

IN THE HIGH COURT OF ORISSA, CUTTACK

JCRLA No.24 OF 2015

From judgment and order dated 17.12.2014 passed by the Assistant Sessions Judge (Special Track Court), Cuttack in S.T. Case No.178 of 2014.

Satrughna Samal Appellant
-Versus-
State of Odisha Respondent

For Appellant: - Mr. Sobhan Panigrahi
Amicus Curiae

For Respondent: Mr. Arupananda Das
Addl. Government Advocate

P R E S E N T:

THE HONOURABLE MR. JUSTICE S.K. SAHOO

Date of Hearing and Judgment: 23.08.2023

S.K. SAHOO, J. The appellant Satrughna Samal faced trial in the Court of learned Assistant Sessions Judge (Special Track Court), Cuttack in S.T. Case No.178 of 2014 for commission of offences punishable under sections 366-A/376 of the Indian Penal Code (hereinafter 'I.P.C.') on the accusation that on 16.08.2010 the appellant induced the victim girl (P.W.8), who is the minor daughter of the informant (P.W.3), to go from her house situated

at village Safa under Tangi police station, Cuttack to somewhere with intent that the victim may be (or knowing that it is likely that she would be) forced (or seduced) to illicit intercourse and also committed rape on her.

The learned trial Court vide impugned judgment and order dated 17.12.2014 though acquitted the appellant of the charge under section 366-A of the I.P.C. but found him guilty of the offences punishable under sections 366/376 of the I.P.C. and sentenced him to undergo rigorous imprisonment for seven years and to pay a fine of Rs.10,000/-(rupees ten thousand), in default, to undergo rigorous imprisonment for six months more for the offence under section 376 of the of the I.P.C. and sentenced to undergo rigorous imprisonment for four years and to pay a fine of Rs.5,000/-(rupees five thousand), in default, to undergo rigorous imprisonment for three months more for the offence under section 366 of the I.P.C. and both the substantive sentences were directed to run concurrently.

The prosecution case:

The prosecution case, as per the first information report (hereinafter 'F.I.R.') lodged by Shri Hemanta Kumar Mohanty (P.W.3) before the I.I.C., Tangi police station, Cuttack on 19.08.2010, in short, is that his daughter/victim (P.W.8) was missing from his house since 16.08.2010 which he had intimated

to the police on 18.08.2010 and thereafter he came to know on enquiry that the appellant who belonged to Safa Sabar Sahi along with his brother Mitika Samal, friends Kalia Samal and Dharama Samal had kidnapped his daughter.

On the basis of such written report, the I.I.C. of Tangi police station registered Tangi P.S. Case No.116 dated 19.08.2010 against the appellant along with three others under section 366A/34 of the I.P.C. and directed Shri Narayan Das, (P.W.10), S.I. of police, Tangi police station to take up the investigation of the case.

P.W.10, the Investigating Officer during course of investigation, examined the informant, visited the spot and prepared the spot map (Ext.7). Thereafter he examined the mother of the victim and other witnesses. On 28.03.2011, he apprehended the appellant from his house and rescued the victim girl from the house of the appellant on the same day and examined the victim. He also seized the wearing apparels of the victim so also that of the appellant and prepared the seizure lists in presence of witnesses marked as Ext.8 and Ext.9 respectively. He sent the appellant and the victim to F.M.T. Department of S.C.B. Medical College and Hospital, Cuttack for their medical examination through escorting constable. On 28.03.2011 at about 6.30 p.m., he seized the school leaving certificate of the

victim on production by her father and prepared the seizure list marked as Ext.2/1. On 29.03.2011, the appellant was forwarded to the Court of J.M.F.C.(R), Cuttack and on the prayer of the I.O., the statement of the victim was recorded under section 164 Cr.P.C on 29.03.2011 and the very day, the I.O. (P.W.10) handed over the victim to her father (P.W.3) as per direction of the learned J.M.F.C.(R), Cuttack. On 09.05.2011, the I.O. sent the seized sealed packets to S.F.S.L., Rasulgarh, Bhubaneswar through the Court of J.M.F.C.(R), Cuttack for chemical examination. On 28.05.2011, he received the medical examination report of the victim so also of the appellant from the M.O., F.M.T., S.C.B., Medical College and Hospital, Cuttack. On 30.05.2011, he submitted the charge sheet in the case.

Charges:

The learned trial Court on 08.07.2014 framed the charges under sections 366-A/376 of the I.P.C. against the appellant and since the appellant refuted the charges, pleaded not guilty and claimed to be tried, the sessions trial procedure was resorted to prosecute him and establish his guilt.

Prosecution witnesses & exhibits:

During course of trial, in order to prove its case, the prosecution has examined as many as fifteen witnesses.

P.W.1 Susanta Mohanty is the cousin of the victim who stated that on the fateful day at about 07.30 p.m. to 08.00 p.m., the parents of the victim were searching for her and upon seeing them, he also joined to trace her out.

P.W.2 Sukanti Mohanty is the mother of the victim who stated that on the date of incident, the victim had been to watch a village festival and did not return. She further stated to have come to know that the appellant kidnapped the victim and seven months after lodging of the F.I.R., police rescued the victim from Tangi. She also stated about the disclosure made by the victim regarding commission of sexual intercourse on her by the appellant.

P.W.3 Hemanta Kumar Mohanty is the father of the victim who is also informant of the case. He stated about the presentation of missing report of the victim in the police station and disclosure made by the victim about the occurrence.

P.W.4 Gayadhar Behera was working as A.S.I. of police attached to Tangi police station who is a witness to the seizure of the school leaving certificate of the victim vide seizure list Ext.2/1.

P.W.5 Ajaya Kumar Mohanty was working as a Constable at Tangi police station who stated to have taken the

appellant to S.C.B. Medical College and Hospital, Cuttack as per direction of the Investigating Officer. He is a witness to the seizure of biological samples of the appellant vide seizure list Ext.3.

P.W.6 Mamilata Moharana was working as a Constable at Tangi police station, Cuttack who stated to have taken the victim to S.C.B. Medical College and Hospital, Cuttack as per direction of the Investigating Officer. She is a witness to the seizure of biological samples of the victim vide seizure list Ext.4.

P.W.7 Dr. Motirmoy Giri was working as Tutor, F.M.T. Department, S.C.B. Medical College and Hospital, Cuttack who examined the appellant on police requisition and found that the appellant was capable of performing sexual intercourse but there was no bodily injury found to suggest forcible sexual intercourse and the genital examination did not reveal any recent sign and symptoms of sexual intercourse. He proved the medical examination report of the appellant vide Ext.5.

P.W.8 is the victim. She supported the prosecution case and stated about the appellant forcibly took her on a bicycle to his relative's house and committing rape on her. She also stated that the appellant forced her to sign a document by giving threats.

P.W.9 Dambarudhara Mohanty is an independent witness and stated that he came to know from their village discussion that the appellant kidnapped the victim.

P.W.10 Narayana Das was working as S.I. of police attached to Tangi police station and he is the Investigating Officer of the case.

P.W.11 Dr. Purnima Singh was working as the Tutor, F.M.T. Department, S.C.B. Medical College and Hospital, Cuttack who examined the victim on police requisition and found that all the secondary sexual characters were well developed. On genital examination, she found wide gapping of labia majora and labia minora was exposed and posterior commissure was obliterated and there was old tear over the hymen at 5 and 7 O'clock position and the opening admitted two fingers easily and the vaginal canal wall rugosity was felt. She proved the medical examination report of the victim vide Ext.12.

P.W.12 Narendra Kumar Khuntia and P.W.13 Pratap Kumar Das who were working as A.S.I. and Constable respectively attached to Tangi police station are witnesses to the seizure lists vide Ext.3 and 4.

P.W.14 Ramesh Chandra Mohanty is the uncle of the victim who stated that the appellant took the victim from her

village. He also stated that the victim was aged about sixteen to seventeen years at the time of incident.

P.W.15 Nilima Khillar was the Headmistress of Nehru Nodal U.P. School, Safa where the victim was prosecuting her studies. She produced the school admission register which contained the date of admission and date of birth of the victim with other particulars.

The prosecution exhibited thirteen numbers of documents. Ext.1 is the F.I.R., Ext.2/1 is the seizure list in respect of school leaving certificate of the victim, Ext.3 is the seizure list in respect of two seized sealed packets, Ext.4 is the sealed packets, Ext.5 is the medical examination report, Ext.6 is the statement of P.W.8 recorded under section 164 Cr.P.C., Ext.7 is the spot map, Ext.8 and Ext.9 are the seizure lists in respect of wearing apparels of the victim and the appellant respectively, Ext.10 is the seizure list in respect of school leaving certificate of the victim (with objection), Ext.11 is the forwarding letter of J.M.F.C.(R), Cuttack, Ext.12 is the report of P.W.11 and Ext.13 is the page containing Sl. No. 25/1980 of school admission register of the victim.

Defence plea:

The defence plea of the appellant is one of complete denial and false implication.

The defence has neither examined any witness nor exhibited any document.

Findings of the Trial Court:

The learned trial Court, after assessing the oral as well as documentary evidence on record, has been pleased to hold that the school leaving certificate indicates the date of birth as 10.06.1994 and since the case record indicates that the incident took place on 16.08.2010, the age of the victim as on the date of incident is appearing to be more than sixteen years and therefore, the ingredients of the offence under section 366-A I.P.C. would not be attracted rather the ingredients of the offence under section 366 of the I.P.C., which is lesser offence to the offence under section 366-A of the I.P.C., would be attracted. It has been further held that so far as the question of kidnapping of the victim is concerned, it appears from the case record that nobody had seen while the victim was kidnapped except the victim herself. As a matter of course, there is also no eye witness available to the incident of rape except the victim for which the appellant is charged under section 376 of the I.P.C. It has been further held that the evidence of the seizure witnesses leaves no iota of doubt regarding the steps taken by the I.O. during course of investigation of the case and the evidence of P.Ws. are appearing to be clear, cogent and trustworthy and

hence, reliable. It has been further held that there was no consent at all on the part of the victim in the entire incident alleged against the appellant. The defence did not question the victim regarding the allegation of rape. Therefore, it appeared from the evidence of the victim that she was forced to move with the appellant and she was also forced to sexual intercourse by the appellant. The victim in her evidence further stated that she was produced before the Court where her statement was recorded vide Ext.6 which indicates that the appellant forcibly kidnapped the victim and kept her in the house of his maternal aunt and thereafter, took her to several places and frequently committed sexual intercourse with her despite her protest.

Contentions of the Parties:

Mr. Sobhan Panigrahi, learned Amicus Curiae appearing for the appellant contended that the finding of the learned trial Court in convicting the appellant under section 366 of the I.P.C. is completely faulty inasmuch as it appears from the materials on record that the victim had not only attained the age of discretion but also she moved with the appellant from place to place including the Court premises and she stayed with him for seven months and she had never protested before anybody while accompanying with the appellant nor tried to escape while she was forcibly taken on a bicycle by the appellant. Learned counsel

further submitted that no date of birth certificate has been proved and the entry made in the school admission register which has been proved by the Headmistress of the school being examined as P.W.15 is not acceptable as she herself stated that no document was produced at the time of admission of the victim to establish the authenticity of her date of birth. Learned counsel further submitted that the parents of the victim are silent about her date of birth and though the doctor (P.W.11), who examined her at S.C.B. Medical College and Hospital, Cuttack, stated that from the radiological examination and from the physical and dental examination, she came to know that the victim girl was more than sixteen years and less than seventeen years but neither the x-ray plates nor the x-ray reports were proved during the trial and being an opinion evidence, it cannot be said to be conclusive in nature. Learned counsel further submitted that when the victim was examined by the doctor, she described herself to be a married lady and stated to have last sexual intercourse with her husband one week prior to her examination. Therefore, if the victim had accepted the appellant as her husband and was having sexual intercourse with him regularly, it cannot be said to be a case of rape and therefore, it is a fit case where benefit of doubt should be extended in favour of the appellant.

Mr. Arupananda Das, learned Additional Government Advocate, on the other hand, supported the impugned judgment and contended that the evidence of the victim is clinching, trustworthy and even though there is no corroboration from the medical evidence but the same cannot be a ground to discard the evidence of the victim in view of the settled position of law laid down by the Hon'ble Supreme Court and this Court and as such the appeal should be dismissed.

Analysis of Evidence:

Adverting to the contentions raised by the learned counsel for the respective parties and coming to the ingredients of the offence under section 366 of the I.P.C., the section requires that the prosecution has to prove that the appellant has kidnapped or abducted the victim girl and such kidnapping or abduction was made with an intention that the victim might be compelled or knowing that she is likely to be compelled to marry any person against her will or in order that she may be forced or seduced to illicit intercourse or that the appellant knew that she would be likely to be forced or seduced to illicit intercourse.

Kidnapping from lawful guardianship has been defined under section 361 of the I.P.C. which provides, inter alia, that if someone takes or entices any minor, who is under the age of sixteen years if a male or under eighteen years of age if a

female, out of keeping of the lawful guardian of such minor without the consent of such guardian, can be said to have kidnapped the minor from lawful guardianship. Thus, one of the vital ingredient that is required to be proved is the age of the female victim to be under eighteen years of age. Similarly, so far as the abduction is concerned, which has been defined under section 362 of the I.P.C., there must be evidence that the accused by force has compelled or by any deceitful means has induced the victim to go from any place. If such kidnapping or abduction as defined under the aforesaid sections 361 & 362 I.P.C. respectively are for the purposes which have been mentioned under section 366 of the I.P.C. then only the ingredients of the offence would be attracted.

Learned counsel for the appellant placed reliance on the decision of the Hon'ble Supreme Court in case of **S. Varadarajan -Vrs.- State of Madras reported in A.I.R. 1965 Supreme Court 942** wherein it is held that taking or enticing minor out of the lawful guardianship is an essential ingredient of the offence of kidnapping. But when the girl who though a minor had attained the age of discretion or on the verge of attaining majority where the minor leaves her father's protection knowing and having capacity to know the full import of what she is doing, voluntarily joins the accused, the accused cannot be said to have

taken her away from the keeping of her lawful guardian. Something more has to be shown in a case of this kind and that is some kind of inducement held out by the accused person or an active participation by him in the formation of the intention of the minor to leave the house of the guardian. If the evidence to establish one of those things is lacking, it would not be legitimate to infer that the accused is guilty of taking the minor out of the keeping of the lawful guardian merely because after she has actually left her guardian's house or a house where her guardian had kept her, joined the accused and the accused helped her in her design not to return to her guardian's house by taking her along with him from place to place. No doubt, the part played by the accused could be regarded as facilitating the fulfilment of the intention of the girl. But that part falls short of an inducement of the minor to slip out of the keeping of her lawful guardian and is, therefore, not tantamount to "taking".

Learned counsel further placed reliance in the case of **Lalta Prasad -Vrs.- State of Madhya Pradesh reported in A.I.R. 1979 Supreme Court 1276** wherein the Hon'ble Supreme Court has been pleased to hold that even though it is assumed in favour of the prosecution that the victim was below eighteen years of age but then two ingredients further must be established; (i) that she was kidnapped or abducted from the

custody of her lawful guardian, and (ii) that she was kidnapped, or abducted with the intention of compelling her to marry any person against her will or in order that she may be forced or seduced to illicit sexual intercourse.

Learned counsel further placed reliance in the case of **Shyam and another -Vrs.- State of Maharashtra reported in 1995 Criminal Law Journal 3974** wherein the Hon'ble Supreme Court has been pleased to hold that when the case of the prosecution is that the accused took the victim by means of a bicycle, it was expected of her then to jump down from the bicycle, or put up a struggle and, in any case, raise an alarm to protect herself. No such steps were taken by her. It seems she was a willing party to go with the appellant on her own and in that sense, there was no 'taking' out of the guardianship of her mother and the charge under section 366 I.P.C. would fail.

In the case of **Jinish Lal Sah -Vrs.- State of Bihar reported in (2003) 1 Supreme Court cases 605**, the Hon'ble Supreme Court has been pleased to hold that the evidence on record indicates that the victim was with the appellant from 30th April to 10th May during which period she had travelled by train and stayed with the appellant without there being any evidence of her having protested or having made any effort to seek help from others or even trying to run away. In such a situation, in

the absence of any other material to show to the contrary, it would be difficult to accept the prosecution case that either there was a forcible marriage or rape as contended by the prosecution to find the appellant guilty under section 366 or section 376 of the I.P.C.

Age of the victim:

Coming to the age of the of the victim, the learned trial Court seems to have relied mainly on the evidence of Headmistress of the Nehru Nodal U.P. School, Safa who has been examined as P.W.15 and proved the school admission register in which the date of birth of the victim has been mentioned to be 10.06.1994. It transpires from her evidence that the victim was admitted in the said school on 12.07.1999 and transfer certificate was issued in her favour on 28.03.2011. The school admission register entry and the transfer certificate have been marked as Ext.13 and Ext.10 respectively. However, in the cross-examination of P.W.15, it is revealed that she had not admitted the victim in the school and no document was produced before the school at the time of admission of the victim to establish the authenticity of her date of birth. At column no.10, it was noted that "PITANKA LIKHITA MATE". The word 'LIKHITA' was struck down and substituted by "KAHIBA". The substituted word "KAHIBA" is made by another person. P.W.15 specifically

stated that the father of the victim had not produced any writing in respect of the date of birth of the victim and the school admission register also did not indicate as to when and by whom the word "LIKHITA" was struck down and substituted by the word "KAHIBA". The father of the victim has been examined as P.W.3 and his evidence is also silent about the date of birth of the victim. He only stated that the victim was aged about sixteen years at the time of occurrence. However, he stated that except the school leaving certificate of the victim, he had not handed over anything to the police. The mother of the victim being examined as P.W.2 is also silent about the date of birth of the victim. However, she stated that the victim was aged about sixteen years at the time of incident. Therefore, there is no oral evidence adduced by the parents of the victim regarding the date of birth of the victim nor there is any documentary evidence like the birth certificate to substantiate the correct age of the victim. Even though in the school admission register, the date of birth of the victim has been mentioned as 12.07.1999 but since there was no basis for mentioning such age in the school admission register, the same is not acceptable. The doctor (P.W.11), who examined the victim on 28.03.2011 at S.C.B. Medical College and Hospital, Cuttack stated that from the physical, dental and radiological examination, the age of the

victim was found to be more than sixteen years and less than seventeen years. Though the doctor in her evidence stated about the positions of the different bones but x-ray plates have not been produced in Court nor those were attached to the report of P.W.11 which has been marked as Ext.12. Also, the x-ray report has not been proved nor the person who conducted the x-ray has been examined. Therefore, from the evidence of the doctor (P.W.11) which is an opinion evidence relating to the age of the victim, it cannot be said with certainty that the prosecution has successfully proved that the victim was under eighteen years of age at the time of occurrence.

Analysis of the victim's evidence:

The victim (P.W.8) though stated in her examination-in-chief that on the date of incident at about 7 p.m. to 8 p.m. when she had been to fetch water from the village well, the appellant forcibly kidnapped her by means of a bicycle towards the house of his relative at village Nandua but in the cross-examination, she stated that the appellant parked his cycle at village lane at a distance of 200 meters to 300 meters away from the village well where she had gone to fetch water. She further stated that the appellant dragged her by hand towards the place where he had parked the cycle by covering the house of the nearby dwellers including her house. Had that been the

state of affairs, it would have drawn the attention of others. Therefore, the evidence of the victim that the appellant dragged her towards the place where he had parked his cycle at a distance of 200 meters to 300 meters is very difficult to be accepted. The victim further stated that she sat at the rear (carrier) of the cycle and they passed 300 to 400 meters to reach village Nandua. She further stated that she did not shout for any help when the appellant was kidnapping her by means of his cycle and she did not get down from the cycle.

The father of the victim being examined as P.W.3 has stated that she got the intimation from a co-villager that the victim eloped with the appellant by means of a bicycle through their village road to Chandanpur road and the said road approached the National Highway-5 at Chhatia by covering Chandanpur, Kanpur, Bisuali, Kusupada, Amejhari, Bairee, Solara and Chhatia and the victim and the appellant went through the above villages.

In view of the conduct of the victim in sitting on the rear-carrier of bicycle of the appellant and not trying to escape from his cycle and not trying to shout to draw the attention of anyone either when she was dragged or when she was taken on the bicycle while passing through village houses clearly indicate that she was a consenting party. The victim further stated that

the uncle of the appellant, the appellant and she herself came to Chandikhol Court by means of motorcycle and the Court was crowded with advocates and they reached at the Court at about 11 a.m. to 12 noon but she did not disclose anything about the incident to anybody at Chandikhol Court. She further stated that from Chandikhol, they went to the house of the sister of the appellant and they stayed there for two to four days and then they went to the house of the appellant at village Safa from where she was rescued by the police on the next day. The conduct of the victim as narrated above indicates that not only she was a consenting party but she voluntarily accompanied the appellant from place to place and therefore, it cannot be said that the appellant induced her in any manner to leave the lawful guardianship. The evidence on record indicates that the victim stayed with the appellant for seven months and during this period, they visited number of places including the Court. When the victim was examined by the doctor, she gave her marital status to be married and having last sexual intercourse with her husband one week before her examination and therefore, the victim seems to have accepted the appellant as her husband and allowed the appellant to have sexual intercourse with her. This aspect finds corroboration from the medical report of P.W.11 who examined the victim. On genital examination of the victim,

she found wide gapping of the labia majora, her labia minora was exposed and there were old tears over the hymen. All these are suggestive of the fact that the victim had frequent sexual intercourse with the appellant.

In her report, P.W.11 further stated that the vaginal opening of the victim easily admitted two fingers. The medical professionals while conducting medical examination on the victims of rape and sexual assault cases should desist from two-finger test in the private part of the victim which is also known as virginity test as the test violates the right of such victims to privacy, physical and mental integrity and dignity and hence, not at all permissible under the law. It is no less than adding an unforgettable insult to an unhealed injury. When a sexually active woman or a woman habituated to sexual intercourse can also be raped if the act of the accused comes within section 375 of I.P.C., this sort of test is certainly unscientific and traumatizing.

While declaring the 'two-finger test', the Hon'ble Supreme Court in the case of **Lillu @ Rajesh and another -Vrs.- State of Haryana reported in (2013) 14 Supreme Court Cases 643** held as follows:

"14. Thus, in view of the above, undoubtedly, the two-finger test and its interpretation

violates the right of rape survivors to privacy, physical and mental integrity and dignity. Thus, this test, even if the report is affirmative, cannot ipso facto, give rise to a presumption of consent.”

Recently, the Hon'ble Supreme Court in the case of **State of Jharkhand -Vrs.- Shailendra Kumar Rai reported in (2022) SCC OnLine SC 1494**, while reiterating the dictum laid down in the case of **Lillu** (supra), ruled that any person who conducts 'two-fingers test' or 'per vaginum examination' in contravention of the directions of the Hon'ble Court shall be guilty of 'misconduct'.

No doubt the medical examination in the present case was conducted by P.W.11 in the year 2011 which is two years prior to the decision of the Hon'ble Supreme Court in the case of **Lillu** (supra), however, this Court is constrained to observe the above as it is not very infrequent to see such test being conducted by medical professionals in a routine manner while medically examining victims of rape and sexual assaults in most of the cases which is derogatory to the invaluable dignity of the victims.

Conclusion:

In view of the foregoing discussions, in absence of any clinching evidence that the victim (P.W.8) was under the age of eighteen years at the time of occurrence and since she seems to have left her lawful guardianship on her own accord and voluntarily joined the accused and she remained in the company of the appellant without any protest for seven months and was treating the appellant to be her husband and allowing him to have sexual intercourse with her and since she seems to be a consenting party, I am of the humble view that neither the ingredients of the offence under section 366 of the I.P.C. nor section 376 of the I.P.C. are attracted against the appellant.

Accordingly, the Jail Criminal Appeal is allowed. The impugned judgment and order of conviction of the appellant under sections 366/376 of the I.P.C. and the sentence passed thereunder is hereby set aside and the appellant is acquitted of all such charges.

The appellant, who is on bail by order of this Court vide order dated 14.12.2015 passed in Misc. Case No.68 of 2015, is hereby discharged from liability of the bail bonds and the surety bonds shall also stand cancelled.

Lower Court Records with a copy of this judgment be sent down to the learned trial Court forthwith for information and necessary action.

Before parting with the case, I would like to put on record my appreciation to Mr. Sobhan Panigrahi, the learned Amicus Curiae for rendering his valuable help and assistance towards arriving at the decision above mentioned. The learned Amicus Curiae shall be entitled to his professional fees which is fixed at Rs.7,500/- (rupees seven thousand five hundred only). This Court also appreciates the valuable help and assistance provided by Mr. Arupananda Das, learned Additional Government Advocate.

Orissa High Court, Cuttack
The 23rd August 2023/ Sipun

