused caught hold her two hands and dragged her inside the house. When she shouted, accused Bindhani put a cloth pack in her mouth. Accused Sankhua committed rape on her. Thereafter, accused Bindhani also committed rape. When they left her, she came out and while putting chain to the door from outside, accused Sankhua forcibly pulled the door and came out. Accused Bindhani remained inside the room. P.W. 7 chained and locked the door and shouted. Hearing her shout, her parents (not examined), husband (P.W. 6) and villagers Bhagabat Sahu (not examined), Banchanidhi Sahu (not examined), Bhuban Behera (not examined), Somanath Behera (not examined) and other villagers reached the spot. While accused Sankhua was running away with the cycle, P.W. 7 locked his cycle and took away the key. But finding that people are coming he lifted the cycle and ran away. At about 10 p.m. she went to the police-station with her husband (P.W. 6) and father Surendra Sahu (not examined) and orally reported the aforesaid fact which was reduced to writing as First Information Report by P.W. 8. In the report it was stated that her bangle were broken and by the broken bangle, there were scratches in her hand. She also stated that she had injuries on her breasts caused at the time of rape.

4. As revealed from evidence of P.W. 8, the investigating officer after recording FIR which was explained to P.W. 7, he recorded her statement and proceeded to the spot. He found accused Bindhani inside the room of house of P.W. 7. He kept the accused for interrogation and examined some persons. As it was late night, he suspended investigation and sent the A.S.I, (not examined) to search accused Sankhua. Next day he examined some more persons and seized broken pieces of bangles, broken pieces of earthen pot, one lock and chain. Thereafter, he arrested accused Bindhani. At Police-station he seized the lungi and banian of accused Bindhani. He then seized the cycle key, saree and saya of P.W. 7. Thereafter, he

sent P.W. 7 and accused Bindhani for medical examination at Kaptipada hospital. In absence of Lady Medical Officer, P.W. 7 was referred to District Headquarters Hospital for her examination. Accused Bindhani who was arrested on 17-3-1984 was forwarded on the next day. On 19-3-1984, accused Sankhua was arrested. After seizure of his Dhoti, he was sent for medical examination. He sent the clothings seized for chemical examination. His attempt to collect semen from both accused failed since there was no semen discharge. On investigation, he submitted charge-sheet against both accused persons.

5. Accused persons pleaded not guilty and denied the occurrence. While accused Bindhani admitted to have been confined in the room, his case is that P.W. 6 called both the accused persons to dress the fowl while they were going to the house of his brother next to house of P.W. 6. After the same was dressed P.W. 6 requested him to keep the meat room was chained from outside leaving him inside. Accused Sankhua made out the case that on account of party faction, as he belongs to rival party of P.W. 6 case has been falsely foisted against him.

6. Prosecution examined 8 witnesses, proved the FIR (Ext.. 5), the five seizure lists (Exts. 1 and 6 to 9) reports of the Medical Officers (Exts. 2 to 4). Requisition and report of the Director of chemical examination (Exts. 10 and 11) and produced broken glass bangles, door chain lock, broken earthen pot, banyan, lungi, cycle key, saree and saya (M.Os. I to IX) to bring home guilt of the accused persons.

7. Trial court on appreciation of evidence held that prosecution has not been able to bring home the guilt and acquitted both the accused. Trial court disbelieved the circumstances for presence of accused persons in house of P.Ws. 6 and 7 and fact of sexual intercourse of both accused with P.W. 7.

8. Learned Addl. Standing Counsel submitted that evidence of P.W. 7 corroborated by existence of semen in the saree, saya and dhoti of accused Sankhua tending assurance to the version of P.W. 7 ought to have been held to be sufficient to convict the accused persons when accused Bindhani was found confined in house of P.W. 6 to be recovered by P.W. 8. As combined effect of these materials have not been considered, it is submitted that judgment of acquittal is vulnerable.

9. In a prosecution of an accused for an offence Under Section 376, IPC totality of circumstances are to be considered distinguishing grain from the chaff. If the remaining materials which are grain lead to an inference that accused committed the offence, he is to be convicted. While assessing evidence it is to be remembered that our criminal jurisprudence puts the onus on the prosecution to prove beyond reasonable doubt that accused has committed the offence since several accused persons may be acquitted but one innocent person should not be convicted. Apart from punishment imposed, in our society conviction attaches indelible stigma and a person is looked down upon. Even arrest on account of allegations though not punishment has some retarding effect on the person so far as his place in society. Hence, onerous duty is cast on the Presiding Officer of the court to be scrutinising for convicting an accused. More heinous the offence, graver is the stigma.

10. Ladies in our society have a separate place. While mythology gives them position higher than men, in present day, they are found to be helpless and various laws have been made to give them protection. Extra marital sex relationship whether by force or with consent brings them down in estimation of the society. Thus, sexual intercourse with married woman without their consent constitutes the offence of rape as provided Under Section 375, I.P.C. irrespective of the fact that they are above the age of sixteen to be punishable Under Section 376, I.P.C. In view of gravity of the offence, accused is to face Sessions Trial and punishment is also quite severe. Normally a lady would not make herself lower in society by stating her sexual intercourse with another who is not her husband. Many ladies in fear of being looked down upon in the society suppress such facts from being brought to light. Version of such ladies who are victims of rape are normally accepted since she would not tell a lie at her own cost and she would give out the fact for punishment of the real culprit. Taking circumstances of rape into consideration at times uncorroborated testimony of a victim of rape is accepted to convict the accused. Either other evidence or circumstances must tend assurance to accept her version.

11. P.W. 7 being a married lady, medical evidence of signs of sexual intercourse by itself would not tend assurance. Such would be the case where a lady though

not married, has evidence of being habituated to sexual intercourse. Therefore, existence of semen in cloth of accused or victim lady by itself would not be a circumstance to tend assurance. Other circumstances are to be looked into.

12. House of P.Ws. 6 and 7 is not the normal place in the evening for both the accused to be found. Their presence is a circumstance unless explained. Trial court on appreciation of evidence did not find presence of accused Sankhua in house of P.Ws. 6 and 7. Key of the cycle with P.W. 7 and carrying the locked cycle would have been circumstance to create a suspicion that he was in the house of P.W. 7 at that time. Key was not seized at the police station immediately from P.W. 7 when first Information Report was lodged. No attempt has been made to prove that the key seized is of the cycle lifted by accused Sankhua. Even lifting of cycle and carrying the same in his shoulder has not been disclosed by P.W. 6 to P.W. 8 during investigation. It is true that accused Bindhani stated in his statement Under Section 313, Cr. P.C. that both accused were going together when called by P.W. 6 to kill the fowl. The same is not evidence against accused Sankhua. Accused Sankhua is a married person with children as found by trial court in his forties. He is a co-villager. It is not believable that he would have forcible sexual intercourse with P.W. 7 in her house when there is every chance of P.W. 6 returning any time specially in presence of another person like the accused Bindhani. Trial court rightly acquitted him and I am not inclined to accept prosecution case that he was present in house of P.W. 7 far less to speak of commission of offence of rape on P.W. 7. His acquittal is confirmed.

13. Coming to accused Bindhani, on his own version, he was found confined inside room of P.Ws. 6 and 7. Although the lungi was seized, it was not sent for chemical examination as found by trial court. Being married, existence of marks of semen would not be of much assistance. P.W. 7 stated that he committed sexual intercourse inside the room on a cloth there. Such cloth has not been seized. Persons named by her to have rushed to spot as stated in First Information Report have not been examined. Even her father who accompanied her has not been examined. There was an old lady, her mother-in-law inside the house. P.W. 8 has not stated that he examined her during investigation. Other circumstances have been elaborately discussed by trial court to disbelieve the story of sexual

isntercourse which need not be again stated here. I agree with trial court that offence of rape has not been brought home against him.

14. However, explanation given by accused Bindhani as regards his being confined in the room of P.Ws 6 and 7 is not convincing. One part of the prosecution case is that this accused dragged P.W. 7 inside the house. Although I am not inclined to accept that accused Bindhani committed rape on P.W. 7, I accept her statement that he dragged her inside. There is every probability that P.W.7 exaggerated the story having confidence given by her husband P.W.6 for which her father and other villagers have not been examined in this case. Dragging a woman is an offence of outraging her modesty. Although not charged fact constituting this offence which is a lesser offence has been brought to his notice. On the materials on record, I am satisfied that accused Srinath Bindhani is guilty of offence under Section 354 I.P.C.

15. Coming to the sentence, accused has not been heard as provided under Section 235(2), Cr. P.C. by the trial court since trial court was satisfied that no offence has been made out and persons cannot be convicted. It is true that hearing on the question of sentence is not an empty formality and non-compliance of the provision would not be a mere irregularity. By itself, the occurrence is of the year 1984 and about 7 years are going to pass. To call upon the accused to be heard on the question of sentence would only result in further delay in disposal of the appeal. In such circumstances, although I am of the view that Section 235(2), Cr. P.C. is to be complied with even by the appellate court in a case of appeal against acquittal, in the present case, I am satisfied that if a sentence for the period already in detention is passed, the same would be adequate and accused would not be required to serve any sentence any more.

16. In the result, appeal is allowed in part. Accused Musa alias Srinath Bindhani is convicted under Section 354, I.P.C. and is sentenced to the period for which he was under detention before being released on bail in the trial court. In respect of accused Srinath Sankhua appeal is dismissed.