Pratap Misra And Ors. vs State Of Orissa on 23 February, 1977

Equivalent citations: AIR1977SC1307, 1977CRILJ817, (1977)3SCC41, AIR 1977 SUPREME COURT 1307, (1977) 3 SCC 41, 1977 SC CRI R 258, 1977 CRI APP R (SC) 164, 1977 SCC(CRI) 447

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Bench: P.N. Bhagwati, S. Murtaza Fazal Ali

JUDGMENT

S. Murtaza Fazal Ali, J.

1. In these appeals by-special leave the appellant Pratap Misra (hereinafter referred to as 'A-1') in Criminal Appeal No. 564 of 1976 and appellant Suresh Chandra Sahu referred to as 'A-2' and Khitish Chandra Paltasingh referred to as 'A-3' in Criminal Appeal No. 565 of 1976 have been convicted under Section 452, I.P.C. and sentenced to rigorous imprisonment for one year, under Section 376, I.P.C. and sentenced to rigorous imprisonment for five years, under Section 342 I.P.C. to rigorous imprisonment for two months, and under Section 313 I.P.C. to rigorous imprisonment for three years. Suresh Chandra Sahu A-2 was also convicted under Section 325 I.P.C. and sentenced to rigorous imprisonment for one year. The learned Sessions Judge directed the sentences to run concurrently. The appellants filed appeals against their convictions and sentences to the High Court of Orissa which affirmed the judgment of the Sessions Judge and upheld the eonvietions as also the sentences passed against each of the appellants. The appellants then moved the High Court for a certificate of fitness for leave to appeal to this Court, which having been refused they obtained special leave from this Court, and hence these appeals,

2. Ordinarily this Court does not interfere with the concurrent findings of fact arrived at by the Courts below, but after hearing counsel for the parties we are satisfied that this is a case in which the Sessions Judge as also the High Court have completely overlooked some striking facts and glaring defects appearing in the prosecution evidence which have vitiated the findings of fact. Furthermore, none of the Courts below tried to examine the possibility which was clearly suggested by the evidence of the prosecution itself that one or more of the appellants may have had sexual intercourse with the prosecution not against her will but with her consent and the connivance of her husband P.W. 2. The learned Sessions Judge dismissed the plea of consent on the ground that it was not pleaded by the accused, completely losing sight of the fact that in a criminal ease the accused wag not bound by his pleading and it was open to the accused to prove his defence even from the admissions made by the prosecution witnesses or the circumstances proved in the case. The High Court has not considered this aspect at all. Such a wrong approach, therefore, by both the Courts below has resulted in a serious miscarriage of justice to the accused calling for our interference in

these appeals.

3. Put briefly the prosecution case is as follows.

P.W. 1 Pramila Kumari Rout aged about 23 years was the wife of P.W. 2 Bata Krishna Rout and according to the finding of the High Court she was living in a state of concubinage with P.W. 2 who had already married a wife who was living at the time when P.W. 1 started living with him. The High Court recorded its finding at p. 15 of Paper Book Vol. I as under:

> It is, therefore, clear that he was having legally wedded wife Basanthi by the time he came in contact with P.W. 1. Thus it is clear that P.W. 2 is having illicit intimacy with P.W. 1. Even if their version that their marriage had taken place by exchange of garlands is accepted such a marriage cannot be held to be valid while their previous marriages were subsisting. At worst, P.W. 1 can be treated as the concubine of P.W. 2.
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> P. Ws. 1 and 2 were the residents of Dubagadia within the limits of Dharamsala Police Station in Puri District. P.W. 1 was carrying a child and her pregnancy was running in the fifth month at the time of the incident. It is also admitted that the prosecutrix P.W. 1 was also a midwife and had served in that capacity with a Doctor. On April 19, 1972, the prosecutrix persuaded her husband P.W. 2 to take her to Nandaa Kanan for a pleasure trip. It appears from the evidence that Nandan Kanan was a beauty spot being constantly visited by tourists and other persons. There is a Rest House as also tourist lodges in Nandan Kanan. P. Ws. 1 and 2 reached Nandan Kanan in the afternoon at about 3.40 p. m. on April 19, 1972 and contacted the chowkidar of the Tourist Lodge for giving them accommodation. Fortunately since Lodge No, 4 was vaeat, P. W, 3 the chowkidar of the said Tourist Lodge allotted Lodge No. 4 to P. Ws. 1 and 2 after getting the necessary entries made in the accommodation register. Thereafter P. Ws. l and 2 went out for sight-seeing and returned to the Lodge at about 6.30 p. m. At that time a number of N. C. C. students including appellants 1 to 3 who were students of the Orissa University of Agriculture and Technology had also visited Nandan Kanan to practice horse-riding and were led by their Commander and other N. C. C. Officers. After nightfall P. Ws. 1 and 2 bolted their room from inside, spread the bed-sheets on the floor and started taking their dinner. While P. Ws. 1 and 2 were taking their dinner the appellants approached them through the window and requested them to open the door. The appellants are also alleged to have disclosed their complete identity to P.W. 2 who asked them to come after they had finished their food. The appellants then went away but returned soon thereafter and insisted that the door should be opened. P.W. 2 opened the door of the Lodge followed by P.W. 1. As soon as P.W. 2 had opened the door, A-2 and A-3 forcibly dragged away P.W. 2, through the verandah and took him to two trees about 15 feet away. Immediately thereafter A-1 entered the room, threatened P.W. 1 and after making her lie on the bed-sheet already spread on the floor, he is alleged to have raped her in spite of her protests. P.W. 1 felt pain all over the body. It is said that while A-1 had entered the room he was dressed only in a white-stripped towel and was wearing no

other garment. The evidence on this point is by no means consistent, and we will refer to this part of the case a little later. After having raped P.W. 1, A-1 left the room and was soon followed by A-2 who also in spite of the protestation of P.W. 1 raped her. The prosecutrix is alleged to have shouted at the top of her voice but no one tried to protect her. While P.W. 2 was being detained by A-1 and A-3, P.W. 3 the chowki-dar arrived and found P.W. 2 sobbing. P.W. 3 then went away to inform his officers about the incident, After A-2 came out of the room. A-3 entered the room and Is said to have raped P.W. 1. While A-3 was raping the prosecutrix, P.W. 3 returned with P. Ws. 4, 5 and others and remonstrated with A-1 and A-2 who gave a call to A-3 to come out of the room as people had come. P.W. 2 was also released by A-1 and A-2 and soon thereafter p, W. 4 asked P, W. 2 to go into the room and bolt the same from inside. P.W. 4 asked the three appellants as to why they had left their lodge and come to Lodge No. 4. This led to some altercation in the course of which A-2 is said to have given a fist blow on the nose of P.W. 4 as a result of which P.W. 4 fell down. P.W. 3 informed P.W. 6 and a number of forest employees including P.W. 6 who also arrived at the scene, when P.W. 1 on being asked narrated the harrowing experience she had gone through. It appears that one of the persons who had arrived at the spot was the Forest Ranger AH who immediately brought the Police Assistant Sub-Inspector P.W. 12 at the spot. First Information Report was lodged by P.W. 1 before the A. S. I. at about 11.30 P. M. on April 19, 1972. Soon thereafter some articles in the nature of skirt and underwear of P.W. 1, a towel and a bed-sheet were seized and a search list was prepared On the morning of April 20, 1972, P.W. 1! was produced before the police station Chandaka where she was examined by P.W. 7 and was later produced before P.W. 8 Dr. (Mrs.) Mimati Padhi at about 5 P. M. P.W. 1 was also examined by P.W. 10 who was working as Professor and Head of the Department of Forensic Medicine and Toxicology, who admitted her as an kidoor patient for evacuation of the uterine contents. According to the Doctor complete evacuation was done on May 13, 1972. In other words, the prosecution case was that a few days after the incident the prosecutrix had an abortion which was really caused because of the rape committed by the three appellants one after the other and this formed the backbone of the prosecution case. We shall, however, point out that the Courts below did not consider that this aspect of the case was not only not proved but positively disproved by the medical evidence of P. Ws. 8 and 10 which has not been rejected by the Courts below on this ground. The Sessions Judge, however, seems to have entered into the realm of speculation in trying to explain away the effect of medical evidence.

4. According to the prosecution, the report regarding the assault on P.W. 4 by A-2 was made at the Chandaka Police Station two days later, i.e. , on April 21, 1972. We have not been able to find any explanation by the prosecution as to why when the incident of rape on the prosecutrix and the assault on P.W. 4 by A-2 were parts of the same transaction and one continuous act it was thought necessary to split up the incident into two parts, report of one being lodged on April 19, 1972 and of the other on April 21, 1972. In this connection the statement of P.W. 3 who is not in a position to give any explanation makes an interesting reading and speaks for itself. The said statement of P.W. 3 may be extracted thus:

> On 21-4-1972 I gave a report to the S. I. of Police Chandaka at Nandan Kanan about the occurrence that took place on 19-4-1972. The Section 1. Chandaka Police Station had come to Nandan Kanan to investigate about the said occurrence and then I gave him that report. There is no reason why I did not lodge a complaint on 19-4-1972 or on 20-4-1972 even at the out post, and why I gave the report for the first time only on 21-4-1972. The S. I. was not at the out post after the night of 19-4-1972 and 20-4-1972. I did not try to give a report to the person in charge of the out post on 20-4-1972. I cannot give any reason for not lodging a complaint at Chandaka with the police prior to 21-4-1972, Neither my departments [superiors nor the S. I. wanted me to give a report on 21-4-1972. Nobody advised me to make such a report.
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> We shall show from a discussion of the evidence on this point that the likelihood is that really the F.I.R. was lodged on April 21, 1972 and that explains why the F.I.R. reached the Magistrate as late as April 22, 1972 as would appear from the endorsement of the Magistrate and as admitted by the Investigating Officer P. W, 16. The articles were sent to the Examiner who found blood and seminal stains on some of the articles. After the usual investigation a charge-sheet was submitted against the appellants who were then prosecuted and tried by the Sessions Judge with the result mentioned aforesaid.

5. The defence of the appellants was one of complete denial of the prosecution allegations. The appellants denied to have committed any rape on the prosecutrix and averred inter alia that there was some altercation between the appellants and p. Ws. 3 and 4 as a result of which P.W. 4 was injured and as the forest employees felt humiliated they, in collusion with the local police, and P. Ws. 1 and 2, bolstered up a false case of rape against the appellants to teach them a lesson. Even if we may not be in a position to accept the defence in toto, the circumstances appearing in the evidence clearly disprove the case of rape but suggest a clear possibility that either one of the appellants or two of them may have had sexual intercourse with P, W. 1 with her consent and with the connivance of her husband. In our view the fact that the Saya and the underwear of P, W. 1 had some blood or seminal stains or even the chadhi of the accused had similar stains is not by itself conclusive to prove the case of rape and is quite consistent with the appellants having had intercourse with the prosecutrix with her consent. The learned Sessions Judge has taken great pains to refer to various books on Medical Jurisprudence to disbelieve the evidence of P.W. 8 on the question that the prosecutrix could not have been raped beyond 24 to 48 hours of the time when she was produced before the Doctor. The reason given by P.W. 8 was that the presence of spermatozoa in the cervical smear indicated that the prosecutrix had sexual intercourse between 24 to 48 hours and not earlier. Secondly, the Doctor thought that as the vaginal fluid did not contain any spermatozoa whether living or dead, the spermatozoa found in the cervical smear could only be dead one and this was consistent with the prosecutrix having sexual intercourse at a time beyond 24 hours at the period of time when she was produced before the Doctor. In this opinion P.W. 8 was supported by p. W. 14 Dr. Pradhan. The learned Sessions Judge tried to demolish the two reasons given by the Doctor on the basis of the medical opinions referred to by some authOrs. In the first place, it is well settled that the medical jurisprudence is not an exact, science and it is indeed difficult for any Doctor to say with precision and exactitude as to when a particular injury was

caused and in the instant case as to the exact time when the appellants may have had sexual intercourse with the prosecutrix. The period of 24 hours prior to examination was given by the Doctor only roughly and would also include 20 or 18 hours before. According to the prosecution the incident of rape took place near about 10 P. M. on April 19, 1972, and the prosecutrix was produced before the Doctor on April 20, 1972, at about 5 P. M. i.e. , about 18 to 19 hours after the incident. In these circumstances, therefore, the possibility that the sexual intercourse may have been committed by the appellants with the prosecutrix even before 24 hours but more than 18 to 19 hours before she was produced before the Doctor cannot, be ruled out. In these circumstances it was not at all necessary either for the Sessions Judge or for the High Court to have made a detailed research on this point which was more or less futile. The High Court has itself pointed out that this Court in Bhagwandas v. State of Rajasthan, and Sunderlal v. State of Madhya Pradesh had deprecated the approach of Judges in drawing adverse conclusions by relying upon tried particular passages in Medical Books without drawing attention of the Doctor who has examined the victims to such passages. It is evident that the Doctor who has examined the victims is in a best position to depose about the medico-legal aspects of the offence committed on the victim. In these circumstances we are not at all impressed with the finding of the learned Sessions Judge that P. Ws. 8 and 14 ought to have been disbelieved on this ground alone. On the other hand on a perusal of the evidence of P. Ws. 1 and 2 and the circumstances of the case we are fully satisfied that there can be no doubt that the appellants had sexual intercourse with P.W. 1, though not in the manner and the circur stances as alleged by the prosecution.

6. Before referring to the evidence, we might dispose of one important aspect of the matter which forms the sheet-anchor of the judgments of the Courts below. The Sessions Judge has found by a circuitous process of reasoning that abortion of the prosecutrix was the logical result of the rape committed on her by the accused. There does not appear to be any legal evidence to support this conclusion of the Sessions Judge which has been affirmed by the High Court. P.W. 8 has clearly explained that when she examined P.W. 1 she did not find any trace of abortion. In this connection she stated thus:

> In the case of P.W. 1, the presence of blood in the vagina was not due to local injuries or abortion.
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> She has further deposed that the presence of blood in the vagina may be due to either local injuries or occurrence of bleeding at the usual interval in the case of pregnant ladies right upto sixth month of pregnancy. Such a bleeding may be a symptom of abortion also. She has further stated that when she examined P.W. 1 on April 20, 1972 she did not suspect that she was likely to have abortion and she did not give any treatment because P.W. 1 did not complain of pain and there was no contraction of uterus. She has further stated that if three persons had forcible intercourse with a pregnant lady one after the other, the abortion which occurs in consequence thereof would be immediate, due to shock. In this connection she stated thus:
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> If three men had forcible intercourse with a pregnant lady, the abortion which occurs in consequence thereof would be immediate, due to shock. By shock I meant

psychological state resulting from excessive fear and physical discomfort etc.

7. Similarly P.W. 10 who is a highly qualified Doctor and a Professor in the Medical College at Cuttack has corroborated P.W. 8 by categorically stating that if a pregnant lady who is alleged to have been raped does not exhibit any symptoms of abortion about ten or twelve hours later and subsequently has a complete abortion about four days later, that abortion could not have been caused by the rape. The Doctor stated thus:

> If a pregnant lady who is alleged to have been raped does not exhibit any symptoms of abortion about ten or twelve hours later, and subsequently has a complete abortion about four days later, that abortion could not have been caused by the alleged rape.
>
> Thus this witness also fully supports the view of P.W. 8 that if the prosecutrix had been raped by the three appellants one after the other in quick succession with force and violence, the abortion would have been immediate and not after a few days. It is the admitted case of the prosecution that the abortion of P.W. 1 took place 4 or 5 days after the occurrence. This important circumstance which has been completely overlooked by the Courts below clearly demonstrates that the accusation of rape is absolutely false. It is. therefore, manifest that when the Doctor P.W. 8 examined the prosecutrix and found no trace of abortion, though there was bleeding, that would clearly negative the story of rape by the three appellants one after the other. Both P. Ws. 8 and 10, however, stated that one of the causes of abortion is shock and violence which was completely absent in this case, otherwise we should have expected the abortion to take place even before the prosecutrix was produced before the Doctor P.W. 8. If, however, the appellants had sexual intercourse with the prosecutrix with her consent, there can be no question of any shock and it could not have caused any abortion unless it was a case of threatened abortion from before the occurrence. P.W. 8 has further explained in her evidence that from the third to sixth month of the pregnancy, sexual intercourse can be had without incurring the risk of abortion. Thus it is clear that if the prosecutrix would have been subjected to rape by the three appellants in the manner alleged to have been described by her, the inescapable conclusion would be that she would have abortion immediately and not a few days later. On this aspect, neither the Sessions Judge nor the High Court appear to have disbelieved the Doctors P. Ws. 8 and 10. Moreover, we do not see any reason to distrust the statements of these two Doctors who were fully conversant with the medical science. Thus on this ground alone, the appellants would have been entitled to an acquittal. But we find that there are a number of other circumstances which clearly show that the prosecutrix was not raped by the three appellants, although there can be no doubt that the appellants may have had sexual intercourse with her with her consent. We now proceed to deal with these circumstances.

8. In the first place, the admitted position is that the prosecutrix is a fully grown up lady and habituated to sexual intercourse and was pregnant. She was experienced inasmuch as she had acted as a midwife. It is true that the learned Sessions Judge was impressed with the demeanour of this

witness, but that by itself is not sufficient to prove the case if the allegation of the prosecution suffers from inherent improbabilities. The opinions of medical experts show that it is very difficult for any person to rape single-handed a grown up and an experienced woman without meeting stiffest possible resistance from her. In the instant case, according to the evidence given by P.W. 1, A-1 entered the room and committed sexual intercourse with very great force and violence against her consent. Indeed if this was so, we should have expected the stiffest possible resistance from her resulting in injury over the penis or scrotum of the accused or abrasions over other parts of the body caused by the nails of the prosecutrix. The accused were examined by P.W. 9 who did not find any injury over the penis or scrotum and he does not say that he found any injury on any other part of the body. This is rather an important circumstance which negatives the allegation of rape. The prosecutrix knew full well that the appellants had entered the room with evilintention from the fact that her husband was dragged away to the verandah and the door was bolted by A-1. In 'these circumstances we fail to see why the prosecutrix should have silently abided to have the intercourse with the appellant without putting up any resistance, except shouting, particularly when the prosecutrix was a fully grown up lady and experienced not only in sexual intercourse but also in the art of midwifery. She knew that she was pregnant and if any violence was caused to her it may lead to abortion. This circumstance would naturally impel her to put up the stiffest possible resistance against A-1 who was single-handed and was not armed with any weapon which may have silenced the prosecutrix. The theory propounded by the learned Sessions Judge was that as the appellants were N. C. C. students and sturdy persons the prosecutrix may have found it futile to put up any resistance and may have decided to submit to the onslaught on her. Such a course of conduct is wholly improbable, particularly in the case of grown up and an experienced lady like P.W. 1. Taylor, in the Principles and Practice of Medical Jurisprudence, Vol. II, dealing with the cases of rape on a grown up woman observes as follows:

> Unless under the influence of drink or drugs or asleep or ill, a fully grown girl or adult woman should be able to resist a sex assault. We should expect to find evidence of a struggle to avoid sexual contact or penetration, and may well feel uncertainty about the real nature of an alleged assault in its absence....
>
> A false accusation of rape may some times be exposed by marks of violence being wholly inadequate or absent. Bruises upon the arms or the neck may be considered to constitute some evidence of a struggle; and impressions of finger nails are also significant. Bruises or scratches about the inner side of the thighs and knees may be inflicted during., attempts to abduct the legs forcibly, and care must also be taken to examine the back, for the victim may have been pinned against the wall or floor. It is important to record these in detail, and to say, if possible, how fresh they are. The ageing of bruises is, as was indicated in Volume I, a matter of some uncertainty in the absence of microscopy.
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> Strong corroborative evidence of a struggle might be obtained from an examination of the accused for similar marks of bruises or scratches about the arms or face, and possibly even about his penis, though this is less likely.

> Though injury is most unlikely to the penis, a man may have had his face scratched or have been bitten during a sex assault. The clothing may bear some contact traces of the woman-hairs, vaginal secretion or blood, and, though of less significance, seminal stains.
>
> The medical evidence, therefore, clearly discloses that the prosecutrix does not appear to have put up any resistance to the alleged onslaught committed on her by the appellants. From this the only irresistible inference can be that the prosecutrix was a consenting party which would be reinforced by other circumstances to which we shall refer hereafter.

9. Another aspect of the matter is that where there has been any real resistance there is bound to be local injury and marks of violence on the body and the limbs of the victim. Taylor in his book Principles and Practice of Medical Jurisprudence, Vol. II, observes thus at p. 64:

> Nevertheless, it is most likely that when there has been some real resistance, local injury will be apparent and probably also marks of violence on the body and limbs.
>
> Although according to the prosecutrix, three persons raped her with great force and violence resulting in great pain to her and her breasts becoming swollen and red and other injuries, yet when she was examined by the Doctor P.W. 8 only after 16 to 17 hours of the occurrence, the Doctor found no marks of injuries on her body at all. In this connection P.W. .& has categorically stated thus:
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> I examined her (P.W. 1) at 5-15 p. m. on 20-4-1972. There was no injury or bruise mark on the breasts or chest There was no injury mark on the face, thighs and over the whole body.
>
> If the story of the prosecutrix was true, then we should have expected an injury or bruise-mark on the breasts or chest or on the thighs or other part of the body. The learned Sessions Judge, with whom the High Court has agreed, seems to have brushed aside this important circumstance on the ground that as the prosecutrix was examined by the Doctor on April 20, 1972, at about 5 P. M about 17 hours after the occurrence injuries may have disappeared and has relied on an observation of Taylor at p. 66 of his book which runs as follows:
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> Injuries from rape may soon disappear or become obscure, especially in women who have been used to sexual intercourse.
>
> The Sessions Judge explained that as the prosecutrix was habituated to sexual intercourse injuries may have disappeared. While referring to one part of the observation of Taylor, the learned Sessions Judge has completely lost sight of the other part which explains the real issue and which runs thus:

> After 3 or 4 days, unless there has been unusual degree of violence, no traces may be found. Where there has been much violence, the signs may of course persist longer.
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> Thus, if such a serious violence was caused to the prosecutrix by the appellants, the injuries are not likely to have disappeared before 2 or 3 days and the signs were bound to persist at least when she was examined by the Doctor. The absence of injuries on the person of the appellants as also on the person of the prosecutrix is yet another factor to negative the allegation of rape and to show that the appellants had sexual intercourse with the prosecutrix with her tacit consent.

10. Another important circumstance that negatives the story of rape Is that both P, Ws. 1 and 2 have categorically stated that while they were having their food, the three appellants approached them through the window and asked them to open the door, and on inquiries being made by P. W, 2 they disclosed their complete identity. Such a conduct on the part of the appellants would be wholly inconsistent with their guilt or with any guilty intention that they may have. The appellants were fully aware that they did not know either P.W. 1 or P.W. 2 and if they really had hit upon a plan to rape the wife of P, W. 2 they would be the last persons to disclose their complete identity and place all their cards on the table. Furthermore, the evidence of P. Ws. 1 and 2 shows that the appellants not only asked P.W. 2 to open the door but told them that he should come to their lodge No. 3 because they wanted to talk to P.W. 2 in the absence of his wife. In this connection P.W. 1 stated thus in her statement under Section 164 of the CrPC which had been put to her in her evidence:

> The boys said "Come after finishing your meal. We are in room No. 3. We shall tell you something in the absence of your wife".
>
> This would naturally show that the appellants may have entertained some suspicion that P.W. 1 was not of a good character and was merely a concubine of P.W. 2. They, therefore, wanted to negotiate with P.W. 2 the husband of P.W. 1 and that is why they had asked him to come to their lodge. Having done so, it is difficult to believe that the appellants would suddenly try to get the door opened and drag out the complainant when the matter could be settled, if possible, by negotiation. We do not mean to suggest for a moment that P.W. 2 was a pimp, but the fact remains that the appellants undoubtedly wanted to have negotiations with him before insisting upon him to open the door. This is also a circumstance which militates against the case of rape and shows that P.W. 2 himself connived at the sexual intercourse committed by the appellants with his concubine.

11. Another important circumstance which negatives the theory of rape and suggests that the prosecutrix might be a consenting party is the admission of P.W. It and 2 that even after A-1 left the room after having raped the prosecutrix no attempt was made by the prosecutrix to get up and close the door at once so as to stop the entry of the other accused. Ac cording to the prosecutrix A-1 had come without any garment and wearing only a towel, A little before he along with companions, namely the other two appellants, had contacted P.W. 2 and asked him to open the door. In these circumstances as an experienced woman it would not have been difficult for P. W, 1 to anticipate the

intention of the other appellants, and the first natural instinct on her part would be to close the door after she had been raped by A-1. P.W. 2 has also stated in his evidence that the time-lag between A-1 coming out of the room and A-2 entering therein was about 5 to 6 minutes. This was sufficient for the prose cutrix to have closed the door and thus avoid the rape by the other two appellants. The fact that she allowed the door to remain open so as to allow the entry of the other two appellants clearly shows that the whole thing was a pre-arranged show.

12. Another circumstance, which taken cumulatively with the circumstances mentioned above, is the fact that even though P.W. 2 had several opportunities to narrate the incident to the persons who came to the spot, yet he did not do so and short of sobbing he made no disclosure at all. To begin with, the evidence of P.W. 3 is that when he reached the spot, he found p. W. 2 being detained by A-1 and A-3 and a woman crying from lodge No. 4. The witness categorically admits that except sobbing P.W. 2 did not at all complain to the witness of the actions of the appellants one of whom was raping his wife inside the room and two of them were trying to detain him forcibly. In this connection P.W. 3 stated thus:

> I asked P.W. 2 why he was weeping and I also questioned A-1 and A-3 why they were holding P.W. 2. A-1 and A-3 told me that P.W. 2 was their friend and that it was none of my business to question them. They asked me to go away.
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> Even while A-1 and A-3 tried to send away P.W. 3, no attempt was made by P.W. 2 to tell P.W. 3 that what A-1 and A-3 had told him was absolute falsehood. The witness further admits that before the Committing Court he stated thus:
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> I found P.W. 2 was crying on the verandah of Lodging No. 4 and accused Pratap Misra and Kitish sitting with him.
>
> This reveals that A-1 and A-3 were not detaining or catching hold of P.W. 2, but they were only sitting with him which suggests that the appellants must have gone inside the room with the consent of P.W. 2. Finally P.W. 3 states thus:
>
> I did not talk to P.W. 2 when I first saw him being detained by A-1 and A-3 and before starting for the office to inform my superiOrs. Even when I returned to the Lodge with Sridhar and Kedar 1 did not have any conversation with him.
>
> This statement of the witness clearly shows that there was no disclosure by P.W. 2 to this witness either when the witness had come to the spot or even when P.W. 3 returned to the spot with two more persons, namely, Sridhar and Kedar. Thus there were two, clear opportunities when P.W. 2 could have revealed the fact to Sridhar, Kedar or P.W. 3 but he chose to remain silent. Such a conspiracy of silence could only be consistent with the theory that the appellants were committing sexual intercourse with tacit consent of P.W. 1 and with the positive connivance of her husband.

13. Similarly P.W. 4 Sridhar who is said to have been injured by A-2 appears to have reached the spot after being informed by P.W. 3, This witness clearly states that except asking P.W. 2 to go inside the lodge and bolt the door he did not talk anything to P.W. 2 nor did P. W.2 talk to him. The witness stated thus:

> Except asking him to go inside the lodge and bolt the doOrs. I did not talk anything else to P.W. 2. P.W. 2 also did not talk to me.

14. Similarly, P.W. 5 Kedar who also arrived at the spot with Sridhar when in formed by P.W. 3 clearly stated thus:

> I did not question P. Ws. 1 and 2 about the occurrence nor did they inform me about it.

15. The last witness on the point is P.W. 6 Brundaban Das who was a forester and held a higher rank than P. Ws. 3 to 5. He is the only witness who claims in the Court that on being asked as to what had happened, P.W. 1 told him that three students had committed 'Atyachar' on her, meaning thereby they had raped her. This was, however, a statement by the witness made for the first time in the Court and this statement was heavily re lied upon by the learned Sessions Judge to corroborate the testimony of P. Ws. 1 and 2. The learned Sessions Judge, how ever, failed to consider that the witness stated no such thing in his earlier statement to the police. At p. 49 of the Paper Book a definite suggestion was put to him that the statement made by him in the Court that he had gone to Lodge No. 4 in the company of 10 to 12 employees of the Forest Department and that P.W. 1 was found crying and narrated the story of rape to him was not made before the police, the witness appears to have denied the suggestion, but it has been proved by his statement before the police which is Ext. D-24 where he stated that he heard about the occurrence at about 4 A. M. in the night which completely falsifies the story given out by the witness in the Court,

16. Similarly, P.W. 12 at p. 73 of the Paper Book falsifies the statement of P.W. 6 in the Court when the Investigating Officer admits that these statements were not made before him. The Investigating Officer P.W. 12 deposes thus:

> P.W. 6 did not state before me that on the night of 19-4-1972 he went to Lodge No. 4 in the company of ten or twelve Forest Department employees including P.W. 3, or that he had seen P.W. 4 lying speechless on the ground in front of Lodge No. 4, with bloodstains on his clothes, or that P.W. 4 was removed by two persons or that he went to Lodge No. 4 at all on that night or that after P.W. 3 had knocked at the Door of Lodge No. 4, P.W. 2 opened it, or that he went into that lodge or that P.W. 1 was found crying or that on that night P.W. 1 told him that Atyachar was committed on her by any one,....
>
> Thus it is difficult to accept the belated statement of P.W. 6 made for the first time in the Court when he did not speak about the fact of the. disclosure of the statement of rape to him by P.W. 1 in Ms statement before the police. Thus the position is that out

of the witnesses who arrived at the spot, namely, P. Ws. 3 to 6, neither P.W. 1 nor P.W. 2 narrated the story pf rape to any of them. According to the prosecution after a number of Forest Department employees gathered at the spot some officers also came there, namely, T. AH, Forest Ranger and Mr. Nara Commander of the N. C. C. in whose presence also it is said that P. Ws. 1 and 2 narrated their story. They would have been the best persons to corroborate the evidence of P. Ws. 1 and 2, but for the reasons best known to the prosecution they have not been examined. On the other hand, a definite suggestion was given by the accused to the witnesses that these two responsible persons were not examined, because no disclosure was made to them or if any statement was made to them it was that the appellants had committed no rape. To this may be added the circumstances which we have discussed already, namely, the lodging of two separate F. I. Rs. by splitting up one incident into two parts, for which the prosecution has no explanation to offer. In fact P.W. 4 was definitely asked as to why he did not lodge one report for both the occurrences and he has failed to give any explanation for the same. This circumstance taken with the conduct of the police officers in preparing a seizure list but leaving the articles at the Lodge without taking them to the police station or placing them in the custody of any super-dar fortifies our conclusion that the story of rape appears to have come to Hght only after P. Ws. 1 and 2 were persuaded to support the case of rape. The position, it appears, was that the seizures by themselves did not prove rape, but in fact they did not exclude the possibility of the sexual intercourse having taken place by the appellants with the prosecutrix with her consent. The police wanted to fish out further evidence to prove the charge of rape. Such evidence was procured in the shape of testimony of P.W. 7 who however turned hostile in the Court who denied having examined the prosecutrix and having found any injuries or bleeding from her vagina. Neither the Sessions Judge nor the High Court have relied on the testimony of P.W. 7 who, in our opinion was undoubtedly a trumped up witness.

17. The next question that arises was as to why a false case of rape was bolstered up against the appellants. It seems to us that the Forest Department employees must have resented the conduct of P.W. 2 in allowing his wife to have sexual intercourse with the students in another Lodge. This may have led to an altercation between some of the students and the employees of the Forest Department including P.W. 4 as a result of which P.W. 4 was seriously injured. The employees of the Forest Department must have felt insulted and humiliated at the action of the accused and they may have persuaded P. Ws. 1 and 2 to reconstruct a case of rape so as to teach a lesson to the students. As the matter was taken at the lower level, the higher officers T. Ali the Forest Ranger and Mr. Nara, the Commander N. C. C. were not prepared. to support this case and, therefore, they were not produced as prosecution witnesses at the trial, although having regard to the circumstances of the present ease they were the most material witnesses whose evidence would have clinched the issue. As the police was not sure of the case of rape made out against the appellants, the articles seized were not taken in custody but were allowed to remain in the Lodge, proper sealing was not done and the F.I.R. was despatched to the Magistrate as late as April 22, 1972 i.e. , after the report regarding the assault on P.W. 4 was also lodged. This explains the various irregularities and discrepancies which appear in the evidence of the Investigating Officer and other witnesses regarding the manner in which the

articles M. Os. 1 to 4 were seized and kept. Sometimes the A. S. I. has ascribed this irregularity to a lapse on his part, sometimes he gives some other explanation. It is, however, not necessary for us to go into the question of seizure of these articles, because assuming that the articles were seized they are in no way inconsistent with the appellants having committed sexual intercourse with the prosecutrix with her consent as is proved from the circumstances discussed above.

18. Another important circumstance which proves the theory of consent is that there is a serious contradiction in the manner in which A-1 raped the prosecutrix. According to the definite case of P.W. 1 in her evidence, the appellant No. 1 entered the room wearing only a turkish towel and had no other garment. Before the police the prosecutrix clearly stated that the appellant No. 1 took out his pants and then raped the prosecutrix. As the towel did not bear any blood or seminal stains, a case now put forward by the prosecution that the towel was not the towel worn by the accused. This is. however, completely falsified by the statements mentioned in the seizure list at page 92 where it is clearly and categorically stated that the Turkish towel recovered was worn by all the accused persons at the time of committing rape on the prosecutrix and the towel was seized from the col In this connection the seizure list contained the following statement:

> Accused persons wearing a striped Turkish towel committed rape on the complainant. The complainant showed the said towel lying on the sofa bed of Lodge No. 4 of Nandan Kanan and so it was seized.
>
> According to the statement made at the time of the seizure it is absolutely clear that the prosecutrix herself gave out that this was the towel which was used in the commission of the rape and yet when she came to depose in Court she categorically stated that the towel seized was not the one which was worn by the accused. This is a glaring instance as to how the prosecution tried to get out from a very difficult situation,

19. Similarly Ext. P-29 seizure list shows that one blue coloured Chadi (underwear) was recovered from A-2 Suresh Chandra Sahu, and a blue striped trouser from A-3 Khitish Chandra Paltasingh. None of these articles had any blood-stains but they had a gum like sub stance which may be semen in a dried form. Recovery of these articles from the appellants, therefore, is not inconsistent with their having committed sexual inter course with the prosecutrix with her consent.

20. Then there are the articles M. Os. 1 and 2 the skirt worn by the prosecutrix and the pad used by her to prevent bleeding. There is no doubt that these two articles were blood-stained. This is, however, clearly explainable on the hypothesis that the bleeding from the vagina could be due to natural causes as deposed to by P. Ws. 8 and 10. P.W. 8 Dr. (Mrs.) Minati Padhi has categorically stated that it is not unusual for a woman upto the sixth month of her pregnancy to bleed from her vagina. The recovery of these two articles, therefore, did not advance the case of the prosecution any further.

21. Lastly, there is the recovery of the bedsheet which also does not take us anywhere.

22. This is all the evidence that has been led in this case. After going through the entire evidence carefully we are clearly of the opinion that the evidence in this case shows that the appellants had no doubt committed sexual intercourse with the prosecutrix but such an intercourse was done with the tacit consent of the prosecutrix and the connivance of her husband. There is no material at all to prove the allegation of rape, the medical evidence does not support it, the circum stances proved in the case militate against the case of such a theory and the con duct of P. Ws. 1 and 2 itself is inconsistent with the allegation of rape. Both the Courts below, while appreciating the evidence have completely overlooked the telling circumstances and the glaring errors found in the prosecution case which have necessitated its rejection in toto. The Courts below appear to have presumed that the allegation of rape was true without there being sufficient evidence and without even examining the possibility of consent which was not only present in this case but almost proved and probabilised by the circumstances discussed by us and which appear from the prosecution evidence itself. We are, therefore, satisfied that the Courts below have made an absolutely wrong approach to this case, have failed to consider the striking circumstances which demolish the prosecution case and have committed gross error of procedure in not examining the possibility of consent merely on the ground that the same was not plead ed by the accused. Such an approch, therefore, clearly vitiates the judgments of the Courts below.

23. In these circumstances we are unable to accept the contention of Mr. Ramamurthi that this was not a case in which this Court should interfere. Mr. Ramamurthi counsel for the State of Orissa submitted that once if P.W. 1 is believed, as she has been believed by the two courts below, this Court should not interfere. We have already found that in view of the inherent improbabilities and the circumstances militating against the case put up by P.W. 1 it is not possible for us to believe her evidence which is not only untrue but inherently improbable. We have given our anxious consideration to all the aspects of the case and we feel that the story with which P.W. 1 has come forward is not true and she has deliberately suppressed the truth. In these circumstances it is not possible for us to accept the evidence of P.W. 1 even though her demeanour may have impressed the Sessions Judge who appears to have been too presumptuous. Furthermore when the evidence of the prosecutrix is totally inconsistent with the medical evidence consisting of P. Ws. 8 and 10, when it is found to be false in material particulars regarding the preparation of the seizure lists, when it is wholly discrepant with respect to a most vital point, namely, the manner in which the appellant No. 1 committed rape on her and finally when she has been guilty of deliberately suppressing the truth by denying the towel recovered to be the one which was used In the offence, which she herself had pointed out to the A. S. I. of the time of the seizure on April 19, 1972, it is difficult for us to place any implicit reliance on the testimony of such a witness. In this view the contentions raised by the learned Counsel for the State are, therefore, overruled.

24. Once the case of rape which is closely connected with the case of assault by A-2 on P.W. 4 is rejected, then the fundamental part of the case fails, and it would be in our opinion unsafe to rely on the allegation of assault divorced from the circumstances on which the prosecution relies,

25. For these reasons, therefore, we are satisfied that the prosecution has failed to bring home any of the charges against the appellants. The appeals are accordingly allowed, the convictions and sentences passed on the appellants are set aside and the appellants are acquitted of all the charges

framed against them. The appellants are now directed to be released forthwith.