

Orissa High Court

Kulamani Mohakud vs State Of Odisha on 9 December, 2021

IN THE HIGH COURT OF ORISSA, CUTTACK

CRLA No.227 of 2008

From judgment and order dated 17.03.2008 passed by the Addl.  
Sessions Judge -cum- Addl. Special Judge, Baripada in G.R. Case  
No.431 of 2005/T.C. No.10 of 2007.

1. Kulamani Mohakud

2. Bala @ Chittaranjan Hesa ..... Appellants

-Versus-

State of Odisha ..... Respondent

JCRLA No.78 of 2010

Chittaranjan Hesa ..... Appellant

-Versus-

State of Odisha ..... Respondent

For Appellants: - Mr.Abhas Mohanty  
(in both the cases) (Amicus Curiae)

For Respondent: - Mr. Arupananda Das  
Addl. Govt. Advocate

P R E S E N T:

THE HONOURABLE MR. JUSTICE S.K. SAHOO

Date of Hearing and Judgment: 09.12.2021

// 2 // S.K. SAHOO, J. CRLA No.227 of 2008 has been filed by the appellants Kulamani Mohakud and Bala @ Chittaranjan Hesa which was presented before this Court on 13.05.2008 and admitted

on 08.09.2008.

JCRLA No.78 of 2010 was registered on the basis of the prisoner's petition received from the appellant Bala @ Chittaranjan Hesa, which was admitted on 04.11.2013 after condoning a delay of 502 days.

Since by the time of registration of JCRLA No.78 of 2010, the appeal preferred by the appellant Bala @ Chittaranjan Hesa has already been admitted in CRLA No. 227 of 2008, this JCRLA No.78 of 2010 is not maintainable and accordingly, the same is disposed of.

Both the appellants faced trial in the Court of learned Addl. Sessions Judge -cum- Addl. Special Judge, Baripada in G.R. Case No.431 of 2005/T.C. No.10 of 2007 for offences punishable under section 376(2)(g) of the Indian Penal Code and section 3(2)(v) of the S.C. & S.T. (PoA) Act, 1989 (hereafter '1989 Act'). Learned trial Court vide impugned judgment and order dated 17.03.2008 though acquitted both the appellants of the charge under section 3(2)(v) of the 1989 Act, but found them guilty under section 376(2)(g) of the Indian Penal Code and sentenced // 3 // each of them to undergo rigorous imprisonment for ten years and to pay a fine of Rs.5,000/- (rupees five thousand) each, in default of payment of fine, to undergo further rigorous imprisonment for six months.

2. The prosecution case, in short, is that on 14.10.2005 the victim (P.W.20) along with some of her friends had been to village Ghagarbeda to watch 'Dussehra' festival and after visiting the festival, in the evening hours when they were returning to their village by foot, on the way a Commander jeep came and the driver of the jeep asked the victim girl and her companions to board the jeep with the minimal charge of rupees five per person and accordingly, all of them boarded the jeep. At that point of time, there were three persons in the jeep including the driver and subsequently another accused boarded the jeep. It is the further case of the prosecution that after covering some distance, four persons who were present in the jeep asked the companions of the victim to get down from the jeep and pushed them from the jeep, but they did not allow the victim to get down from the jeep and took her inside a forest in that jeep. It is the further prosecution case that inside the forest, all the four accused persons committed gang rape on the victim one after another. The companions of the victim, who were asked to get // 4 // down from the jeep, intimated about the same to P.W.1 Narendra Mohakud, who in turn intimated P.W.3 Mahendra Mahanta to report the matter to the police. P.W.3 came to Ghagarbeda police Outpost and intimated about the occurrence to P.W.25 Lokanath Bhoi, the Sub-Inspector of Police attached to the said outpost. On getting such information, P.W.25 along with P.W.3 Mahendra Mahanta, P.W.5 Bichitrananda Giri and others went in search of the victim girl as well as the Commander jeep. It is the prosecution case that P.W.25 noticed the Commander jeep coming from the side of Fulcom Chhak and he stopped the vehicle, which was having registration No. OR-09-D-3444. In the said jeep, the appellant no.1 Kulamani Mohakud and accused Debendra Naik and Madhu Karua were present. P.W.25 took all those three persons and the Commander jeep to Ghagarbeda police outpost. While interrogation was going on, accused Debendra Naik stealthily escaped from the police outpost, but the appellant no.1 Kulamani Mohakud was detained in the police outpost. P.W.25 along with accused Madhu Karua went in search of the victim girl towards Fulcom Chhak, but he could not locate the girl and returned to the outpost at about 12.30 midnight, where he found that the appellant no.1 had escaped

from the outpost. Appellant no.2 Bala @ Chittaranjan Hesa came to the // 5 // police outpost to ascertain about the Commander jeep but he was detained there in the night. On the same night at about 2.30 a.m., the victim, her father and four to five others came to Ghagarbeda police outpost and the father of the victim, namely, Budhiram Sayan presented the written report relating to the commission of gang rape on the victim and he mentioned in the report that while the victim and other women of her village were returning to their village from the Yatra, on the way they boarded the Commander jeep and the driver and three others forced the other women to get down from the jeep at Marichahudi and took the victim to Naluburu forest where they committed rape on her by force.

It is the further prosecution case that after receipt of the written information from the father of the victim, P.W.25 made station diary entry and prepared the required documents to send the same to Raruan police station for registration of the case along with the accused persons, namely, Bala @ Chittaranjan Hesa and Madhu Karua, but on the next day in the early morning i.e. on 15.10.2005 both Madhu Karua and Bala @ Chittaranjan Hesa also escaped from the police custody when they had gone to attend the call of nature. P.W.25 immediately intimated P.W.26 Barini Das, the officer in-charge of Raruan // 6 // police station about the same and as per the direction of the latter, P.W.25 went in search of the accused persons, but on 15.10.2005 in the afternoon at about 1.00 p.m., he received information over phone that a violent mob set fire to Ghagarbeda police outpost as they came to know about escape of the accused persons from the outpost, for which the outpost was completely set ablaze along with all the documents, registers and the Commander jeep.

P.W.24 Kalabati Giri, the women constable attached to Ghagarbeda police outpost lodged a written report (Ext.14) before the officer in-charge of Raruan police station, in which she not only narrated about the abduction of the victim, her rape, earlier lodging of the report by the father of the victim, escape of the apprehended accused persons from police custody, but also the overt act committed by some persons in setting fire to the outpost as well as jeep which was involved in the crime.

3. On the basis of such written report presented by P.W.24, Raruan P.S. Case No.67 dated 16.10.2005 was registered under section 376(2)(g) of the Indian Penal Code against the two appellants so also Madhu Karua and Debendra Naik.

// 7 // P.W.26, the officer in-charge of Raruan police station on receipt of the message regarding the disturbance in Ghagarbeda police outpost, immediately rushed to the outpost where he found that the outpost was completely burnt along with all the documents, registers, articles including the Commander jeep. He took up investigation of the case, examined the informant and other witnesses including the victim on 16.10.2005. The victim girl was sent for medical examination on police requisition to Karanjia hospital. The appellant Kulamani Mohakud was arrested on that day i.e. 16.10.2005 and his wearing apparels were seized as per seizure list Ext.15. The wearing apparels of the victim, i.e. one rose colour Punjabi dress, one rose colour scarf, one ghee colour semij were also seized in the police outpost as per seizure list Ext.16 on 16.10.2005. P.W.26 visited the spot on 17.10.2005 and prepared the spot map marked as Ext.17. During spot visit, he seized one red colour salwar, one chadi and one hair clip lying at the spot as per seizure list Ext.5. P.W.27 Ashok Kumar Biswal, the S.D.P.O. of Rairangpur Sub-division took over the charge of investigation from P.W.26.

P.W.26 as per the requisition received from P.W.27 on 21.10.2005, seized the pubic hair, sample vaginal swab, blood sample and vaginal smear at Raruan // 8 // police station on production by the constable as per seizure list Ext.4. On 26.10.2005, the appellant Bala @ Chittaranjan Hesa was arrested and brought to Ghagarbeda police outpost and his wearing apparels were also seized as per the seizure list Ext.6 and P.W.26 intimated P.W.27 in that respect. On 27.10.2005 P.W.26 seized sample pubic hair, sample saliva of the appellant Bala @ Chittaranjan Hesa as per seizure list Ext.10 and thereafter the said appellant was forwarded to Court. P.W.26 also seized the caste certificate of the victim in presence of the witnesses as per seizure list Ext.6 and he received the caste certificate of the appellant no.1 Kulamani Mohakud, Madhu Karua and Debendra Naik from the Tahasildar, Raruan. P.W.26 sent the x-ray plates of the victim to the Sub-divisional Medical Officer, Karanjia for determination of her age and the report was received by him.

P.W.27 after taking over investigation of the case from P.W.26 on 17.10.2005, sent the appellant Kulamani Mohakud for his medical examination and subsequently received the medical examination report. He seized sample saliva, blood, semen and pubic hair of appellant Kulamani Mohakud collected by the doctor produced by the constable under seizure list Ext.18. He forwarded the appellant Kulamani Mohakud to Court.

// 9 // He also received the medical examination report of the victim as well as the appellant Bala @ Chittaranjan Hesa and on 10.02.2006, on completion of investigation, he submitted charge sheet against four accused persons including the two appellants showing the accused Madhu Karua and Debendra Naik as absconders.

4. After submission of charge sheet, the case was committed to the Court of Session following due formalities, where the learned trial Court framed the charges against the appellants on 09.08.2007 and since the appellants refuted the charges, pleaded not guilty and claimed to be tried, the sessions trial procedure was resorted to prove the guilt of the appellants.

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

P.W.1 Narendra Mohakud was having a stationery shop at village Maricha, before whom the companions of the victim disclosed regarding the forceful abduction of the victim in the vehicle, who in turn requested his friend Mahendra Mohanta (P.W.3) to inform the matter to police.

P.W.2 Balaram Pingua is a post-occurrence witness. P.W.3 Mahendra Mohanta stated that on being informed by P.W.1 regarding the abduction of the victim, he // 10 // went to Ghagarbeda outpost and intimated about the occurrence to P.W.25 and on the request of P.W.25, he accompanied him in his motor cycle to P.W.1, where the companions of the victim were there. On getting the information from the companions of the victim regarding the incident, he along with other police staff went towards Fulcom chhak and on the way, they found the Commander jeep and on the direction of the police, the driver stopped the vehicle and P.W.25 sat in the said jeep and directed the jeep driver to take him to the police outpost. He further stated that during the conversation between P.W.25 and the persons present in the jeep, he heard the voice of accused Madhu Karua. He further stated that

on the next day, he came to know that four persons were brought to the police outpost, but those persons escaped from the police outpost and P.W.25 had gone in search of them.

P.W.4 Dinabandhu Giri was the Gramarakhi attached to Ghagarbeda outpost, who stated about the search of the victim by P.W.25 and other police staff on the date of occurrence along with him and detention of the Commander jeep along with the co-accused Madhu Karua. He also stated about the detention of the appellant Bala @ Chittaranjan Hesa in the police outpost, who came to ascertain about the Commander jeep.

// 11 // P.W.5 Bichitrananda Giri was the police constable attached to Ghagarbeda police outpost, who accompanied P.W.25 in the search of the victim and stated about detention of the Commander jeep along with the appellant Kulamani Mohakud, accused Madhu Karua and Debendra Naik. He also stated that on being asked about the whereabouts of the driver of the vehicle, namely, appellant Bala @ Chittaranjan Hesa, they told that he was with the victim girl in the forest. He has also stated regarding fleeing away of the accused Debendra Naik, Madhu Karua as well as appellant Bala @ Chittaranjan Hesa from the police outpost.

P.W.6 Chandra Mohan Tiria was the A.S.I. of Police attached to Ghagarbeda police outpost, who stated about the detention of the Commander jeep along with the driver of the jeep i.e. appellant Bala @ Chittaranjan Hesa and two others and fleeing away of appellant Bala @ Chittaranjan Hesa and accused Madhu Karua from the police outpost P.W.7 Amit Kumar Giri, the owner of the Commander jeep stated that appellant Bala @ Chittaranjan Hesa was the driver of the said vehicle and co-accused Madhu Karua was the helper and on 14.10.2005 both of them took the vehicle for transportation of passengers and thereafter, he came to know // 12 // that his vehicle was detained in connection with this case and later on he came to know that some persons set fire to the said vehicle.

P.W.8 Bholanath Pradhan is a witness to the seizure of the wearing apparels of the appellant Bala @ Chittaranjan Hesa as per seizure list Ext.3.

P.W.9 Prafulla Chandra Barik, who was working as a Home guard attached to Raruan police station is a witness to the seizure of biological samples of the victim as per seizure list Ext.4.

P.W.10 Danardan Pingua and P.W.11 Rabindra Purty are witnesses to the seizure as per seizure list Ext.4 and Ext.5 respectively.

P.W.12 Lalit Kumar Panda and P.W.13 Bhadra Naik, who were the police constables attached to Raruan police station are witnesses to the seizure of caste certificate of the victim as per seizure list Ext.6.

P.W.14 Ashish Ranjan Mohanty was the Gynaec Specialist in the Sub-Divisional Government Hospital, Karanjia, who examined the victim on police requisition and submitted the report vide Ext.7.

// 13 // P.W.15 Dr. Manas Ranjan Dandapat was working as Gynaec Specialist in Sub-Divisional Government Hospital, Karanjia, who examined the x-ray plates of the victim and submitted his report vide Ext.8. According to his estimation, the age of the victim girl was within sixteen to seventeen years.

P.W.16 Saroj Kumar Mohanta was the Home guard attached to Raruan police station, who is a witness to the seizure of biological samples of appellant Bala @ Chittaranjan Hesa vide Ext.10.

P.W.17 Dr. Dubraj Tudu, who was working as Gynaec Specialist in Sukruli C.H.C.-II, medically examined the appellant Bala @ Chittaranjan Hesa and proved his report vide Ext.11.

P.W.18 Dr. Kunal Patra, who was working as an Asst. Surgeon in Sukruli C.H.C.-II, medically examined the appellant Kulamani Mohakud and proved his report vide Ext.12.

P.W.19 Toyaka Bharati was the S.D.J.M., Karanjia, on whose supervision the T.I. parade of the appellants were conducted and she proved her report vide Ext.13.

P.W.20 is the victim, who identified the appellants in the T.I. parade as well as in Court and supported the prosecution case and stated about the commission of gang rape on her by the appellants along with others.

// 14 // P.W.21 Nanika Sayan and P.W.23 Sumi Sayan were the companions of the victim in the Commander jeep, who supported the prosecution case and stated about the abduction of the victim in the Commander jeep.

P.W.22 Gardi Sayan is a post-occurrence witness, who has been declared hostile by the prosecution.

P.W.24 Kalabati Giri, who is the informant of the case, was working as Woman constable attached to Ghagarbeda police outpost stated about lodging of information by Budhram Sayan regarding abduction of his daughter and gang rape on her by the accused persons before Ghagarbeda police Outpost.

P.W.25 Lokanath Bhoi, was the Sub-inspector of Police attached to Ghagarbeda police outpost, who got information first regarding abduction of the victim from P.W.1 and went in search of the victim on the date of incident.

P.W.26 Barini Das, who was the officer in-charge of Raruan police station, was the initial investigating officer of the case.

P.W.27 Ashok Kumar Biswal was the S.D.P.O. of Rairangpur Sub-division, who took over the charge of investigation from P.W.26 and on completion of investigation, he submitted charge sheet against the appellants and accused // 15 // Madhu Karua and Debendra Naik, showing the last two as absconders.

The prosecution exhibited eighteen numbers of documents. Ext.1 is the chemical examination report, Ext.2 is the serological examination report, Exts.3, 4, 5, 6, 10, 15, 16 and 18 are the seizure lists, Ext.7 is the medical examination report of the victim, Ext.8 is the ossification report of the victim, Ext.9 is the x-ray plate, Ext.11 is the medical examination report of appellant Bala @ Chittaranjan Hesa, Ext.12 is the medical examination report of the appellant Kulamani Mohakud, Ext.13 is the test identification report of the suspects, Ext.14 is the F.I.R., Ext.17 is the spot visit report and Ext.19 is the spot map.

The prosecution proved eleven nos. of material objects. M.O.I is the salwar, M.O.II is the chadi, M.O.III is the hair clip, M.O.IV is the blue colour full pant, M.O.V is the half ganji of appellant Bala @ Chittaranjan Hesa, M.O.VI is the punjabi, M.O.VII is the odhani and M.O.VIII is the semij of the victim, and M.O.IX is the full pant, M.O.X is the half ganji and M.O.XI is the half chadi of the appellant Kulamani Mahakud.

6. The defence plea was one of denial.

7. The learned trial Court after assessing the evidence on record, came to hold that the prosecution has not been able // 16 // to prove its case under section 3(2)(v) of the 1989 Act. It was further held that though the victim being examined as P.W.20 has been cross-examined at length, but nothing material has been elicited to belie her credibility and discard her evidence and her evidence remains unshattered on the basis of her credibility and reliability. The victim has not only identified the appellants in the test identification parade but also in Court. Learned trial Court further held that the evidence of the victim (P.W.20) gets corroboration from the evidence of P.W.21 and P.W.23 and nothing substantial has been brought out in the cross- examination of those two witnesses to disbelieve their testimony and therefore, their evidence were found to be cogent and convincing. Learned trial Court further held that the evidence of the doctor, who examined the victim girl has not at all been challenged in the cross-examination and the evidence of P.W.15, who examined the x-ray plates of the victim and determined her age to be in between sixteen to seventeen years, has also not been shaken. It was further held that the presence of the injuries on the right elbow and front of the left knee of the victim so also hymeneal tears on the private part of the victim fully supported the evidence of the victim regarding commission of rape on her. It was further held that the evidence adduced by the learned // 17 // S.D.J.M., Karanjia being examined as P.W.19 relating to identification of the two appellants in the T.I. parade has remained unshaken. It is further held that the evidence of the victim finds corroboration from the physical clues found by the investigating officer at the spot of occurrence. No importance was attached to the submission made by the defence counsel relating non-proving of the F.I.R., which was lodged by the father of the victim as the violent mob had set fire to the police outpost, which in turn destroyed all the documents of the outpost. Considering the chemical examination report, the serological examination report and the evidence of the victim, which gets support from the oral evidence as well as circumstantial evidence, the learned trial Court found both the appellants guilty under section 376(2)(g) of the Indian Penal Code.

8. Mr. Abhas Mohanty, learned Amicus Curiae appearing for the appellants contended that some information was given relating to the abduction of the victim prior to the lodging of the first

information report (Ext.14) but no attempt was made to record the same and such information has not seen the light of the day. There is suspicious feature in the lodging of the F.I.R. (Ext.14) by P.W.24. It is further argued that there are materials // 18 // to show that prior to the test identification parade, the appellants were shown to the identifying witnesses and therefore, the sanctity of the test identification parade is lost on account of exposure of appellants to the identifying witnesses. So far as the identification of the appellant no.1 Kulamani Mahakud is concerned, he has not been identified by the identifying witness P.W.23 and thus on the solitary evidence of identification by the victim, the appellant no.1 should not have been convicted. It is further argued that the evidence of the victim is full of contradictions and it does not tally with the statements of her companions, who have been examined as P.W.21 and P.W.23. It is further argued that though the victim stated that gang rape was committed on her by four persons by making her complete naked while she was lying on the ground facing upwards but as per her evidence, she had no injury on her back which creates a serious doubt regarding commission of gang rape. He further argued that even though the appellant no.1 Kulamani Mahakud was arrested on 16.10.2005 and the appellant no.2 Bala @ Chittaranjan Hesa was arrested on 26.10.2005, but the test identification parade was conducted only on 08.11.2005 and no explanation has been offered by the prosecution regarding the delay in holding the test identification parade. Placing reliance on // 19 // the decision of the Hon'ble Supreme Court in the case of Hasib

-Vrs.- The State of Bihar reported in A.I.R. 1972 Supreme Court 283, it is argued that it is a fit case where benefit of doubt should be extended in favour of the appellants.

Mr. Arupananda Das, learned Additional Government Advocate appearing for the State of Odisha, on the other hand, supported the impugned judgment and contended that the evidence of the victim is clear, clinching, trustworthy and it gets corroboration at every stage right from the beginning when she was forcibly taken by the appellants and other co-accused persons in the Commander jeep, the disclosure of her companions before others immediately after abduction of the victim, the lodging of the first information report by the father of the victim on the night of occurrence so also her medical examination findings and the evidence of the Magistrate, who conducted test identification parade and nothing has been elicited to show that there is any lacuna in the holding of the test identification parade. It is further argued that since it is a case of gang rape and the victim had come in close contact with the appellants during the course of occurrence, she is not likely to forget their faces and features and in such a scenario, it cannot be said that there has been such an inordinate delay in holding // 20 // the test identification parade so as to discard the evidence of identification of the appellants by the victim. Learned counsel for the State further submitted that while appellant no.1 Kulamani Mahakud along with two absconding accused persons were coming in the Commander jeep on the night of the occurrence, they were detained by P.W.25 on the way and brought to the police station but the appellant no.1 escaped from the outpost. Similarly when the appellant no.2 Bala @ Chittarajan Hesa arrived at the outpost in the night of occurrence to ascertain about the Commander jeep, he was detained but while going to attend the call of nature in the early morning on 15.10.2005, both the appellant Bala @ Chittaranjan Hesa and accused Madhu Karua escaped from the police custody. It is further argued that the information which was given by others about the abduction of the victim was vague and that is why it could not have been registered as the first information report. When the information was given by the father of the victim in the night of



occurrence, on that basis, Station Diary Entry was made but it got destroyed as the villagers set fire to the outpost, which was deposed to by number of witnesses. It is argued that there is no infirmity or illegality in the impugned judgment and therefore, the appeal should be dismissed.

// 21 // Appreciation of evidence of victim of rape:

9. Law is well settled as reiterated in the case of Swaroop Singh -Vrs.- State of Madhya Pradesh reported in (2013) 14 Supreme Court Cases 565 : (2013) 55 Orissa Criminal Reports (SC) 476 that a rapist not only violates the victim's privacy and personal integrity, but inevitably causes serious psychological as well as physical harm in the process. Rape is not merely a physical assault, it is often destructive of the whole personality of the victim. The courts, therefore, shoulder a greater responsibility while trying an accused on charges of rape. They must deal with such cases with utmost sensitivity. The courts should examine the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the statement of the prosecutrix, which are not of a fatal in nature, to throw out an otherwise reliable prosecution case. If evidence of the prosecutrix inspires confidence, it must be relied upon without seeking corroboration of her statement in material particulars. If for some reason, the Court finds it difficult to place implicit reliance on her testimony, it may look for evidence which may lend assurance to her testimony, short of corroboration required in the case of an accomplice. The testimony of the prosecutrix must be // 22 // appreciated in the background of the entire case and the trial Court must be alive to its responsibility and be sensitive while dealing with cases involving sexual molestations.

In the case of State of Punjab -Vrs.- Gurmit Singh reported in (1996) 2 Supreme Court Cases 384 : (1996) 10 Orissa Criminal Reports (SC) 293, it has been held that in a case of rape, no self-respecting woman would come forward to a Court just to make a humiliating statement against her honour such as is involved in the commission of rape on her. The inherent bashfulness of the females and the tendency to conceal outrage of sexual aggression are factors which the Courts should not overlook. Seeking corroboration of her statement before relying upon the same, as a rule, in such cases amounts to adding insult to injury. The Court while appreciating the evidence of a prosecutrix may look for some assurance of her statement to satisfy its judicial conscience, since she is a witness who is interested in the outcome of the charge leveled by her, but there is no requirement of law to insist upon corroboration of her statement to base conviction of an accused. The evidence of a victim of sexual assault stands almost at par with the evidence of an injured witness and to an extent is even more reliable.

// 23 // In the case of Dola @ Dolagobinda Pradhan and another -Vrs.- The State of Odisha reported in A.I.R. 2018 Supreme Court 4020 : (2018) 72 Orissa Criminal Reports (SC) 308, it has been held that just as a witness who has sustained an injury (which is not shown or believed to be self-inflicted) is the best witness in the sense that he is least likely to exculpate the real offender, the evidence of a victim of a sex offence is entitled to great weight, absence of corroboration notwithstanding. An accused in a rape case could be convicted on the sole testimony of the prosecutrix, if it is capable of inspiring confidence in the mind of the Court. If the version given by the prosecutrix is unsupported by any medical evidence or the whole surrounding circumstances are highly improbable and belie the case set up by the prosecutrix, the Court shall not act on the solitary

evidence of the prosecutrix.

In the case of Mukesh and Ors. -Vrs.- State for NCT of Delhi and Ors. reported in (2017) 6 Supreme Court Cases 1 : (2017) 67 Orissa Criminal Reports (SC) 72, it is held that conviction can be based on the sole testimony of the prosecutrix if it is implicitly reliable and there is a ring of truth in it. Corroboration as a condition for judicial reliance on the testimony of a prosecutrix is not requirement of law but a // 24 // guidance of prudence under given circumstances. There is no legal compulsion to look for corroboration of the prosecutrix's testimony unless the evidence of the victim suffers from serious infirmities, thereby seeking corroboration. Persisting notion that the testimony of victim has to be corroborated by other evidence must be removed. To equate a rape victim to an accomplice is to add insult to womanhood. Ours is a conservative society and not a permissive society. Ordinarily a woman, more so, a young woman will not stake her reputation by leveling a false charge, concerning her chastity.

Analysis of the evidence of the victim (P.W.20):

10. The victim (P.W.20) has stated that on the date of occurrence, she went to see the 'Yatra' at village Ghagarbeda along with P.W.21, P.W.23 and others, which was going on the occasion of 'Durga Puja' and after seeing the 'Yatra', when she was returning with other girls to the village and evening had already set in, a Commander vehicle came near them. The driver of the vehicle asked them to board it and accordingly, she as well as her companions boarded the vehicle. She specifically stated that the two appellants were amongst the four persons, who were present in the vehicle. After covering some distance, the four persons present in the vehicle asked her companions to // 25 // get down from the vehicle and forced them in that respect and also pushed them from the vehicle but she was not allowed to get down from the vehicle and her face was tied with a napkin for which she could not see anything thereafter. She further stated that those four persons took her in the jeep to a forest where they threatened her with a knife and also assaulted her, tore her shirt and committed rape on her by force one after another. She specifically identified the two appellants in the dock to be the culprits. She further stated that after committing the crime, the accused persons left her in the forest and fled away and though she tried to raise shout but she could not as the accused persons had closed her mouth by putting their hands. She returned to her village alone and intimated about the occurrence to her parents. She stated that she was wearing a rose colour salwar, one chadi and one rose colour shirt and her salwar, chadi and hair clip were lying at the spot. She identified her wearing apparels as well as her hair clip in Court, which were marked as M.O.I, M.O.II and M.O.III respectively. In the cross- examination, she has stated that she did not know the appellants in the dock prior to the occurrence. She further stated that initially there were three persons in the Commander jeep when they boarded the same and another person joined them on the // 26 // way. She further stated that there was no shop or residential house near the place where rape was committed and her face was tied with a napkin when she was sitting in the vehicle but the face was not tied at the time of commission of rape on her. She further stated that the place of occurrence was completely dark and dry leaves were on the ground and that the accused persons made her complete naked and committed rape on her in a sleeping condition while she was facing upwards. She further stated that she did not try to resist the accused persons when they were committing rape on her because they were holding her hands and legs and they also threatened her to kill. She further stated

that the appellants did not bite her during commission of rape and she had not sustained any injury on her back.

Learned counsel for the appellants submitted that though the victim stated that during occurrence, she sustained injury on the lower lip as she was assaulted by the accused persons but the doctor, who examined her did not notice any injury on her lip.

On perusal of the evidence of the doctor (P.W.14), it appears that on 16.10.2005 when he examined the victim, he found multiple small abrasions on the back of right elbow and front of left knee and he opined that the abrasions were caused // 27 // due to physical violence. There were fresh hymenal tears in right lateral and left posterolateral location which suggested recent sexual intercourse. So far as abrasions are concerned, the age of the injuries was more than twenty four hours and so far as hymenal tears are concerned, it was within seventy two hours. The clothings of the victim girl had no stain of discharge or mark of violence. In the cross-examination, the doctor has stated that there was no nail mark or biting mark on the cheek or breasts of the girl. Nothing has been elicited in the evidence of the doctor to disbelieve his testimony rather I find that the medical evidence corroborates the evidence of the victim.

So far as the identification of the appellants is concerned, the victim stated that in the test identification parade in jail, she identified the appellants correctly to have committed rape on her. Though suggestion was given to the victim that photographs of the accused persons were shown to her prior to test identification parade but she denied such suggestion rather she stated that she went to jail for identification and the police were not present where test identification parade was conducted and she identified both the appellants from the number of persons standing in a queue. At this stage, it would be profitable to discuss the evidence of P.W.19 Toyaka Bharati, the learned // 28 // S.D.J.M., Karanjia, who conducted the test identification parade of the suspects. The victim (P.W.20) and Sumari Sayan (P.W.23) were the identifying witnesses. P.W.19 has stated that the two culprits were mixed up with nineteen other undertrial prisoners of the same age, stature and similarly dressed and they were made to stand in a row, out of the view of the identifying witnesses and that the identifying witnesses were outside the jail and she first called the victim to identify the suspects, who identified both the appellants and then the position of the suspects were changed so also the other undertrial prisoners and then P.W.23 was called for identification of the suspects and she only identified the appellant Bala @ Chittaranjan Hesa. The test identification parade report has been proved as Ext.13. In the cross-examination, P.W.19 stated that the two identifying witnesses were noticed by the Court to appear on 08.11.2005 and they were directed to remain present outside the Sub-jail, Karanjia for identifying the suspects and that when she came to Sub-jail, Karanjia for holding test identification parade, the identifying witnesses were outside the jail gate. P.W.19 admitted that in her report (Ext.13), she had not mentioned that nineteen undertrial prisoners those were mixed up with the two suspects were of the same age group and stature of the suspects and they // 29 // were also similarly dressed. After going through the evidence of P.W.19, I find that the defence has not brought out anything clinching by way of cross-examination to disbelieve her evidence. There was no irregularity in the test identification parade rather all precautions were taken in such identification parade process.

The other witnesses to the identification parade i.e. P.W.23 has stated that while she along with the victim and others were returning to their village by foot after seeing 'Yatra', one Commander jeep came and the appellant Bala was driving the vehicle and she asked them about their destination and agreed to take them by paying fare of Rs.5/- each. She further stated that on the way, the persons, who were present in the jeep, forced them to get down from the jeep but they did not allow the victim to get down and left the place in the jeep with the victim. She further stated that they disclosed about the incident to a shopkeeper whose shop was nearer to the place of occurrence.

The shopkeeper has been examined as P.W.1 who stated that on the 'Dussehra Puja' day at about 7.30 p.m. while he was in his shop situated at Maricha, four to five young girls came in front of his shop and started crying and when he asked them about the reason of their crying, they told that while they // 30 // were returning home after seeing the 'Dussehra Mela', on the way, one vehicle picked up a girl, who was with them. Thus, the evidence of P.W.1 corroborates the evidence of P.W.23. P.W.1 has stated that he informed the matter to his friend Mahendra Mohanta (P.W.3) over phone and requested him to report the matter to the police.

P.W.3 has stated that he received a phone call from P.W.1 who told him that a group of girls came to his shop and informed him about lifting of a girl of his village by a Commander jeep on the way. P.W.3 reported the matter at Ghagarbeda outpost and intimated about the occurrence to S.I. of police Bhoi Babu (P.W.25) and then he along with P.W.25 came near the shop of P.W.1 where the girls told them about the abduction of one girl forcibly. Thus, the evidence of P.W.3 also corroborates the evidence of P.W.1.

P.W.25, the S.I. of Police has stated that he received a telephone call from P.W.3 about taking away of a girl in a Commander jeep at about 7.30 p.m. by some persons and thereafter, P.W.3 came to the police outpost and informed him that while a group of women were going in a Commander jeep, the driver of the said jeep and three others forced the other women except a girl to get down from the jeep at Marichahudi // 31 // and took away the girl in the jeep towards Fulcom chhaka. Thus, the evidence of P.W.25 corroborates from the evidence of P.W.3.

The evidence of the victim that her salwar, chadi and hair clip were lying at the spot of occurrence is corroborated by the evidence of the Investigating Officer (P.W.26), who stated that during his spot visit on 17.10.2005 at about 8.00 a.m., he seized one red colour salwar, one chadi and one hair clip of the victim, which were lying at the spot and he prepared the seizure list marked as Ext.5. P.W.26 further stated that the spot of occurrence was identified to him by the victim girl on 17.10.2005 and that he noticed skid mark of the Commander jeep near the spot of occurrence. The chadi (M.O.II) which was sent for chemical analysis was found stained with human blood. Therefore, in my humble view, the evidence of the victim (P.W.20) not only inspires confidence and implicitly reliable but also gets corroboration from the evidence of her friend (P.W.23), other circumstantial evidence and more over from the medical evidence, the evidence of the learned Magistrate who conducted test identification parade and also from the evidence of the Investigating Officer.

// 32 // Lodging of first information (Ext.14) by P.W.24:

11. P.W.24 has stated that on the night of occurrence, a report was submitted by the father of the victim at Ghagarbeda police outpost and on the next day morning, number of persons of Jharkhand State gathered in front of the police outpost as they came to know about the escape of the accused persons from the police outpost and they became agitated and set fire to the police outpost and the Commander jeep and in the fire, all the documents of the police outpost including the F.I.R. presented by the father of the victim were destroyed. No doubt, the informant (P.W.24) has stated that she could not say the name of the villager, who scribed the first information report (Ext.14) and that she had not mentioned in Ext.14 that she went through the contents of the F.I.R. and finding the contents to be true, she signed the same, but in my view, in absence of such mention in the F.I.R., when the evidence of the informant has remained consistent and unshattered, the authenticity of the first information report cannot be doubted. The destruction of the documents of the outpost on account of fire has been proved by P.W.25 so also P.W.26. No challenge has been made by the defence in the cross-examination to such aspect. The destruction of the first information report lodged by the father of the victim // 33 // on account of fire in the outpost compelled the informant (P.W.24) to lodge another first information report (Ext.14) in which she described as to how the F.I.R. lodged earlier by the father of the victim was destroyed so also how the accused persons escaped from the police station. Therefore, there is no suspicious feature in the lodging of the F.I.R. by P.W.24. Delay in holding test identification parade:

12. The appellant no.1 Kulamani Mohakud was forwarded to Court after his arrest on 16.10.2005 and the appellant no.2 Bala @ Chittaranjan Hesa was forwarded to Court on 26.10.2005. The test identification parade was conducted by P.W.19 on 08.11.2005, which was twenty two days after the arrest of appellant no.1 and twelve days after the arrest of appellant no.2. It cannot be lost sight of the fact that before the rape was committed, the victim was threatened and intimidated by the appellants. She remained with the appellants for a considerable time. This is not a case where the victim had only a fleeting glimpse of the appellants on a dark night. The victim also had a reason to remember their faces as they had committed a heinous offence and put her to shame. She had, therefore, abundant opportunity to notice their features. In fact on account of her traumatic and tragic experience, the faces of // 34 // the appellants must have got imprinted in her memory and she is not likely to forget it so easily and there was no chance of her making a mistake about their identity.

In the case of Hasib (supra), the Hon'ble Supreme Court has held that the test identification parades, which belong to the investigation stage, serve to provide the authority with material to assure them if the investigation is proceeding on right lines and therefore, it is desirable to hold them at the earliest opportunity. A further reason is that an early opportunity to identify also tends to minimize the chances of the memory of the identifying witnesses fading away due to long lapse of time.

In the case of Mulla and others -Vrs.- State of Uttar Pradesh reported in (2010) 3 Supreme Court Cases 508 : (2010) 45 Orissa Criminal Reports (SC) 901, it is held that mere delay in investigation parade does not make the evidence of identification inadmissible, if the same was properly done after following due procedure of law. An identification parade ideally must be conducted as soon as possible to avoid any mistake on the part of witnesses and this condition can be revoked if proper

explanation justifying the delay is provided and the authorities must make sure that the delay does not result in // 35 // exposure of the accused which may lead to mistake on the part of the witnesses.

In the case of Pramod Mandal -Vrs.- State of Bihar reported in (2004) 13 Supreme Court Cases 150 : (2004) 29 Orissa Criminal Reports (SC) 501, it is held that it is neither possible nor prudent to lay down any invariable rule as to the period within which a test identification parade must be held, or a number of witnesses who must correctly identify the accused, to sustain his conviction. These matters must be left to the Courts of fact to decide in the facts and circumstances of each case. If a rule is laid down prescribing a period within which the test identification parade must be held, it would only benefit the professional criminals in whose cases the arrests are delayed as the police have no clear clue about their identity, they being the persons unknown to the victims. They therefore, have only to avoid their arrest for the prescribed period to avoid conviction. Similarly, there may be offences which by their very nature may be witnessed by a single witness, such as rape. The offender may be unknown to the victim and the case depends solely on the identification by the victim, who is otherwise found to be truthful and reliable. What justification can be pleaded to contend that such cases must necessarily result in acquittal // 36 // because of there being only one identifying witness? Prudence therefore demands that these matters must be left to the wisdom of the Courts of fact which must consider all aspects of the matter in the light of the evidence on record before pronouncing upon the acceptability or rejection of such identification.

In the case of Malkansingh -Vrs- State of Madhya Pradesh reported in (2003) 5 Supreme Court Cases 746, it is held that as a general rule, the substantive evidence of a witness is the statement made in Court. The evidence of mere identification of the accused person at the trial for the first time from its very nature is inherently of a weak character. The purpose of prior test identification, therefore, is to test and strengthen the trustworthiness of that evidence. It is accordingly considered a safe rule of prudence to generally look for corroboration of the sworn testimony of witnesses in Court as to the identity of the accused who are strangers to them, in the form of earlier identification proceedings. This rule of prudence, however, is subject to exceptions, when for example, the Court is impressed by a particular witness on whose testimony it can safely rely, without such or other corroboration.

// 37 // In the case of Raja -Vrs.- State reported in (2020) 15 Supreme Court Cases 562 : (2020) 77 Orissa Criminal Reports (SC) 621, it is held that the defence has not imputed any motive to the prosecution for the delay in holding the test identification parade, nor has the defence alleged that there was any irregularity in the holding of the test identification parade. The evidence of the Magistrates conducting the test identification parade as well as the investigating officer has remained unchallenged and therefore, it was held that in the facts and circumstances of this case the holding of the test identification parade about one month after the occurrence, is not fatal to the case of the prosecution.

In the factual scenario of this cases, I am of the humble view that the delay in holding test identification parade, if any, is no way fatal to the prosecution case particularly in view of abundant opportunity on the part of the victim to notice the features of the appellants on account of her

traumatic and tragic experience in the company of the appellants for a considerable period. By very nature of the offence, the close proximity with the offender would have certainly afforded sufficient time to imprint upon her mind the identity of the offender. Moreover, it cannot be lost sight of the fact that another witness (P.W.21), // 38 // who had also accompanied the victim on the date of occurrence but did not participate in the test identification parade has also stated that after seeing the Yatra, she along with the victim (P.W.20) and others were returning to their village by foot and on the way the driver of the Commander jeep i.e. appellant no.2 Bala @ Chittaranjan Hesa asked them to sit in the jeep with assurance to leave them in the village. She further stated that the appellant no.2 asked them to pay fare of Rs.5/- each to take them in the jeep to their village. She further stated that initially there were three persons present in the jeep and subsequently another person also boarded the jeep and on the way, those four persons forced them to get down from the jeep but they did not allow the victim to get down from the jeep.

Out of the two identifying witnesses, nothing has been brought on record that the victim (P.W.20) had any opportunity to see any of the appellants after the occurrence and prior to the test identification parade rather she denied the suggestion given by the learned defence counsel that the photographs of the accused persons were shown to her prior to test identification parade. So far as P.W.23 is concerned, she stated that she had gone to Raruan police station on the next Monday after the arrest of the appellant no.2 where she saw the // 39 // appellant no.2 but on the basis of such evidence of P.W.23, the evidence of identification of appellant no.2 in the test identification parade by the victim (P.W.20) cannot be discarded particularly when the said appellant has been identified by the victim in the Court also.

Earlier information about commission of crime not recorded:

13. Even though some information had come to P.W.25 regarding a group of women giving information relating to a driver of the Commander jeep and three others forcibly taking away a girl towards Fulcom chhak site but non-registration of such information as F.I.R. cannot be a ground to hold that the first information report has been suppressed.

In case of Sidhartha Vashisht @ Manu Sharma

-Vrs- State (NCT of Delhi) reported in (2010) 46 Orissa Criminal Reports (SC) 208, it has been held that the phone calls made immediately after an incident to the police constitutes an F.I.R. only when they are not vague and cryptic. Calls purely for the reason of getting the police to the scene of crime do not necessarily constitute the F.I.R.

In the present case, the phone call given by P.W.1 to P.W.3 and the information of the latter to P.W.25 were vague // 40 // and therefore, could not have been registered as the F.I.R. Therefore, I am of the humble view that non-registration of such information as F.I.R. or destruction of the first information report lodged by the father of the victim in the fire at the outpost are no ground to discard the prosecution case.

Conclusion:

14. In view of the foregoing discussions, I find that the evidence of the victim (P.W.20) is clear, cogent, trustworthy and above board and it gets corroboration from other witnesses and circumstantial evidence. There is no delay in the lodging of the first information report. The medical evidence also corroborates the evidence of the victim. The incriminating articles seized at the spot lend support to the victim's evidence and it strengthens the prosecution case. The two appellants have been identified in the test identification parade as well as in Court by the victim. Thus, I am of the humble view that there is no infirmity or illegality in the impugned judgment and the learned trial court has rightly found the appellants guilty under section 376(2)(g) of the Indian Penal Code.

Accordingly, the conviction of the appellants under section 376 (2)(g) of the Indian Penal Code and the sentence passed thereunder stands confirmed and upheld.

// 41 // The CRLA stands dismissed.

Before parting with the case, I would like to put on record my appreciation to Mr. Abhas Mohanty, 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).

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S.K. Sahoo, J.

Orissa High Court, Cuttack The 9th December 2021/PKSahoo/Pravakar/RKM