STATE OF ORISSA

v.

SUKRU GOUDA

(Criminal Appeal No. 2044 of 2008)

DECEMBER 16, 2008

[DR. ARIJIT PASAYAT AND MUKUNDAKAM SHARMA, JJ.]

Penal Code, 1860 – s. 376 – Rape – Prosecutrix corroborating FIR version – Eye-witness to the incident – Two versions of defence; one that it was false implication and the other that the act was with consent – Conviction by trial Court – Acquittal by High Court – On appeal, held : Conclusion arrived at by High Court was contrary to law – Matter remitted to High Court for consideration afresh.

Judicial Discipline – Rape case – Name of Prosecutrix – Mentioning of, in the judgment – Held: Is in disregard of judicial discipline.

PW-4 lodged an FIR alleging that respondent No. 1 (accused) committed rape on PW-1/Prosecutrix (wife of PW-4). PW-2 was the eye-witness to the incident. The accused took the plea of false implication. Trial Court convicted the accused under Section 376 IPC. High Court directed acquittal. Hence, the present appeal.

Disposing of the appeal and remitting the matter to High Court, the Court

HELD: 1. High Court's order shows a complete non-application of mind. Some of the conclusions are clearly contrary to the law as laid down by this Court. The High Court's conclusions are not only abrupt but also clearly indicate the non-application of mind. The conclusions are not only confusing but border non absurdity. It baffles the Court as to why High Court says that "law is well settled that it is not possible for a single man to commit sexual

inter course with a healthy adult female in full possession of her senses against her will." There is not even a single decision which says so. The presumptuous conclusion is that PW 1 was an able bodied tribal lady capable of taking care of herself. On that basis the High Court has come to this conclusion is not fathomable. The High Court itself noticed that there were two contradictory stands. One was that no such incident had taken place and this was a case of false implication; other was that the act was with consent. Such irreconcilable stand should not have found favour with the High Court. The High Court observed that except PWs 1 & 2, there were no other eye witnesses, and therefore, prosecution version was not acceptable. The conclusion is not only contrary to law laid down by this Court, but also shows scant regard to law declared by this Court. [Para 6] [620-F-G; 621-G-H; 622-A-C]

2. The name of victim should not be indicated in the judgment in a rape case. The High Court has done the reverse. This speaks volumes of judicial indiscipline. [Para 7] [622-D]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 2044 of 2008.

From the final Judgment dated 21.1.2004 of the High Court of Orissa at Cuttack in Crl. Appeal No. 47 of 1995.

Shibashish Misra for the Appellant.

The Judgment of the Court was delivered by

DR. ARIJIT PASAYAT, J. 1. Leave granted.

2. Challenge in this appeal is to the judgment of the Division Bench of the Orissa High Court directing acquittal of the respondent of the charges under Section 376 of the Indian Penal Code, 1860 (in short the 'IPC') and Sections 3 to 5 of the Scheduled Castes and Scheduled tribes (Prevention of Atrocities) Act, 1989 (in short the 'Atrocities Act'). The respondent No.1 filed an appeal before the High Court questioning his conviction as recorded by learned Special

Judge-cum-Sessions Judge, Koraput, Jeypore.

3. Prosecution version sans unnecessary details is as follows:

On the basis of an FIR lodged on 4-9-1993 by Dasamu Bhatra (P.W. 4) alleging that on the said day at 1.00 p.m. while his wife (P.W.1) was collecting fire wood in a nearby jungle known as 'Dobari Jungle', the respondent who was collecting cow dung in the said jungle told her that a big piece of wood was lying nearby in the jungle. P.W.1 however refused to go there. It was alleged that thereafter the respondent forcibly pulled her down on the ground and in spite of her resistance committed rape on her inside that jungle by raising the saree of P.W.1 and also removing the pad which P.W.1 was using as she was having her monthly menstruation. *While the appellant* was committing the crime, Lachhminath Bhatra (PW2) arrived at the spot, seeing whom the appellant left P.W.1 and fled away. Due to rape on her P.W.1 had profused bleeding. She reported the matter to her husband P.W.4 who lodged the report before police at 6 p.m., the very day. On the basis of such report, G.R. Case No. 383 of 1993 was registered. After investigation prosecution submitted charge sheet against the respondent who faced the trial.

The plea of the respondent was complete denial. He further stated that a day prior to the alleged occurrence, he had dispute with informant P.W.4 and his wife – the alleged victim (P.W.1) regarding landed property which had culminated in a quarrel and in order to harass the respondent the case had been falsely foisted against him.

To prove its case, prosecution examined as many as eight witnesses and exhibited eleven documents. Two witnesses were examined by the defence. P.W.1 is the alleged victim. She corroborated the FIR story. Lachhminath Bhatra (PW2) who was stated to have seen the alleged occurrence. Lachhma Bhatrani (P.W. 3) a resident of the village and was near the spot of occurrence before whom P.W.1 was stated to have narrated the incident soon thereafter. P.W.4

A was Dasamu Bhatra – P.W.1's husband – before whom P.W.1 stated to have narrated the alleged incident whereafter he had reported the matter to the police. Damuru Pujari (P.W.5) is another person before whom also P.W.1 had narrated the alleged incident. The Lady Assistant Surgeon (P.W.6) who had examined the alleged victim on police requisition. S. Venkataswamy (P.W.7) the A.S.I of Police Kosagumuda Outpost before whom P.W.4 had lodged the FIR and was one of the investigating officers. O.I.C. of Kodinga P.S. (PW 8) the other investigating officer who had submitted charge sheet in the case.

Out of the defence witnesses, Laikhana Bhatra (DW 1) who deposed about the dispute between the appellant and PW 4 over excavation of a drain on the land of the appellant and the quarrel ensuing thereafter. Hari Mirgan (DW 2) who deposed about the land dispute which was reported to him by the appellant.

4. Learned counsel for the appellant-State referred to the evidence of PWs 1&2 and submitted that the High Court was not justified in directing acquittal. No reason has been indicated to discard their evidence. On surmises and conjectures the High Court has directed acquittal.

5. There is no appearance on behalf of the accused in spite of service of notice.

6. A bare reading of the High Court's order shows a complete non application of mind. Some of the conclusions are clearly contrary to the law as laid down by this Court. The High Court's conclusions are not only abrupt but also it clearly indicate the non application of mind. The reasoning is contained in one paragraph i.e. Para 11 reads as follows:

"11 After perusing the statements of the doctor and the other prosecution witnesses, we are unable to *accept* the prosecution story without a pinch of salt. *Here is a case where excepting P.W.1 and P.W.2 the person who claimed to have seen the occurrence, there is no other*

eye-witness. The medical evidence contradicts the ocular statement of P.W.2. If P.W.2's statement is believed, a suspicion arises with regard to the conduct of P.W.1. Admittedly PW.1 was an able-bodied tribal lady, capable of taking care of herself. It was natural that she would have resisted to the best of her ability if sexual intercourse was being committed on her against her consent. P.W.2's evidence does not reveal that any resistance by P.W.1 was found by him. In fact, P.W.2 walked inside the jungle when the crime as alleged was in the process. *Law is well settled that it is not possible for a single man to commit sexual intercourse with a healthy adult female in full possession of her senses against her will.* If there would have been any resistance by P.W.1, at least some scratches or bruises would have been found either on her body or the body of the appellant. The medical evidence clearly reveals that no external injury was detected. Though it was alleged that P.W.1 was raped during her menstrual period and that there was profuse bleeding due to rape, the wearing apparel of PW 1 did not contain any blood stain, as would appear from the chemical examination report (Ext. 11). This also throws a cloud of suspicion on the truthfulness of the prosecution case. A cumulative effect of the medical evidence coupled with the oral testimony throws a doubt on the correctness of the allegation of rape put forward by PW 1 in her statement in Court. Thus the assessment of the entire evidence in the case leads us to the conclusion that prosecution has not succeeded to prove its case beyond all doubts. We have therefore no hesitation to set aside the conviction and sentence passed against the appellant by the court below."

(Underlined for emphasis)

The conclusions are not only confusing but border non absurdity. It baffles us as to why High Court says that "law is well settled that it is not possible for a single man to commit sexual inter course with a healthy adult female in full possession of her senses against her will." There is not even a single decision

A which says so. The presumptuous conclusion is that PW 1 was an able bodied tribal lady capable of taking care of herself. On that basis the High Court has come to this conclusion is not fathomable. To add to the confusion the High Court itself noticed that there were two contradictory stands. One was that no such B incidence had taken place and this was a case of false implication; other was that the act was with consent. Such irreconcilable stand should not have found favour with the High Court. The High Court observed that except PWs 1 & 2, there were no other eye witnesses, and therefore, prosecution version was not acceptable. To say the least, the conclusion is C not only contrary to law laid down by this Court, but also shows scant regard to law declared by this Court.

7. Before we part with the case, we note with lot of concern that notwithstanding series of decisions by not only the Orissa High Court but also of this Court that name of victim D should not be indicated in the judgment, the High Court has done the reverse. This speaks volumes of judicial indiscipline.

8. We would have set aside the order of the High Court and restored that of the trial court. But it is considered appropriate to remit the matter back to the High Court to hear E the appeal afresh for disposal of the same as the accused-respondent has not appeared before the court in spite of notice, keeping in view the correct legal principles.

9. The appeal is disposed of accordingly.

F K.K.T. Appeal disposed of.