IN THE HIGH COURT OF ORISSA, CUTTACK

CRA NO. 128 Of 1990

From the judgment and order dated 17.03.1990 passed by the Additional Sessions Judge, Titilagarh in Sessions Case No.62/22 of 1989.

Satrughana Nag ..... Appellant

-Versus-

State of Odisha ..... Respondent

For Appellant: - Mr. Rajjeet Roy
(Amicus Curiae)

For Respondent: - Mr. D.K.Pani
Addl. Standing Counsel

P R E S E N T:

THE HONOURABLE MR. JUSTICE S.K. SAHOO

Date of Hearing: 03.12.2020 Date of Judgment: 11.12.2020

S. K. SAHOO, J. The appellant Satrughana Nag faced trial in the Court of learned Additional Sessions Judge, Titilagarh in Sessions Case No.62/22 of 1989 for offences punishable under sections 376/ 511, 354 and 457 of the Indian Penal Code.

The learned trial Court vide impugned judgment and order dated 17.03.1990, found the appellant guilty of the offences charged and sentenced him to undergo rigorous

imprisonment for three years and to pay a fine of Rs.100/-, in default, to undergo R.I. for one month for the offence under section 376/511 of Indian Penal Code, R.I. for one year and to pay a fine of Rs.100/-, in default, to undergo R.I. for one month for the offence under section 457 of Indian Penal Code and both the sentences were directed to run concurrently. No separate sentence was awarded for the offence under section 354 of the Indian Penal Code.

This appeal was preferred on 04.05.1990 and the appellant was directed to be released on bail as per order dated 25.05.1990.

2. The prosecution case, as per the first information report (Ext.4) lodged by the victim (P.W.1) before the officer in charge of Titilagarh police station is that on 03.10.1989 at about 9.30 p.m. while she was sleeping with her younger brother Susil Nag on a cot in one room of her house and her elder brother Jubaraj Nag (P.W.3) and his elder brother's wife Jayanti Nag (P.W.2) were sleeping in the adjacent room, the appellant entered into the room where the victim was sleeping by opening the bamboo door of the victim's room, disrobed her saree and attempted to commit rape on her. Hearing hullah of the victim, P.Ws.2 and 3 came inside her room. The appellant tried to conceal himself underneath a raised platform inside the bed

room but the victim as well as P.W.2 assaulted him by fire wood. Due to tussle of the appellant with the victim, the bangles of the victim were broken and were lying underneath the cot. Then the brothers of the appellant came and took him to their house.

3. On the basis of the first information report lodged, Titilagarh P.S. Case No.100 of 1989 was registered on 03.10.1989 under sections 457 and 354 of the Indian Penal Code. The officer in charge of Titilagarh Police Station directed P.W.7 Smt. Gitarani Panda, who was the W.S.I. of police to take up investigation of the case.

During course of investigation, P.W.7 examined the victim (P.W.1) and other witnesses, visited the spot and also seized the pieces of fire wood (M.O.I and M.O.II), one gamuchha (M.O.III) and broken pieces of glass bangles (M.O.IV) vide seizure list Ext.5. The appellant was found hospitalized as an indoor patient at Titilagarh Government Hospital and after his discharge from the hospital, he was arrested on 17.10.1989 and forwarded to the Court. On completion of investigation, charge sheet was submitted against the appellant on 25.10.1989 for the offences under sections 457 and 354 of the Indian Penal Code. The learned Magistrate however took cognizance of the offences under sections 376/511, 354 and 457 of the Indian Penal Code and committed the case to the Court of Session for trial.

4. The learned trial Court framed charges as aforesaid on 15.01.1990 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.

5. The defence plea of the appellant was one of complete denial.

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

is the victim and the informant of the case.

She stated about the occurrence.

Jayanti Nag is the sister-in-law of the victim and she stated to have come to the room of the victim on hearing hullah and found the appellant in a naked condition lying over the victim who was also naked and committing sexual intercourse with her. She further stated to have assaulted the appellant with fire wood when he tried to conceal himself underneath a raised platform.

Jubaraj Nag is the brother of the victim and he stated to have come to the room of the victim on hearing hullah and found the appellant in a naked condition lying over the victim who was also naked. He further stated that the victim and P.W.2 assaulted the appellant by fire wood.

Dr. Sarat Kumar Das was the Medical Officer attached to Titilagarh Government Hospital, who examined the appellant and noticed some simple injuries on his person and proved the injury report vide Ext.1.

Sayed Mujibur Rahaman was the S.I. of Police in-charge of station diary of Titilagarh Police Station who stated to have made a station diary on the oral information of the brother of the appellant relating to the injuries sustained by the appellant inside the house of the victim. He sent requisition to the Medical Officer, Titilagarh Government Hospital for treatment of the appellant.

Golap Nag is the neighbour of the victim and he stated that on hearing the hullah, he rushed to the house of the victim and found that the appellant was lying naked over the victim who was also in a naked condition. He further stated that the brothers of the appellant forcibly took him to their house.

Smt. Gitarani Panda was the Women Sub-Inspector of Police who was the investigating officer of the case.

Chaitanya Behera was the officer in charge of Titilagarh police station who registered the case on the oral report of the victim and directed P.W.7 to investigate the case.

The prosecution exhibited five documents. Ext.1 is the injury certificate, Ext.2 is the S.D. entry No.98 dated

04.10.1989, Ext. 3 is the S.D. entry No.99 dated 04.10.1989, Ext.4 is the F.I.R. and Ext.5 is the seizure list.

The prosecution also proved two pieces of fire wood as M.O.I and M.O.II, one gamuchha as M.O.III and broken pieces of glass bangles as M.O.IV.

7. The learned trial Court after discussing the evidence of the victim (P.W.1), her sister-in-law (P.W.2) and her brother (P.W.3) came to hold that the act of the appellant was definitely a step towards the commission of the offence of rape though the penultimate act of thrusting his male organ into the private part of P.W.1 was not completed and so the act of the appellant did not stop at the stage of preparation but it reached the stage of attempt and his intention to commit the offence failed by the reason of P.Ws.2, 3 and 6 coming to the spot hearing the hullah of P.W.1. Accordingly, the Court found the appellant guilty of the offences charged.

8. When the matter was called for hearing on 05.11.2020, learned counsel for the appellant was not present and since it is an appeal of the year 1990, Mr. Rajjeet Roy, learned counsel was appointed as amicus curiae to assist the Court for the appellant. A copy of the paper book was also directed to be served on him and he was given time to prepare the case.

The learned amicus curiae appearing for the appellant placed the impugned trial Court judgment, F.I.R. as well as the evidence of the witnesses. He argued that there are certain improbability features in the prosecution case which create doubt that the appellant attempted to commit rape on the victim rather the victim appears to be a consenting party and when she was caught in a compromising position with the appellant by her family members, she reacted and brought false accusation against the appellant just to save her own skin. The victim developed her case at the stage of trial and brought an allegation of rape against the appellant for the first time which shows that she is not a truthful witness. It was further argued that the victim has not been medically examined and therefore, it is a fit case where benefit of doubt should be extended in favour of the appellant.

Mr. D.K. Pani, learned Addl. Standing Counsel on the other hand contended that the evidence of the victim is clear, cogent and trustworthy, that in itself is sufficient to convict the appellant. He urged that the victim has categorically implicated the appellant to have committed rape on her and injuries sustained by the appellant corroborate the prosecution case of assault on him by fire wood by the victim and P.W.2 inside the

room of the victim and therefore, the appeal should be dismissed.

9. It is the settled principle of law that if the statement of the prosecutrix is found to be worthy of credence and reliable, then it requires no corroboration and the Court can act on such testimony and convict the accused. There may be compelling reasons in some cases which may necessitate looking for corroboration to the statement of the prosecutrix. The evidence of the prosecutrix is more reliable than that of an injured witness. Minor contradictions or insignificant discrepancies in the statement of the prosecutrix should not be a ground to discard her version, if it inspires confidence. Corroboration to the testimony of the prosecutrix is not a requirement of law but a guidance of prudence under the given circumstances. The very nature of offence makes it difficult to get direct corroborating evidence.

The victim (P.W.1) who is the star witness of the case has stated that on the date of occurrence at about 9.30 p.m., while she along with her younger brother Susil was sleeping on a cot placed on the middle room of the house, she suddenly woke up as she found somebody was lying over her and she found that it was the appellant who had pressed her. Then the appellant removed her saree and made her naked,

threw her on the ground of that room, pressed her mouth with his hand, squeezed her breast with his other hand, removed his own lungi and gamucha and then committed rape on her. She further stated that when she shouted, on hearing her hullah, P.Ws.2 and 3 rushed to her room and on seeing them, the appellant concealed himself underneath the raised platform of that room. She further stated that she along with P.W.2 assaulted the appellant by means of fire wood. Then others also came to the scene of occurrence and the appellant was detained by them but suddenly the brothers of the appellant arrived there and took away the appellant with them. She identified the material objects. She further stated to have gone to the police station along with P.W.3 and reported the matter orally.

In the cross-examination, the victim stated that there was another room adjoining the room where she was sleeping and inside that adjoining room, P.W.2, P.W.3, her another brother Sudhir and old step mother were sleeping. She further stated that one has to pass through the room where P.W.2 and others were sleeping to come to her room and that adjoining room was closed with a tin door. In view of the room positions as narrated by the victim, it becomes clear that if someone wanted to enter into the room of the victim, he has to first open the tin door and then enter inside the room where

and others were sleeping and after crossing that room, he could come inside the victim's room. The victim further stated that there was no light inside the room where she was sleeping when the occurrence took place. She further stated that at times when that tin door was opened, that would produce some sound. Therefore, when there was darkness inside, unless a person is well accustomed to the room position as well as the sleeping room of the victim, it would be very difficult on his part to reach near the victim and there was every chance of being detected inside the adjoining room where P.W.2 and others were sleeping.

has stated that the appellant was related to him as his agnatic nephew. P.W.2 has stated that previously the appellant was frequently coming to their house and taking food in their house as he was related to them. Thus the appellant being related to the victim and a frequent visitor to the house of the victim, the possibility of his knowing every titbit of the house of the victim cannot be ruled out.

There is no allegation in the F.I.R. relating to commission of rape on the victim for which the case was registered under section 354 of the Indian Penal Code. Though the victim stated about the commission of rape on her during her examination-in-chief but it has been confronted to her and proved through the investigating officer (P.W.7) that she had not

stated in her previous statement that the appellant squeezed her breast with one of his hands and that he removed his wearing lungi and became naked and that he inserted his penis inside her vagina and that P.Ws.2 and 3 saw the appellant raping her. Admittedly, there is no medical evidence relating to the commission of rape on the victim. The victim stated to have shouted when the appellant inserted his penis inside her vagina for which both P.Ws.2 and 3 came to her room. This statement seems to have been developed during trial for which it cannot be accepted. The victim's version in the Court was of rape but when it is compared with the one given during investigation, certain irreconcilable discrepancies are noticed. The evidence regarding actual commission of rape is at variance from what was recorded by police during evidence. Therefore, the victim cannot be said to be a truthful witness.

Now, coming to the charge of attempt to commit rape, the reaction of the victim at the time of occurrence and immediately thereafter are very relevant features, but its absence is not always a decisive factor. There must be material to show that the appellant was determined to have sexual intercourse with the victim in all events and the overt act committed by him must show that it had gone beyond the stage of preparation and it reached the stage of attempt but his

intention to commit the offence of rape could not materialise for some kind of interference.

The victim (P.W.1) who was aged about twenty to twenty one years at the time of occurrence has stated in the cross-examination that at the time of struggle with the appellant, both of them fell down on the ground from the cot and the cot became upside down but the appellant did not leave her and he had pressed her hands with his hands. She further stated that at the time of struggle with the appellant, her younger brother Susil who was sleeping by her side woke up from his sleep but Susil did not separate the appellant nor tried to assault the appellant out of fear as he was a boy aged about seven years only. If according to the victim, after falling down from the cot, the appellant was pressing her hands with his hands, it is obvious that in such position her mouth was open and there was no difficulty on her part to raise shout as by that time her younger brother had already woke up and in the adjoining room, her other family members were sleeping. The victim further stated in the cross-examination that when the appellant lied down over her, she raised hullah but the appellant pressed his hands on her mouth and about ten to fifteen minutes thereafter, P.Ws.2 and 3 came to her room holding a lantern which was burning. Why the victim raised hullah late? For raising hullah late even after the

appellant was sleeping over her in a naked condition after making her naked, the explanation given by the victim that appellant was pressing his hands on her mouth is very difficult to be accepted. She stated that she was unable to separate the appellant and to free herself from the clutches of the appellant as he was holding both of her hands with one of her hands and had pressed her mouth by using the other hand. She further stated that the appellant had pressed both her hands on her chest. She further stated that the appellant removed his hand from her mouth and sat over her and while so sitting, he removed her wearing saree with one of her hands. In that position, the victim had got chance also to shout but she did not. She further stated that she was unable to give kicks to the appellant as he was sitting over her and her legs were not approachable or reaching the body of the appellant. She further stated that she was unable to bite the hands of the appellant as he had pressed both of her hands with one of his hands on the chest. Thus it appears that there were many opportunities earlier for the victim to raise shout and protest but she did not do that.

P.W.2 stated that when she entered inside the room where the victim was sleeping, she found the victim was lying complete naked on the earthen floor and the appellant was lying over the victim and the wearing saree of the victim and gamuchha of the

appellant were lying inside the room. P.W.3 stated in the chief examination that he came to the room of the victim on being called by P.W.2 and he saw the appellant lying naked over the victim, however, in the cross-examination, he stated that when he arrived in the room of the victim, he found the victim and P.W.2 were assaulting the appellant. Thus it seems that P.W.3 reached a little late than P.W.2 in the room of the victim on being called by P.W.2 and he had not actually seen the appellant lying naked over the victim but seen the assault part. The statement of P.W.6 that he had also seen the appellant was lying over the victim on the ground and both of them were in naked condition cannot be accepted as he stated to have come to the room of the victim after P.Ws.2 and 3. The evidence of assault on the appellant by fire wood gets corroboration from the evidence of the doctor (P.W.4) who examined the appellant on the night of occurrence in Titilagarh Govt. Hospital and noticed two lacerated wounds and one bruise and also the station diary entry (Ext.2) of Titilagarh police station made at the instance of the brother of the appellant. In view of the room positions and the surrounding circumstances under which the occurrence stated to have happened, it is evident that the appellant had entered inside the room of the victim in the night but the victim's conduct and her late reaction in raising shout probably on the

arrival of P.W.2 makes it clear that she was a consenting party and after having been caught red handed with the appellant in a compromising position inside her bed room in the night by P.W.2, the victim tried to put the entire blame upon the appellant as perpetrator of the crime, in order to save her own skin among her family members as well as in her society. Law is well settled that even in the absence of a specific defence of consent being taken by an accused charged with the offence of rape, if the evidence on record indicates that the victim was a consenting party, then the Court can always take the view that the sexual intercourse with the prosecutrix was not against her will but with her consent. Whether there was consent or not, is to be ascertained only on a careful study of all relevant circumstances. An inference as to consent can be drawn only basing on evidence or probabilities of the case. ‘Consent’ is stated to be an act of reason coupled with deliberation. It denotes an active will in mind of a person to permit the doing of the act complained of. If the victim fails to offer sufficient resistance, the Court may find that there was no force or threat of force or the act was not against her will. 'Consent' does not mean submission under the influence of fear or terror. There must be an exercise of intelligence based on knowledge of its significance and moral quality and there must be choice between

resistance and assent. If the woman resists to a point whereafter further resistance would be useless or until her resistance is overcome by force or violence, submission thereafter is not consent. Verbal resistance apart, the woman can give effective obstacles by means of hands, limbs and pelvic muscles. Resistance by any or more of these will amount to resistance in the eye of law. A mere act of helpless resignation in the face inevitable compulsion, acquiescence, non-resistance or passive giving in, when volitional faculty is either clouded by fear or vitiated by duress, cannot be deemed to be a consent, as envisaged in law.

In view of the foregoing discussions, the conviction of the appellant under sections 376/511 and 354 of the Indian Penal Code is not sustainable in the eye of law.

10. Coming to the charge under section 457 of the Indian Penal Code, it requires commission of lurking house-trespass or house breaking by night in order to commit any offence punishable with imprisonment. Lurking house-trespass is defined under section 443 of the Indian Penal Code. In order to constitute the offence of lurking house-trespass, the offender must have taken some active means or precautions to conceal his presence while committing house-trespass. The purpose of concealment is to avoid being noticed by some person who has a

right to exclude or eject the trespasser from the building, tent or vessel which is the subject of trespass. The mere fact that a house-trespass is committed by night does not make the offence one of lurking house-trespass. There is no evidence that the appellant had taken precautions to conceal the house-trespass. As it seems, he had come inside the house of the victim wearing lungi and gamuchha. There is also no evidence that any housebreaking as defined under section 445 of the Indian Penal Code has been committed by the appellant. In the illustration (d) of that section, it is stated that if 'A' committed house-trespass by entering Z's house through the door, having opened a door which was fastened, that is housebreaking. Fastening the door means to firmly fix or fix securely. 'Unfastening' means to open something that was fastened. The victim stated in the cross-examination that the entrance of the house was closed by tin tati and one bamboo lathi was pressed on that tin tati but there was space through which one can remove the bamboo lathi by inserting his hand and open that door. Thus there was no fastening of the door. Therefore, I am of the humble view that lurking house trespass or housebreaking has not been proved by the prosecution and as such the ingredients of the offence under section 457 of the Indian Penal Code are not attracted. However, there are enough materials to make out an offence of house-

trespass as defined under section 442 of the Indian Penal Code which is punishable under section 448 of the Indian Penal Code. Even if no specific charge is framed under section 448 of the Indian Penal Code but since charge was framed under higher offence like section 457 of the Indian Penal Code, it cannot be said that any prejudice is caused to the appellant in convicting him under section 448 of the Indian Penal Code. Accordingly, the conviction of the appellant under section 457 of the Indian Penal Code is set aside, instead he is found guilty under section 448 of the Indian Penal Code.

Now, coming to the question of sentence to be imposed on the appellant for his conviction under section 448 of the Indian Penal Code, the maximum substantive sentence provided for such offence is one year or the sentence can be fine only which may extend to one thousand rupees, or with both. The appellant was arrested and produced in Court during investigation on 17.10.1989 and he was throughout in judicial custody till he was released on bail by the learned trial Court on 02.06.1990 on the basis of the bail order passed by this Court in this criminal appeal on 25.05.1990. Therefore, the appellant has remained in judicial custody for more than seven months. Keeping in view the fact that more than thirty one years have

passed since the date of occurrence, I sentence him to undergo imprisonment for the period already undergone by him.

11. In the result, conviction of the appellant under sections 376/511, 354 and 457 of the Indian Penal Code is hereby set aside, instead the appellant is convicted under section 448 of the Indian Penal Code and sentenced to undergo imprisonment for the period already undergone by him. The criminal appeal is allowed in part.

Lower Court's record with a copy of this judgment be communicated to the learned trial Court forthwith for information.

Before parting with the case, I would like to put on record my appreciation to Mr. Rajjeet Roy, the learned counsel for rendering his valuable help and assistance towards arriving at the decision above mentioned. The learned counsel shall be entitled to his professional fees which is fixed at Rs.5,000/- (rupees five thousand).

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S.K. Sahoo, J.

Orissa High Court, Cuttack
The 11th December 2020/PKSahoo/RKM