

Deepak Mohapatra Vs. State of Orissa

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Court : Orissa

Decided On : Dec-23-2008

Reported in : 107(2009)CLT93; 2009(I)OLR516

Judge : L.K. Mishra, J.

Appellant : Deepak Mohapatra

Respondent : State of Orissa

Judgement :

ORDER

L.K. Mishra, J.

1. The petitioner is the accused in G.R. Case No. 589 of 2008 pending in the Court of Learned S.D.J.M., Bolangir wherein charge sheet has been filed under Sections 376/451 of the I.P.C. He has sought for bail under Section 439 of the Code of Criminal Procedure, 1973 (here-in-after called 'the Cr.P.C').

2. I have heard Learned Counsel for both sides on the question of bail and have perused the records.

The prosecution case in short is that the victim girl (name withheld) is a deaf and dumb girl, who lives with her brother and sister-in-law (wife of her brother) and niece but her mother remains else where. On a visit her mother found the

petitioner to be looking sick and on medical examination found her to be pregnant for three months. On her enquiry, she communicated through signs and gestures that three months back on a day at about 2 or 2.30 P.M. while she and her niece were sleeping in the kitchen, the petitioner came there and forcibly took her at the point of knife to the backside of a house, where he committed rape on her forcibly. He again brought and left her in the house and threatened her and her niece at the point of knife to finish them off, if the offence was disclosed. For fear she had not disclosed about the matter. The mother of the victim girl presented a written report at the police station on the basis of which police registered a Rs. Case and conducted investigation. During the course of investigation the victim was medically examined and so also the petitioner. Charge sheet has been placed against the petitioner as above.

3. Sri S.S. Swain, Learned Counsel appearing on behalf of the petitioner has submitted with vehemence that the narration of the prosecution case is highly improbable and cannot be believed. He has further submitted that the I.O. has not recorded the statement of the victim girl and whatever material is collected may amount to hearsay and not admissible since the statement of the victim girl is lacking. He has further submitted that non-examination of Dr. Mrs. Mohapatra who examined the victim girl at the out set and found her to be pregnant and lack of D.N.A test to ascertain the paternity of the unborn child is fatal to the prosecution case entitling the petitioner to bail. Sri S. Behera, Learned Addl. Government Advocate on the other hand has resisted the prayer for bail.

4. At the stage of bail detailed discussion of materials collected by the prosecution should be avoided. This is not the stage to say whether a particular witness or the prosecution case as a whole is worthy of belief or not. Any finding of this nature, without having assessed the credibility of the materials collected - which can only be done at the time of trial and that too by the Court conducting the trial - may tend to prejudice either the prosecution or the defence. The submission made on behalf of the petitioner that the prosecution case is not believable either due to some contradictions or due to some such infirmity is not acceptable.

5. The second contention raised that the victim is a deaf and dumb girl and she having not been examined by the I.O. any other statement forthcoming from other witnesses who heard about the occurrence from the victim amounts to hearsay and is not admissible as such is misconceived. The stage of evidence will come only during trial when a witness is examined or a document is produced for examination of the Court. It shall then be called 'oral evidence' or 'documentary evidence' as the case may be. At that stage only the question of hearsay evidence will come and at no point earlier to that. By now the Court is concerned with materials collected by the Investigating Agency which though loosely sometimes called evidences not evidence in legal sense. Therefore, the concept of hearsay evidence does not enter to the case at this stage. Even though the victim girl has not been examined by the I.O., she may be examined later during further investigation which is permissible under the law or even during the trial. There is no legal bar on examination of witness in the Court during trial whose statement under Section 161 Cr.P.C. has not been recorded earlier. At that time the statement of such a witness will be considered for all it is worth.

6. At the present stage, it cannot be said that for the lack of examination of the victim other materials collected by the I.O. will not be admissible for consideration of the bail petition or to find out a prima facie case. Two decisions cited by the Learned advocate for the petitioner i.e. AIR 1926 Pat 58 : Emperor v. Phagunia Bhuian & AIR 1916 Lah 292 Abdul Rahman v. Emperor are not applicable to this case since those decisions relate to appreciation of evidence adduced during trial, whereas the present case, the stage is much before that.

7. As far as non-examination of Dr. Ms. Mohapatra is concerned, her examination would not have served much purpose since the victim girl on her medical examination by the Government doctor was found to be pregnant for three months. D.N.A test may be resorted to even during trial so that is also of no consequence either. Moreover, it does not have much relevance to the case as would be seen infra.

8. Under the facts and circumstances of the case, it is seen that the victim girl though deaf and dumb had a means of communication through her mother who

has stated that she can understand and communicate with her by gestures. In the F.I.R. itself she is stated to be aged about 30 years and thus she is an adult. She and her niece who is a girl aged about 15 years also did not disclose about the occurrence before anybody. In any event her niece has merely stated that in her presence the petitioner pulled away the victim lady and after one hour brought her and left in the house. All in all the allegation of rape is an old one i.e. at least three months old and at that juncture the victim lady was above the age of consent and did not disclose about the matter till three months from the date of the occurrence and especially since she has capability to communicate with her mother who is responsible for her future welfare and would now be anxious for her marriage at any cost, a case of consent cannot be ruled out. If it was a case of consent then D.N.A. test would carry no meaning.

9. In the peculiar facts and circumstances and having regard to all the aspects, I feel that in the present case denial of bail may amount to pre-trial punishment to the petitioner since the investigation has already been completed and there is less chance of the petitioner's absconding or tampering with the evidence. I therefore, feel inclined to grant bail to the petitioner.

10. Let the petitioner be released on bail of Rs. 10,000/- (rupees ten thousand) with two solven sureties for the like amount to the satisfaction of the Learned S.D.J.M., Bolangir in the aforesaid case.

11. The BLAPL is disposed of accordingly.