Orissa High Court
Prasanta Kumar Sahoo And Anr. vs State Of Orissa on 18 June, 2004
Equivalent citations: 2004 CriLJ 3501
Author: P Tripathy
Bench: P Tripathy
JUDGMENT P.K. Tripathy, J.

1. Appellants are two out of the three accused persons to face the trial in S.T. Case No. 164 of 2000 in the Court of Assistant Sessions Judge, Athagarh. The 3rd accused then was said to be absconding. Appellants was charged for the offences punishable under Sections 450/366/376/307/34, I.P.C. on the allegation that in the night between 22/23-4-1999, they entered into the residential premises of the prosecutrix (P.W. No. 1) when she was sleeping on the inner varandan of the house by the side of her husband, who is hard of hearing and also having a defective power of speech. Her mouth was gagged, she was lifted and taken to a paddy field belonging to Batu Pradhan and she was ravished by all the three accused persons one after the other. It is also alleged that she was over-powered by the two accomplices when the 3rd person (accused) committed rape and that arrangement on rotation went on till all the three accused persons committed rape on her. After committing rape they trampled on her body and that made her unconscious. She was discovered lying naked on the following day morning by the searching party including her mother-in-law and co-villagers. On the aforesaid allegation, charge was framed for the above noted offences. Appellants denied to the allegation and claimed for trial.

2. To substantiate the charges, prosecution examined as many as 11 out of 23 charge-sheeted witnesses. Out of them, as noted above, P.W. No. 1 is the victim lady, P.W. 2 is her mother-in-law, P.W. 3 is the elder brother of her husband, P.W. 5 is a co-villager and Grama Rakhi to associate in search in the night of occurrence and P.W. No. 4 is another co-villager and he accompanied when the senseless body of the P.W. No. 1 was carried to the hospital at Tigiria. P.W. 6 is a witness to the seizures, P.W. No. 7 is a Police-Constable who was commanded to produce the P.W. No. 1 before a lady Doctor for medical examination. P.W. 8 is the male Doctor who was then serving at Tigiria and P.W. 9 is a lady Doctor who was then serving at Athagarh and both of them examined P.W. No. 1 when she was brought to the respective hospitals. P.Ws. 10 and 11 are the two Investigating Officers who conducted investigation, one after the other. The F.I.R., the seizure-lists, requisitions for medical examination and opinion, medical reports, report from the F.M.T. Department and the Chemical Examiner, F.S.F.L., Rasulgarh have been marked as Exts. 1 to 18. Wearing apparels of the accused and the victim and the cut pieces therefrom have been marked as M.Os. II to IX. Seminal fluid of the accused persons were marked as M.Os. X and XI and the electricity bulb seized in the case was marked as M.O.I. In furtherance of their plea of innocency, appellants examined scriber of the F.I.R. a charge-sheet witness, as D.W. No. 1. No document or M.Os. were tendered in evidence by them.

3. The offences complained against the appellants being of trespassing to commit offence, kidnapping and committing gang rape, which is punishable in accordance with the provision under Section 376(2)(g), I.P.C., the trial Court considered the contention of the rival parties and recorded the findings that--

(i) Evidence of P.W. No. 1 sufficiently proves the allegation of lifting her from the house by the accused persons with the intention to commit rape by sharing the common intention and therefore, the offence under Sections 450/34,1.P.C. is proved. For that, he sentenced the appellants to undergo R.I. for three years.

(ii) Evidence of P.W. No. 1 is trustworthy relating to the act of committing rape by the accused persons one after the other; Absence of external bodily injury on her back buttock or breast is not material inasmuch as it was a clay field with presence of grass. Similarly, absence of injury on her private parts is not material inasmuch? as she is a married woman, aged about 22 to 23 years and according to P.W. No. 9, her vagina was admitting two fingers. Similarly absence of semen on her wearing apparels is not material because as alleged by her she was raped after lifting the cloth.

(iii) In the above context, trial Court found corroboration to the evidence of P.W. No. 1 from the circumstantial evidence that she was lying naked unconsciously on the paddy field of Batu Pradhan in the morning of 23-4-1999 and soon after regaining her sense in Tigiria hospital she narrated about the incident by implicating the appellants. That in the occurrence night, accidentally though, when P.W. No. 2 found her missing from her bed the family members and P.W. No. 5 and others went in her search but failed to locate her till the dawn. That accused person had motive to commit crime against her inasmuch as a couple of days before that date of occurrence, there was theft from the house of P.W. No. 1 for which she abused the unknown thiefs by cursing them and therefore, the missing articles were replaced/returned un-noticedly by somebody. In spite of that when she went on cursing then the appellants protested on the ground that she should not curse any more because she got recovery of her articles. In that process they also threatened to kidnap and rape her. Therefore, significance of motive is quite inferable from such facts and circumstances.

(iv) The trial Court took note of the contention of the defence in the above context and rejected the same on the grounds that: there could not have been mistaken identity when light was available from an electric bulb. Alternatively, he held that appellants being the co-villagers and the neighbours of P.W. No. 1, even if the theory of availability of illumination from a lighted bulb is not accepted then also under the given facts and circumstances there could not have been a case of misidentification inasmuch as she saw each of them from the closest range of the vision. Learned Assistant Sessions Judge did not think it worthy to take note of the contradictions, from the evidence of P.W. No. 5 vis-a-vis P.Ws. 1 and 2 relating to the place where the prosecutrix regained her sense. The trial Court opined that P.W. No. 5 having turned hostile to the prosecution, such statement brought from his mouth in course of cross-examination by the defence has no credibility and more so when the acceptable evidence on record proves that she gained her sense only at Tigiria hospital. In relation to the F.I.R. also he disbelieved the D.W. No. 1.

(v) Consequently trial Court found it to be a case proved by the prosecution beyond all reasonable doubt for the offence under Sections 450/34 and 376/34, I.P.C., later offence for the gang rape. He imposed a sentence of R.I. for ten years to each of the appellant for the offence under Section 376(2)(g), I.P.C. Trial Court directed both the sentences to run concurrently. He acquitted the appellants from the offence under Section 307, I.P.C. on the ground that there was no evidence worth the name to prove a case of attempt to commit murder. However, learned Assistant Sessions

Judge has not whispered anything as to why he acquitted the appellants of the charge under Sections 366/34, I.P.C. As it appears to this Court on conviction of the appellants for the offence of trespass to commit crime and gang rape, perhaps he could not remember that appellants have also been charged for the offence under Sections 366/34, I.P.C. or that he did not deal with the offence under Section. 366, I.P.C. because of conviction of the appellants under Sections 350/34 and 376/34, I.P.C. Be that as it may, this Court does not want to probe any further in that regard when neither the prosecutrix nor the prosecution have said anything expressing their grievance against such lacuna in the impugned judgment.

4. After completion of the trial, impugned judgment was delivered on 29-3-2001. Appellants are said to be in Jail custody during the trial and after the order of conviction.

5. In the pursuit for an order of acquittal more or less similar contention, which was raised in the Court below, is canvassed by the appellants backed by citations relied on by them. Learned Standing Counsel on the other hand supported the findings and conclusion of the trial Court and to make that logical, legal and appropriate, he also relied on ratio from the Apex Court in different citations.

6. It is the duty and responsibility of the appellate Court not only to hear the parties but also to peruse the evidence and examine that vis-a-vis the contention of the rival parties and in that process to Judge if the factual finding or appreciation of evidence by the trial Court has fallen short of the standard of appreciation and unless he finds good ground of illegality and perversity, the factual finding should not be disturbed. It should always be borne in mind by the appellate authority that the witnesses were available to the trial Court while recording evidence and therefore the Presiding Officer of the trial Court had the advantage of looking to conduct and demeanour of the parties as well as the witnesses. No doubt, a judgment on fact is to be made by referring to and analysing the evidence on record and appreciating their acceptability in accordance with law of evidence with the prudency of a prudent man. In that connection, the statutory provision in Sections 3 and 4 of the Evidence Act are sufficient guide while defining the terms 'Fact', 'Relevant', 'Fact in issue', 'Proved', 'Disproved', 'May presume' and 'Shall presume'.

7. Amongst the contention in challenging the order of conviction, appellants argued that the facts and circumstances emerging from evidence on record indicate that appellants have been implicated with the accusation on mere suspicion of previous incident relating to altercation after recovery of the stolen articles inasmuch as in the dead of the night when P.W. No. 1 was removed from her bed, no light was available and in that context evidence of P.W. No. 1 appears to be false and exaggerated one that a 100 watt. electricity bulb, which was seized in this case, was lighting that area. Mr. Rajen Mohapatra, learned counsel for the appellants thus argued that when prosecution has no credible evidence that the occurrence house, by the date of occurrence, was supplied with electric connection, if that part of the prosecution case is doubted regarding availability of light then on that score alone appellants are entitled to benefit of doubt. Learned Standing Counsel on the other hand argued that P.W. No. 3 the elder brother of the husband of the prosecutrix is only a witness to seizure of that electricity bulb from the house of the prosecutrix. In course of cross-examination, it was suggested to P.W. No. 3 though denied that, there is no connection of electricity to the house of the prosecutrix. When the evidence of P.W. Nos. 1 and 3 read with the evidence of the Investigating

Officer and the seizure list Ext. 2, give ample evidence regarding existence of electricity connection to the house of the prosecutrix and when no evidence worth the name has been brought on record except a bare suggestion by the defence does not probabilise that there was no electricity connection to the house of the prosecutrix, therefore, availability of illumination from electric bulb is proved in this case. According to him once that be so, the contention of the appellants in the above manner, is to be rejected. In the above context, he also relied on the case of State of Punjab v. Gurmit Singh, AIR 1996 SC 1393 : (1996 Cri LJ 1728) in the context that flaw in investigation by not collecting the consumer number (on electric connection) is not a ground to discredit the version of the prosecutrix on the allegation of rape. He also argued that, whether or not light was available from illuminated bulb, as rightly held by the trial Court, P.W. No. 1 had the occasion to see each of the culprits when she was lifted and removed from her place of sleeping and thereafter when rape was committed on her by each of them. Thus, appellants are not entitled to benefit of doubt on the ground of mistaken identity.

8. On a close scrutiny of the evidence on record, the findings recorded by the trial Court and considering the aforesaid rival contentions of both the parties, this Court, concur with the factual finding of the trial Court to reject the contention of a chance of mistaken identity as canvassed by the appellants inasmuch as evidence on record from the mouth of P.Ws. 1, 3 and 11 proves on record regarding availability of electricity and in addition to that prosecutrix could not have misidentified after seeing the culprits from the closest range.

9. Learned counsel for the appellants argued that Ext. 1 cannot be the F.I.R. inasmuch as according to the prosecution, P.W. No. 5, went in advance to the police station to intimate about the incident when others were busy in carrying the P.W. No. 1 to the hospital and therefore, the intimation by P.W. No. 5 having not come on record, prosecution suffers from that lacuna. That contention of the appellants is heard to be rejected, because the fact sequences involved in this case indicate that by the time P.W. No. 5 went to the Police-station he had the only information that P.W. No. 1 was missing from the house in the night and she was recovered unconscious from the paddy field on the following day morning. On the other hand, the report Ext. 1 was scribed, said to be by D.W. No. 1, and was signed by P.W. No. 3 after the P.W. No. 1 regained her sense at Tigiria hospital and narrated about the incident. Therefore, for all practical purpose Ext. 1 is the F.I.R. relating to the occurrence under prosecution.

10. Appellants also argued that there are omissions in the F.I.R. on the material aspect involved in the case and therefore, the veracity of the prosecution should be doubted for its latter exaggeration about the occurrence through the evidence of P.W. No. 1. In that respect, appellants argued that F.I.R. does not mention about the victim being gagged by a towel and the theory of her senseless condition till reaching hospital has been contradicted by P.W. No. 5, the Grama Rakhi of the village. Such argument of the appellants also does not bear any merit inasmuch as it is the settled principle of law that F.I.R. need not be the encyclopaedia of the details of the events which took place in course of the occurrence. Therefore, some aspect of the occurrence may not always amount to material omission. Apart from that, the statement incorporated in Ext. 1 is the version which the P.W. No. 3 could gather from the statement made by P.W. No. 1 soon after regaining her sense. That circumstance, probabilises naturality of the missing statements as complained by the appellants.

Apart from that Court has to visualise the situation that P.W. No. 1 was narrating the incident in the Tigiria hospital after suffering gang rape and attrocities of trampling. Court cannot ignore that circumstance while in consideration of the question of omissions. It reveals from Ext. 1 that the entire incident has been broadly stated and reflected in Ext. 1. Accordingly, the aforesaid argument of the appellants is also rejected.

11. P.W. No. 1, in her evidence narrated that she was carried to a paddy field and there she was raped by the culprits one after the other with over powering her by two of them when the third one committing sexual intercourse. She has also stated that because of that incident she sustained some abrasions on her hands and back. P.W. No. 8, reported that there was no external injury on her body but P.W. No. 1 complained of pain all over her body. P.W. No. 9 also examined her on 24-9-1999 to provide opinion about the age of the prosecutrix and about no injury on her private part and body. According to that witness (P.W. No. 9 the lady Doctor) no injury was found but her vagina was admitting two fingers. In the cross-examination, she has stated that "If a lady will be raped successively on a mudy surface, then there may or may not be injury on her body." It be noted that such opinion of P.W. No. 9 was neither further challenged nor any contrary evidence was brought on record regarding possibility of injury. Medical jurisprudence in such case cannot over throw the opinion of P.W. No. 9 when possibility of no injury, under the given facts and circumstances is also possible. In the context of the spot it has been brought from the mouth of P.W. No. 1 (in cross-examination) that "there was no mark of violence at the spot when we had been there (which) is a grassy field. It is not a fact that the spot is stony surface" (missing word in the deposition is mentioned in bracket). Similarly, P.W. No. 2 in her cross-examination has stated that "the Gahira land wherein P.W. No. 1 lying situates 2 to 3 kitas apart from my house. Each kita will be about 50 to 60 cubits in length. The place where P.W. No. 1 was lying is a muddy place and it is hard muddy and the surface was uneven." Capitalising on such evidence of P.Ws. 1 and 2 and absence of injury on her body, appellants argued that the allegation of rape is improbabilised inasmuch as when there was repeated forcible cohabitation, be it muddy or grassy surface it was to create some injury on her back. For the reasons already indicated while not accepting the aforesaid argument as a positive factor in favour of the appellants, this Court concurs with the factual finding of the Court below that absence of external injury noted by P.W. Nos. 8 and 9 is not a ground to disbelieve her statement regarding rape committed on her. The sequence of events indicate that she was ravished on the paddy field and abandoned in senseless condition. P.W. No. 2 the mother-in-law having the opportunity of locating her in nacked condition has not stated anything regarding presence of any external injury on the body of the prosecutrix. Therefore, the evidence of P.W. No. 1 relating to the injury of abrasion may be due to the bodily pain which she complained and burning sensation on the back and the hand due to friction with surface in course of rape. The above sequence emerging from the evidence of P.Ws. 1 and 2 do not render evidence of P.W. No. 1 to be doubtful on the allegation of rape.

12. Appellants have relied on the case of Murji v. State of Rajasthan, 2002 Cri LJ 472, in which Honourable Judge from Rajasthan High Court found absence of external injury as an act of passive consent. In the case of Sampad alias Srustidhar Mallick v. State, (2001) 20 OCR 157 : (2001 Cri LJ 793) looking to the different infirmities in the prosecution case, which are not material in the present case, it was held by this Court that if at all the appellants had sexual inter course with the

prosecutrix, then it was with her consent. In the case of Niranjan alias Tima Jena v. State of Orissa, 2000 (2) OLR 68 : (2001 Cri LJ 18) the allegation was of an unmarried girl kidnapped and raped several times for several days but the medical report did not support that allegation. The prosecutrix was also found to be giving false statement in Court. Therefore, the benefit arising out of the same was extended in favour of the accused persons. In the case of Pratap Misra v. State of Orissa, AIR 1977 SC 1307 : 1977 Cri LJ 817, which is popularly known as Nandankanan rape case, keeping in view the facts available in that case and medical report the Apex Court, found it to be a probable case of consented cohabitation. In the case of Chhabi alias Ruturaj Nayak v. The State of Orissa, (1996) 10 OCR 113, it was held by this Court that capability of the accused to commit sexual intercourse by itself is not sufficient to warrant a conviction in absence of evidence to corroborate the allegation of rape. In the case of Dilip v. State of M. P., (2001) 21 OCR (SC) 629 : (2001 Cri LJ 4721) the Apex Court, taking note of the improbable factor on the allegation of rape from the uncorroborated statement of the prosecutrix found the occurrence to be not probable in that manner.

While relying on the aforesaid citations to claim acquittal appellants also relied on the case of Rameshwar S/o Kalyan Singh v. The State of Rajasthan, AIR 1952 SC 54 : (1952 Cri LJ 542) relating to necessity of corroboration and the method in which it should be done.

13. In the above context, learned standing counsel has relied on the cases of Gurcharan Singh v. State of Haryana, AIR 1972 SC 2661 : (1973 Cri LJ 179), Bharwada Bhoginbhai Hirijibhai v. State of Gujarat, AIR 1983 SC 753 : 1983 Cri LJ 1096, State of Maharashtra v. Chandraprakash Kewalchand Jain, and State of Punjab v. Gurmit Singh, AIR 1996 SC 1393 in support of the contention that when the evidence of the prosecutrix is found reliable, then seeking for corroboration to that allegation is not necessary. He also relied on the cases of Prithi Chand v. State of Himachal Pradesh, AIR 1989 SC 702 : (1989 Cri LJ 841) for not drawing any adverse inference against the prosecution for absence of spermatozoa, Gurcharan Singh v. State of Haryana, AIR 1972 SC 2661 : (1973 Cri. LJ 179) for no adverse inference due to absence of external injury on the body of the prosecutrix and Bharwada Bhoginbhai Hirijibhai v. State of Gujarat, AIR 1983 SC 753 : (1983 Cri LJ 1096) for the principle that minor contradictions in the evidence should not over cast reliable evidence of the prosecutrix.

14. It is appropriate to make a note of the principle which emerge after perusal of the aforesaid citations that each case has to be decided on its own merit, but the principle of law which is applicable to facts and circumstances of such case, be properly applied while taking a decision. Therefore, a case where there is availability or possibility of availability of corroborative evidence, Court must look to that aspect and to apply standard of a prudent man to determine the fact on assessment of evidence on record. Corroborative evidence if available but withheld, then consequence thereof should be properly evaluated and explained in the judgment. What constitute contradiction or omission and whether that is a material or not depends on the nature of allegation, sequence of events and the nature of evidence available on record. Therefore, a contradiction or omission relevant in one case may not be crucial in another case under a different fact and circumstance. Evidence of the prosecutrix should be judged, keeping an open mind to the probability factor from both the sides. In one side, it is to be remembered that pursuing for corroboration may in some cases adds 'insult to the injury' to the prosecutrix. On the other hand, the

Court is also to visualise that advantage of the prosecutrix in that manner, should not be utilised as a weapon to stigmatised an innocent person as an accused of rape. A conviction in that way not only imposes severe punishment but also a social stigma not only effecting him individually but also it may injure his family members. Therefore, Courts decision are called judgment in such matter because prudency is the first criteria to consider and decide strictly in accordance with law. Thus, this Court finds that there cannot be a straight jacket formula or catalogued circumstances for deciding such type of cases in one way or the other. Therefore every case is to be decided on its own merit but without departing from settled principle of law.

15. Abreast with the fact situation, the legal principle/ratio and the contention of the parties, this Court finds that in the case at hand evidence of P.W. No. 1 is not found to be untruthful or exaggerated one with a tendency to implicate innocent persons, because of previous enmity or grudge. The incident of prosecutrix missing from her bed in the dead of night, the inmates of the house searching for her in the occurrence night and her discovery in a naked condition from a paddy field on the following day morning are the proved facts and circumstances to lend corroboration to the evidence of P.W. No. 1, the sole witness to the occurrence. Scrutiny of the evidence of P.W. No. 1 renders it credible and trustworthy. This Court had already dealt with the point raised regarding a chance of mistaken identity to reject the contention of the appellants in that respect. Thus, it is made out from her evidence that appellants are guilty of committing gang rape on her. The absence of injury on her private parts or on her back, as explained by the trial Court is acceptable to not to view the prosecution with suspicion or doubt. The evidence of P.W. No. 5, a gained over witness, even if being a Grama Rakhi, does not shake credibility of the evidence of P.W. No. 1 in her allegations against the appellants. The other circumstances as highlighted by the appellants and dealt with by the trial Court, as well are not consequential when the evidence of prosecutrix is found to be true and trustworthy in proof of the allegation of her kidnapping and rape.

Therefore, this Court finds no reason to interfere with the order of conviction and accordingly dismisses the appeal.

It is necessary to put a word of caution for the trial Court for the 3rd accused who was absconding at the time of the trial of the appellants that his case be judged not on the basis of the evidence recorded in this case, or this affirming judgment of this Court but strictly in accordance with law and evidence that may be available to the Court below. It is for the Police department to find out if P.W. No. 5 being a Grama Rakhi has deposed falsehood to support the accused and thereafter to take consequential action but strictly in accordance with law and after providing due opportunity to him, in the event of proceeding against him departmentally.