

Gagan Bihari Samal and Another

Vs

State of Orissa

Criminal Appeal No. 383 of 1991

(S. C. Agarwal, B. C. Ray JJ)

09.07.1991

JUDGMENT

RAY, J. –

1. Special leave granted. Arguments heard.

2. This appeal by special leave is directed against the judgment and order dated July 17, 1990 passed by the High Court of Orissa in Criminal Revision No. 382 of 1986 dismissing the revision and affirming the concurrent findings of the courts below. The prosecution case in short is that on March 19, 1983 at about 7 p.m. while the victim girl Srimanthini Samal (PW 2) was going to the house of Rama Samal, for study, the appellant Gagan informed her that the other appellant Prafulla and others had tied her tutor Rabi Babu in a nearby mango grove and her father was present there. Having believed the version of the appellant Gagan, her agnatic uncle, she accompanied him and ultimately the appellants forcibly took her to a lonely house in hills where she was made to sit on a chair and the appellant Gagan forcibly thrust in her mouth a liquor bottle and she was made to drink the liquor. Thereafter both the appellants after having undressed her committed sexual assault on her. Then she was brought to express highway from where she was bodily lifted to a truck standing there and left her in the truck. While the said truck was unloading materials near village Kurujanga, the victim girl stealthily left the truck and concealed her presence near a fence. Subsequently, one Purusottam Mohanty rescued her and brought her to his house and then she was left to the house of one Niranjana Rout (PW 8), who was distantly related to her and took shelter till her father took her back on being informed. On the information lodged by her father (PW 1) in the police station of Badachana a case under Sections 363 and 376 read with Section 34 of the IPC was registered against the accused appellants and after investigation the IO sent the victim girl as well as the appellants for medical examination and after completion of the investigation a charge-sheet was submitted against the appellants to stand their trial. The pleas of the appellants were a total denial of the prosecution case. The appellant Prafulla took the plea that there was a marriage proposal of the victim girl with him but when it was disclosed that she had illicit relationship with her tutor Rabi, he refused to marry her for which this false case was foisted against him. The plea of the other appellant Gagan as suggested to the informant, was that due to his previous enmity he was falsely implicated with the alleged crime.

3. The appellants were committed to the Court of Sessions. The learned Assistant Sessions Judge after considering the evidences on record rejected the defence pleas, and found that the accused appellants committed rape on the victim girl without her consent relying on the provisions of Section 114-A of the Evidence Act, and convicted them under Section 376(2)(g) IPC and sentenced each of the accused appellants to rigorous imprisonment for three years considering the young age

of the appellants. The Assistant Sessions Judge, however, acquitted the appellants from the charge under Section 366 IPC as the victim girl was more than 16 years of age at the time of occurrence.

4. Against this judgment and order of conviction the appellants filed an appeal being Criminal Appeal No. 153 of 1984 in the Court of First Additional Sessions Judge, Cuttack. The Additional Sessions Judge considered the pleas of the appellants as well as duly scrutinised and appraised the evidences on record and found that the accused appellants committed rape on the victim girl without her consent and affirmed the conviction and sentence imposed by the trial court dismissing the appeal.

5. The appellants thereafter filed a revision case being Criminal Revision No. 382 of 1986 in the High Court of Orissa at Cuttack against the said judgment and order passed by the First Additional Sessions Judge, Cuttack. The High Court duly considered and appraised the evidences of all the 9 PWs including the deposition of the victim girl Srimanthini Samal (PW 2), the evidence of her father (PW 1) as well as the evidence of her mother (PW 3) and the evidences of the two doctors (PW 4 and PW 5) and held that the accused persons committed rape on PW 2 forcibly without her consent. It has been further found from the reliable evidences of PWs 1 and 3 and as soon as PW 2 met her mother, PW 3, PW 2 told her mother about both the accused persons committing rape on her in a solitary house and also about the accused persons taking her away to the highway and keeping her in a truck, and corroborate the version of PW 2 regarding the occurrence of rape committed on her by both the accused persons. It has been further observed that even though the PWs 7 and 8 became hostile still then their evidences can be safely relied on as the same fully corroborates the version of PW 2 that on the relevant night she, with the help of PW 7 had taken shelter in the house of PW 8. PW 6 who was the driver of the truck No. ORG 4839 also stated in his evidence that the accused persons and two others took the victim girl and left her in the truck. PW 6 further admitted that as he stopped the truck at village Ambura for unloading the boulders, the girl had stealthily left his truck and in spite of his searching for her, he could not trace her. This fully supports the version of PW 2 that she left the truck and concealed herself near a fence in darkness. The learned Judge, therefore, held : "Hence, on a careful scrutiny of the evidences of the hostile witnesses PWs 6 and 8 it is seen that even they corroborate the evidence of the victim girl, PW 2 on material aspects of the prosecution case."

6. In cases of rape, generally it is difficult to find any corroborative witnesses except the victim of the rape. It has been observed by this Court in *Bharwada Bhoginbhai Hirjibhai v. State of Gujarat* ((1983) 3 SCC 217 : 1983 SCC (Cri) 728 : AIR 1983 SC 753) as follows : (AIR headnote)

"Corroboration is not the sine qua non for a conviction in a rape case. In the Indian setting, refusal to act on the testimony of a victim of sexual assault in the absence of corroboration as a rule, is adding insult to injury. Why should the evidence of the girl or the woman who complains of rape or sexual molestation be viewed with the aid of spectacles fitted with lenses tinged with doubt, disbelief or suspicion ? To do so is to justify the charge of male chauvinism in a male dominated society.

A girl or a woman in the tradition bound non-permissive society of India would be extremely reluctant even to admit that any incident which is likely to reflect on her chastity had ever occurred. She would be conscious of the danger of being ostracized by the society or being looked down by the society including by her own family members, relatives, friends, and neighbours. She would face the risk of losing the love and respect of her own husband and near relatives, and of her matrimonial home

and happiness being shattered. If she is unmarried, she would apprehend that it would be difficult to secure an alliance with a suitable match from a respectable or an acceptable family. In view of these and similar factors, the victims and their relatives are not too keen to bring the culprit to book. And when in the face of these factors the crime is brought to light there is a built-in assurance that the charge is genuine rather than fabricated."

The above observation has been made by this Court relying on the earlier observations made by this Court in *Rameshwar v. State of Rajasthan* (1952 SCR 377, 386 : AIR 1952 SC 54 : 1952 Cri LJ 547) with regard to corroboration of girl's testimony and version. Vivian Bose, J., who spoke for the Court observed as follows : (SCR p. 386)

"The rule, which according to the cases has hardened into one of law, is not that corroboration is essential before there can be a conviction but that the necessity of corroboration, as a matter of prudence, except where the circumstances make it safe to dispense with it, must be present to the mind of the judge, ... The only rule of law is that this rule of prudence must be present to the mind of the judge or the jury as the case may be and be understood and appreciated by him or them. There is no rule of practice that there must, in every case, be corroboration before a conviction can be allowed to stand."

7. In the instant appeal as has been stated hereinbefore that PW 2 the victim girl has clearly stated in her evidence that she had been taken to a solitary house in the hills by appellant 1 Gagan Bihari Samal and there she was made to drink liquor and thereafter she was undressed and forcibly subjected to sexual intercourse by both the accused appellants one after the other. Her uncontroverted testimony has been accepted by all the courts and the courts concurrently found that she was raped without her consent. It has been tried to be contended on behalf of the appellants that the amended Section 114-A was brought into the Evidence Act after the commission of the offence for which the appellants were charged and as such no assumption can be made on the basis of this provision. This submission is of no avail inasmuch as it is clearly evident that the victim girl protested and struggled while she was subjected to sexual assault forcibly by the accused persons and this clearly evinces absence of consent on part of the victim girl in such sexual intercourse apart from the legal presumption that follows from the provisions of Section 114-A of the Evidence Act. The learned counsel on behalf of the appellants further tried to argue on the basis of some minor discrepancies in the evidences of PW 2 that the prosecution case was a false one and it has been foisted on the appellants due to enmity and also due to accused Prafulla, one of the appellants, having disagreed to marry the victim girl. The courts below have clearly found that the defence case was not at all substantiated by any cogent evidence. So this contention is not at all tenable.

8. It is apropos to mention here the observations made by this Court in the case of *State of Orissa v. Nakula Sahu* ((1979) 1 SCC 328 : 1979 SCC (Cri) 283 : AIR 1979 SC 663) which are set out herein : (AIR headnote)

"Although the revisional power of the High Court under Section 439 read with Section 435 is as wide as the power of court of appeal under Section 423 of the Code, it is now well settled that normally the jurisdiction of the High Court under Section 439 is to be exercised only in exceptional cases when there is a glaring defect in the procedure or there is a manifest error on a point of law which has consequently resulted in flagrant miscarriage of justice. In spite of the wide language of Section

435, the High Court is not expected to act under Section 435 or Section 439 as if it is hearing an appeal."

The High Court of Orissa referred to the said observation and rightly held that the High Court cannot be expected to reappraise the evidence as a court of appeal. This Court hearing an appeal by special leave cannot consider and reappraise the evidences once again in the face of concurrent findings of facts arrived at by all the courts below.

9. For the reasons aforesaid we dismiss the appeal and uphold the conviction and sentence as found by the High Court.

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