

## Gagan Bihari Samal And Anr vs State Of Orissa on 9 July, 1991

Equivalent citations: 1991 SCR (2) 839, 1991 SCC (3) 562, AIRONLINE 1991 SC 32, 1991 (3) SCC 562, (1991) 2 SCR 839, (1991) ALL CRI R 473, (1991) EAST CRI C 651, (1991) 3 REC CRI R 240, (1991) MAD LJ(CRI) 721, (1991) 2 GUJ LH 30, (1991) 72 CUT LT 322, (1991) 2 CRIMES 842, (1991) 28 ALL CRI C 435, (1991) 2 ALL CRI LR 376, (1991) 2 PAT LJR 95, (1992) 1 CUR CRI R 141, (1992) 2 CUR CRI R 141, (1992) 2 CRI CJ 119, (1991) 2 CRI LC 699, (1991) 3 JT 63, 1991 CRI LR(SC MAH GUJ) 577, 1991 UP CRIR 516, 1991 SCC (CRI) 893, (1991) EASTCRIC 681, (1991) 2 SCR 839 (SC), (1991) 3 JT 63 (SC), (1992) SC CR R 25, AIRONLINE 1991 SC 16

**Author: B.C. Ray**

**Bench: B.C. Ray, S.C. Agrawal**

PETITIONER:

GAGAN BIHARI SAMAL AND ANR.

Vs.

RESPONDENT:

STATE OF ORISSA

DATE OF JUDGMENT 09/07/1991

BENCH:

RAY, B.C. (J)

BENCH:

RAY, B.C. (J)

AGRAWAL, S.C. (J)

CITATION:

1991 SCR (2) 839

1991 SCC (3) 562

JT 1991 (3) 63

1991 SCALE (2) 89

ACT:

Constitution of India: Article 136-Special leave petition-Concurrent findings of facts-Re-appraisal of evidence-Whether could be considered.

Indian Penal Code 1860: S.376-Rape-Trial-Uncontroverted testimony of victim-Making out the offence against the accused persons-Conviction and sentence awarded by trial court-Maintained by appellate court and High Court in revision-Validity of-Corroboation not the sine qua non for conviction.

Evidence Act, 1872S. 114A-Evidence-Victim girl subjected to sexual assault forcibly-Protest and struggle by victim-Absence of consent-Presumption of.

Criminal Procedure Code 1973: S. 401-Revisonal jurisdiction-High Court-Whether could reappraise evidence.

HEADNOTE:

The appellants forcibly took P.W. 2 to a lonely place on 19.3.1983, made her to drink liquor and committed sexual assault on her. Thereafter they left her in a truck. While the said truck was unloading materials near a village, the victim stealthily left the truck and concealed herself near a fence. P.W. 7 rescued her and took her to the house of P.W. 8, one of her distant relative, from where her father P.W. 1 took her back and lodged the report at the police station. A case under ss. 363 and 376 read with s. 341.I.P.C. was registered against both the appellants. After completion of the investigation, a charge sheet was submitted and the appellants were tried for the aforesaid offences.

The appellants denied the prosecution allegations and pleaded that they were falsely implicated because of refusal by one of them to marry the girl and previous enmity with the other. The Assistant Sessions Judge rejected the defence pleas, and found that the appellants committed rape on the victim without her consent, and relying on s. 114A of the Evidence Act, convicted the appellants under s. 376(2)(g), I.P.C. and sentenced each of them to rigorous imprisonment for three

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years. Since the victim was more than 16 years of age, the appellants were acquitted of the charge under s. 363, I.P.C.

On dismissal of their appeal against the conviction and sentence by the Addl. Session Judge, the appellants filed a revision application before the High Court.

The High Court duly considered and appraised the evidence and held that the appellants committed rape on PW 2 forcibly without her consent. Ultimately the appellants came in appeal by special leave to this Court.

Dismissing the appeal, this Court,

HELD: 1. In cases of rape, generally it is difficult to find any corroborative witnesses except the victim of the rape. However, corroboration is not the sine que 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. [843D-F]

Bharwada Bhoginbhai Hirjibhai v. State of Gujarat, AIR 1983 SC 753 and Rameshwar v. The State of Rajasthan, [1952] SCR 377, relied on.

2. In the instant case, the victim girl clearly stated

in her evidence that she had been taken to a solitary house in the hills by appellant no. 1 where 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 was accepted by all the courts and they concurrently found that she had been raped without her consent. [844F-G]

3. Apart from the legal presumption that flows from the provisions of s. 114A of the Evidence Act, it is clearly evident in the instant case, 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 her part in such sexual intercourse. [844H; 845A]

4. The High Court rightly held that it cannot be expected to re-appraise the evidence as a court of appeal while exercising its revisional power under s. 401 Cr. P.C. [845E-F]

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State of Orissa v. Nakula Sahu and Ors., AIR 1979 SC 663, relied on.

5. This Court hearing an appeal by special leave cannot consider and re-appraise the evidence once again in the face of concurrent findings of facts arrived at by all the courts below. [845F]

#### JUDGMENT:

CRIMINAL APPELLATE JURISDICTION: Criminal appeal No. 383 of 1991.

From the Judgment and Order dated 17.7.1990 of the Orissa High Court in CrI. Rev. No. 382 of 1986.

Janaranjan Das for the Appellants.

A.K. Panda for the Respondent.

The Judgment of the Court was delivered by RAY, J. Special leave granted. Arguments heard. 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 19th March, 1983 at about 7.p.m. while the victim girl Srimanthini Samal (P.W. 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 expression 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 (P.W. 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 (P.W. 1) in the police station of Badachana a case under sections 363 and 376 read with section 34 of the I.P.C. was registered against the accused appellants and after investigation the I.O. 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.

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) I.P.C. 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 I.P.C. as the victim girl was more than 16 years of age at the time of occurrence.

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 scrutinized 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.

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 P. Ws. including the deposition of the victim girl Srimanthi Samal (P.W. 2), the evidence of her father (P.W.

1) as well as the evidence of her mother (P.W. 3) and the evidences of the two Doctors (P.W. 4) and P.W. (5) and held that the accused persons committed rape on P.W. 2 forcibly without her con-

sent. It has been further found from the reliable evidences of P.Ws. 1 and 3 that as soon as P.W. 2 met her mother, P.W. 3, P.W. 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 P.W. 2 regarding the occurrence of rape committed n her by both the accused persons. It has been further observed that even though the P.Ws. 7 and 8 became hostile still then their evidences can be safely relied on as the same fully corroborates the version of P.W. 2 that on the relevant night the she, with the help of P.W. 7 had taken shelter in the house of P.W. 8 P.W. 6 who 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. P.W. 6 further admitted that as he stopped the truck at village Ambura for unloading the boulders, the girl had stealthily left his truck and inspite of his searching her, he could not trace her. This fully supports the version of P.W. 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 P.Ws. 6 and 8 it is seen that even they corroborate the evidence of the victim gild, P.W. 2 on material aspects of the prosecution case."

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*, AIR 1983 SC 753 as follows:

"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 inthe 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 only 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. The State of Rajasthan*, [1982] SCR 377 with regard to corroboration of girl's testimony and version. Vivian Bose, J, who spoke for the Court observed as follows:

"The rule, which according to the case 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."

In the instant appeal as had been stated hereinbefore that P.W. 2, the victim girl has clearly stated in her evidence that she had been taken to a solitary house in the hills by the appellant no. 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 in as much 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 P.W. 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 sub-stantiated by any cogent evidence. So this contention is not at all tenable.

It is apropos to mention here the observation made by this Court in the case of State of Orissa v. Nakula Sahu and Ors., AIR 1979 SC 663 which are set-out herein:

"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 Sec. 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 excepted 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 re-appraise the evidence as a court of appeal. This Court hearing an appeal by special leave cannot consider and re-appraise the evidences once again in the face of concurrent findings of facts arrived at by all the courts below.

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

R. P.

Appeal dismissed.

