

Orissa High Court

Dhira Alias Dharendra Rout vs State Of Odisha on 26 September, 2017

IN THE HIGH COURT OF ORISSA, CUTTACK

BLAPL No. 3937 Of 2017

An application under section 439 of the Code of Criminal Procedure, 1973 in connection with Special G.R. Case No. 36 of 2017 pending in the Court of 3rd Addl. Sessions Judge -cum- Presiding Officer, Children's Court, Cuttack.

Dhira @ Dharendra Rout Petitioner

-Versus-

State of Odisha

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Oppos

For petitioner:

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Mr. Devashis Panda

For State of Orissa:

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Mr. Arupananda Das
(Addl. Govt. Advocate)

P R E S E N T:

THE HONOURABLE MR. JUSTICE S.K. SAHOO

Date of order: 26.09.2017

----- S. K. SAHOO,
J. Heard Mr. Devashis Panda, learned counsel appearing for the petitioner and Mr. Arupananda Das, learned Addl. Government Advocate appearing for the State.

This is an application under Section 439 of Cr.P.C. for grant of bail to the petitioner Dhira @ Dharendra Rout in connection with Special G.R. Case No. 36 of 2017, arising out of Badambadi P.S. Case No.58 of 2017 pending in the Court of learned 3rd Addl. Sessions Judge -cum- Presiding Officer, Children's Court, Cuttack for commission of offence punishable under sections 366, 376-D of the Indian Penal Code, sections 4, 6 and 14 of the Protection of Children from Sexual Offences Act, 2012 (hereafter 'POCSO Act') and section 67-A of the Information Technology Act, 2000.

The petitioner moved an application for bail before the learned trial Judge which was rejected on 18.05.2017.

The prosecution case as per the first information report submitted by Dibakar Jena before Inspector in charge of Badambadi Police Station is that the accused Jaya Nayak of Khutuni deceitfully induced his daughter (hereafter 'the victim') who was aged about seventeen years by pretending love with her and kept physical relationship with her. It is the further prosecution case that the said accused and his friends committed rape on the victim, recorded it on the video and accused Jaya Nayak showed the video recording to the informant three days prior to the lodging of the F.I.R. and threatened the son-in-law of the informant namely Anu Samal to withdraw the previous case from police station or else to viral the video and commit similar offence with the elder daughter of the informant. It is the further prosecution case that since four months, the victim was kidnapped by accused Jaya Naik and her whereabouts is not known to the informant.

After registration of the case, the I.O. seized the age proof certificate of the victim and one K series micro SD memory containing obscene video and mobile phone on production by Anu Samal. After search at different places, on 20.03.2017 the I.O. apprehended the accused Jaya @ Jayanta Naik who confessed that his brother Bapuni Naik had kept physical/sexual relationship with the victim and later he also kept physical relationship with the victim giving her false promise of marriage. The said accused disclosed the involvement of accused persons Kalia @ Ranjan Kumar Sahoo and Bidyadhar Naik. The accused Bapuni Naik was arrested and at his instance video recording memory card and his mobile phone were seized from his house. The accused Kalia @ Ranjan Kumar Sahoo was arrested and at his instance, obscene memory card and his mobile phone were seized. The wearing apparels of the accused persons were also seized and sent to F.M. & T, S.C.B. Medical College and Hospital, Cuttack. The victim girl was rescued on 27.03.2017 and on being examined, the victim stated that the petitioner along with other co-accused persons committed gang rape on her and the petitioner took away her mobile phone. Basing on the statement of the victim, the petitioner was arrested on 28.03.2017, he was medically examined and forwarded to the Court.

The investigating officer found it to be a true case under section 376-D of the Indian Penal Code and sections 4 and 6 of the POCSO Act against the petitioner and accordingly, submitted charge sheet.

Mr. Devashis Panda, learned counsel appearing for the petitioner contended that the victim had affair with other co-accused persons and she fled away from her house on her own sweet will. It is further contended that the victim has named one Dhira and others to have committed gang rape on her in her 164 Cr.P.C. statement and test identification parade in respect of the petitioner has not been conducted to prima facie establish that it is the petitioner who has been named by the victim. It is further contended that the rest of the materials is based on confessional statement of co-accused and even though one Samsung mobile was seized from the petitioner which is stated to be of the victim but in respect of such mobile phone, no T.I. parade has been conducted and everything has been stage managed to falsely implicate the petitioner.

Mr. Arupananda Das, learned Additional Government Advocate on the other hand contended that during course of investigation, the Investigating Officer made a prayer to the DCP, Cuttack to move the concerned service provider for the supply of the call detail reports of the mobile number used by the victim girl. When the victim was examined, she stated that the petitioner also kept physical relationship with her and snatched away samsung mobile previously used by her. When the

petitioner was arrested, the samsung mobile phone of the victim was seized from his possession. He further submitted that the statement of the victim recorded under section 164 Cr.P.C. clearly indicate the name of the petitioner to have committed gang rape on her. He placed the seizure list of the samsung mobile phone seized from the petitioner. It is contended that since punishment prescribed for the alleged offences extend to life imprisonment and there is chance of tampering with the evidence in case of release of the petitioner on bail, the petitioner should not be released on bail.

There is no dispute that in the statement before police, the victim has named the petitioner Dhirendra Rout to have committed gang rape on her along with others. In the 164 Cr.P.C. statement also, the victim has named one Dhira along with others to have committed gang rape on her. After the apprehension of the petitioner, even though no prayer was made for conducting the test identification parade as to whether the person named as Dhirendra Rout in the 161 Cr.P.C. statement of the victim and Dhira in the 164 Cr.P.C. statement of the victim is the petitioner or not but at this juncture it would not be proper to hold that the victim has not named the petitioner as an accused in the case. Whether the test identification parade is necessary or not would depend on the facts and circumstances of each case. If the prosecutrix had sufficient opportunity to observe the features of the accused who raped her and on account of her traumatic and tragic experience, the face of the accused is likely to be imprinted in her memory and as such, there is no chance of making a mistake about the identity of the accused. Therefore, when the Court is of the opinion that even in absence of any prior test identification parade, the evidence of identification in Court by the victim is reliable and trustworthy and the victim had sufficient opportunity to see the accused during commission of rape and there was no reason to falsely implicate the accused, the Court can act upon the identification of the accused for the first time in Court.

In case of Malkhan Singh -Vrs.- State of Madhya Pradesh reported in (2003) 5 Supreme Court Cases 746, it is held as follows:-

"7. It is trite to say that the substantive evidence is the evidence of identification in Court. Apart from the clear provisions of Section 9 of the Evidence Act, the position in law is well settled by a catena of decisions of this Court. The facts, which establish the identity of the accused persons, are relevant under Section 9 of the Evidence Act. As a general rule, the substantive evidence of a witness is the statement made in Court. The evidence of mere identification of the accused person at the trial for the first time is from its very nature inherently of a weak character. The purpose of a prior test identification, therefore, is to test and strengthen the trustworthiness of that evidence.

It is accordingly considered a safe rule of prudence to generally look for corroboration of the sworn testimony of witnesses in Court as to the identity of the accused who are strangers to them, in the form of earlier identification proceedings. This rule of prudence, however, is subject to exceptions, when, for example, the Court is impressed by a particular witness on whose testimony it can safely rely, without such or other corroboration. The identification parades belong to the stage of investigation, and there is no provision in the Code of Criminal Procedure, which obliges the

investigating agency to hold, or confers a right upon the accused to claim, a test identification parade. They do not constitute substantive evidence and these parades are essentially governed by Section 162 of the Code of Criminal Procedure. Failure to hold a test identification parade would not make inadmissible the evidence of identification in Court. The weight to be attached to such identification should be a matter for the Courts of fact. In appropriate cases it may accept the evidence of identification even without insisting on corroboration.

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17. It is well settled that the substantive evidence is the evidence of identification in Court and the test identification parade provides corroboration to the identification of the witness in court, if required. However, what weight must be attached to the evidence of identification in Court, which is not preceded by a test identification parade, is a matter for the Courts of fact to examine. In the instant case, the Courts below have concurrently found the evidence of the prosecutrix to be reliable and, therefore, there was no need for the corroboration of her evidence in Court as she was found to be implicitly reliable.

Therefore, even though no test identification parade has been conducted in the case in hand, the chance of identification of the petitioner by the victim in Court during trial cannot be ruled out. It is not a case where the victim has not named the accused-petitioner at all. In both her statements, the name of the petitioner finds place. Whether the victim would identify the petitioner during trial as the culprit or not and whether such identification would be acceptable or not, the same has to be decided by the learned Trial Court. Similarly, even though the mobile phone used by the victim and seized from the possession of the petitioner was not put in the test identification parade but the company of the mobile phone and its model number and IMEI number coupled with the call detail reports furnished by the service provider are very clinching and at this stage, such material prima facie raises accusing finger at the petitioner.

Considering the submissions made by the learned counsels for the respective parties, prima facie material available on record, the nature and gravity of the accusation against the petitioner and taking into account the punishment prescribed for such offence, I am not inclined to release the petitioner on bail.

The observation made while disposing of this bail application relates to the materials collected during course of investigation and the findings recorded herein are for the purposes of adjudication of this bail application only. This may not be taken as an expression of opinion on the merits of the case. The learned Trial Court would be at liberty to decide the matter in the light of evidence which shall come on record after it is led de hors any finding recorded in this order.

Accordingly, the BLAPL application stands rejected. Urgent certified copy of this order be granted on proper application.

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S. K. Sahoo, J.

Orissa High Court, Cuttack The 26th September, 2017/Sisir