

IN THE HIGH COURT OF ORISSA AT CUTTACK

CRA No. 307 of 1993

(An appeal under Section 374(2) of the Code of Criminal Procedure, 1973.

AFR **Bada Majhi** **Appellant**

-Versus-

State of Orissa **Respondent**

Advocate(s) appeared in this case:

For Appellant : Mr. B.K. Mishra, Amicus Curiae

For Respondent : Sri S.K. Mishra,
Addl. Standing Counsel

CORAM:

JUSTICE SASHIKANTA MISHRA ★

JUDGMENT

26th September, 2023

SASHIKANTA MISHRA, J.

The judgment passed by learned Sessions Judge, Mayurbhanj, Baripada on 28.08.1993 in S.T. Case No. 94 of 1992 is under challenge in the present appeal. The appeal was originally filed by three persons, namely, Ramei Majhi, Bada Majhi and Rengta Majhi. Ramei Majhi and Rengta Majhi having died during pendency of the appeal,

the case against them has abated and therefore, the appeal is confined only to Bada Majhi. As per the aforementioned judgment, the appellant and other accused persons were convicted for the offences under Sections 451/354/34 of IPC and sentenced to undergo R.I. for two years on each count with both sentences directed to run concurrently.

2. Prosecution case, briefly stated, is that on 28.02.1992 at about 4 p.m., the prosecutrix and her husband and other villagers had congregated at a place where handia drinking ceremony of the village was going on. The prosecutrix left the place after sometime and came home to take some curry. While she was alone in her house, five persons including the present accused entered, gagged her mouth, laid her on the ground and co-accused, Ramei and Birdhan forcefully committed sexual intercourse with her one after the other, while the other accused persons held her firmly. One Phula Majhi arrived at the spot at that time but she was chased away by the accused persons. She informed Chhotrai Majhi, the husband of the prosecutrix, who rushed to the spot with Phula but by then the accused persons had already left the place. The

prosecutrix narrated the entire incident before her husband and Phula and on the next day, she went to the Police Station and lodged a written report. This led to registration of Rairangpur Rural P.S. Case No. 32(13) dated 28.02.1992 under Sections 448/376(2)(g)/34 of IPC followed by investigation. Upon completion of investigation, charge sheet was submitted against five persons including the present accused.

3. The plea of the accused is of denial and of false implication on the ground that they had refused to give more handia to Chhotrai, who then abused them and fought with Ramai. The prosecutrix and Phula also assaulted Ramai, due to which some injuries were caused to Chhotrai and Phula.

4. To prove its case, prosecution examined eight witnesses, out of whom P.W.-1 is the prosecutrix, P.W.-5 is the eye-witness- Phula, P.W.-6 is the husband of the informant, P.W.-8 is the I.O., P.W.-2 is the doctor, who examined the prosecutrix, P.W.-3 is the doctor, who examined the accused Ramai and P.W. -4 is the doctor, who examined accused Birdhan, injured Chhotrai and

Phula. Prosecution also proved 13 documents and two material objects from its side. Defence examined four witnesses.

5. After appreciating the evidence on record particularly, that of the prosecutrix (P.W.-1), her husband (P.W.-6) and eye-witness (P.W.-5) as also the medical evidence, learned Sessions Judge could not persuade himself to believe the prosecution story as regards rape of the prosecutrix by the accused persons. However, having regard to the injuries found on the person of the prosecutrix, her husband and the eye-witness, learned Sessions Judge held that the presence of the accused persons in the house of the prosecutrix and use of physical force on her is proved and considering all these circumstances it was held that the accused persons had outraged the modesty of the prosecutrix. On such findings, the accused persons were convicted and sentenced as aforesaid.

6. Heard Mr. B.K. Mishra, learned Amicus Curiae and Mr. S.K. Mishra, learned Addl. Standing Counsel for the State.

7. Learned Amicus Curiae has argued that when the evidence on record was disbelieved by the trial Court as regards the allegation of gang rape, the same set of evidence could not have been relied upon to hold the accused persons guilty of outraging the victim's modesty. This is all the more for the reason that there is clear evidence of a fight having taken place between the husband of the victim and P.Ws. 5 and 6 with some of the accused persons whereby injuries were sustained by both sides. This, learned Amicus Curiae would argue, is fully consistent with the defence version and therefore, the benefit of doubt should have been given to the accused persons.

8. Mr. S.K. Mishra, learned State Counsel on the other hand would argue that the evidence clearly reveals that the accused persons had committed house trespass and had used physical force on the prosecutrix. This much is adequate to prove that they had outraged her modesty.

9. Be it noted that in the FIR, the prosecutrix has given vivid details of the so called incident of gang rape on her by accused Ramei and Birdhan with the assistance of

the accused persons. Same is also her sworn testimony in the Court but then learned Sessions Judge was not inclined to believe her version when he compared it with the medical evidence. The State has not challenged such finding. After scanning the evidence on record, this Court concurs with the view taken by the trial Court.

10. Thus, the allegation of gang rape being ruled out, the evidence is to be seen as to how far the offences under Sections 448 and 354 of IPC are made out. In this regard, prosecution has heavily relied upon the version of the prosecutrix (P.W.-1), who stated that she came home to take some curry and at that time, the accused persons followed her and asked to give them curry, which she refused. Thereafter, they entered the house and committed gang rape. Ordinarily, this evidence would have been accepted as the same is consistent with the FIR story and her earlier version before the I.O. but then the defence also examined four witnesses. It is admitted that handia drinking ceremony was held on the day of occurrence. While according to P.W.-1 she left the function to bring some curry from home, according to the defence version

the accused persons were serving handia and when the husband of the prosecutrix asked for more, they refused. But Chhotrai insisted for more handia and quarreled with Ramai, both of whom fought. At that time, the prosecutrix assaulted Ramai with Chappal and Phula also joined them in the assault. Learned Sessions Judge disbelieved the allegation of gang rape considering the fact that the perpetrators, namely, Ramai, Bada as also Misui and Birdhan are brothers and nephews of the prosecutrix. Learned Sessions Judge therefore, could not persuade himself to believe that an elder brother and younger brother would jointly commit rape on their aunt. If this is accepted as the reason for discarding the prosecution evidence in so far as the same is projected to prove the occurrence of rape, then by logic the very same argument can be put forth to reject the finding of outraging of modesty. To reiterate, a person can hardly be expected to outrage the modesty of his aunt being associated with his younger brother. Viewed in this background the defence evidence, which is to be tested on the principle of preponderance of probability assumes significance and

rather, lends support to the theory that there was a fight between the husband of the prosecutrix and accused, Ramai in which the prosecutrix as well as Phula (P.W.-5) had also participated. Another significant aspect that needs mention is that according to P.W.-6, his wife (prosecutrix) had also sustained injuries because of assault on her by the accused persons at the end of the handia drinking ceremony. This, in fact explains the injuries found on the body of the prosecutrix.

11. Thus, viewed objectively, the prosecution evidence, particularly that of P.Ws.1, 5 and 6 does not inspire confidence so as to be relied upon. Learned Sessions Judge rightly discarded such evidence to disbelieve the charge of gang rape. This Court is of the considered view that for the very same reason, the offence under Section 354 IPC cannot also stand. Omission of the prosecution to examine any other villager participating in the handia drinking ceremony appears to be material in the context of the present case. For all these reasons therefore, this Court cannot persuade itself to agree with the order of conviction recorded by learned Sessions Judge.

12. In the result, the appeal succeeds and is therefore, allowed. The impugned judgment of conviction and sentence is hereby set aside. The appellant, Bada Majhi be discharged of his bail bonds.

13. Before parting, this Court places on record its appreciation for the able assistance rendered by learned Amicus Curiae, Mr. B.K. Mishra. His professional fee is fixed at Rs.10,000/-.

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Sashikanta Mishra,
Judge

Orissa High Court, Cuttack,
The 26th September, 2023/ A.K. Rana

