

**IN THE COURT OF THE ADDL.SESIONS JUDGE,
BHUBANESWAR**

Present:

Shri A.C. Behera, B.A.(Hons),LL.B.
Addl. Sessions Judge,
Bhubaneswar.

C.T.Case No.22/160 of 2014

(Arising out of G.R case No129 of 2014
corresponding to Balipatna P.S. Case
No.27/dtd.08.03.2014 committed by the learned
J.M.F.C(O), Bhubaneswar)

Dated, this the 5th day of December, 2014

The State of Odisha.Complainant.
-Vrs.-

1. Kalia @ Kalandi Swain,
aged about 26 years,
S/o-Hadubandhu Swain,
At-Biswalpada, P.S.-Balipatna,
Dist.-Khurda.
2. Lokanath Maharana @ Noka,
aged about 36 years,
S/o-Panu Maharana,
At-Biswalpada, P.S.-Balipatna,
Dist.-Khurda.

..... Accused persons

Counsel for the Prosecution : Sri P.K.Dash, Addl.P.P.

Counsel for the accused person : Sri B.K.Singh & his
associate Advocates.

Date of Argument :02.12.2014

Date of Judgment :05.12.2014

Offence U/s.365, 342 r/w. Sec.34, 376-D and 376(2)(k) of the I.P.C

J U D G M E N T

Both the accused persons have been charged U/s.365, 342 r/w. Sec.34, 376-D and 376(2)(k) of the I.P.C on the allegation of commission of gang rape after abducting the victim.

2. The case of the prosecution basing upon the story narrated in the F.I.R vide Ext.1 against the accused persons that, on dtd.07.03.2014 night at about 9 P.M while the informant was absent from his house at village Biswalpada under Balipatna Police Station, during that time, both the accused persons had taken away his deaf and dumb daughter i.e. victim (name not to be indicated) from his house to near the straw heap of Kailash Nayak of their village and when both the accused persons had made sexual intercourse with her (victim) there forcibly against her will after tying her hands and legs and after satisfaction of their sexual lust, they (accused persons) had fled away after leaving the victim there.

When, the family members of the victim did not find her in the house in that night, then they searched her here and there and during the course of their search, they found that, victim was lying on the straw heap of Kailash Nayak of their village with tying condition of her hands and legs and brought her from there to their house. But on asking about the incident to the victim, her family members came to know about the involvement of these accused persons with the said

incident and as it was late night, for which, on its next day i.e. on 07.03.2014 the informant and his wife i.e. the parents of the victim took her (victim) to the Balipatna Police Station with them and wherein, the father of the victim lodged a written F.I.R against the accused persons narrating the above alleged incident.

Basing upon such F.I.R vide Ext.1 the IIC Balipatna P.S registered Balipatna P.S.Case No.27/dtd.08.03.2014 U/s.365, 342, 376-D and 376(2)(k) of the I.P.C against the accused persons and he himself took up the investigation of the case.

3. During investigation, he (I.O.-Cum-IIC Balipatna P.S.) examined the informant (father of the victim), then victim through interpretation to the gestures and indications of the victim by her mother, as the victim was deaf and dumb and so also recorded the statement of the mother of the victim there at the P.S. Then he (I.O.) visited the spot on being identified by the informant, prepared the spot map and its report vide Ext.8, examined other witnesses, apprehended the accused persons from their village, seized the deaf and dumb certificate of the victim on production by her father through seizure list vide Ext.2, released the same in the zima of her father through zimanama vide Ext.3, sent the victim and the accused persons through separate requisitions with constables for their medical examination and accordingly the victim and the accused persons were medically examined. Then after return of the victim and accused persons from the hospital, he (I.O.) seized their wearing apparels through seizure list vide Exts. 7, 11 and 12 through separate seizure list on their production and then arrested the accused persons. He (I.O.) also seized the collected pubic hair and paper socked cemain of the accused persons

on production by the Havildar through seizure list vide Ext.13 and then forwarded the accused persons to the court. He (I.O.) also made prayer before the learned J.M.F.C.(O), BBSR for recording of the statement U/s.164 Cr.P.C of the victim and accordingly after acceptance of such prayer of the I.O. by the court, the statement of the victim U/s.164 of the Cr.P.C vide Ext.5 was recorded by the learned J.M.F.C.(O), BBSR through interpretation to her statement by the interpreter before the learned Magistrate and then he (I.O.) received the medical examination reports vide Exts. 6/3, 18 and 19 of the victim and the accused persons and thereafter he (I.O.) seized the School Admission Register of the victim from the Headmaster of Panchayat High School Purusandha through seizure list vide Ext.15 and released the same in the zima of that Headmaster through zimanama vide Ext.16. Thereafter, he (I.O.) dispatched the seized articles i.e. the seized wearing articles of the accused persons, the seized wearing apparels of the victim and the collected material objects by the doctor from the accused persons as per the order of the court through copy of the forwarding report vide Ext.17 to the S.F.S.L. Rasulgarh, Bhubaneswar for chemical examination and report. He also seized the two straw ropes on production by the father of the victim through seizure list vide Ext.4 and then after completing investigation, he (I.O.) submitted charge sheet on dtd.05.07.2014 U/s.365, 342, 376-D, 376(2)(k) of the I.P.C against the accused persons vide C.S.No.78.

4. Accordingly after commitment, both the accused persons are facing this sessions trial having been charged U/s.365, 342, r/w. Sec.34, 376-D and 376(2)(k) of the I.P.C on the allegation of committing gang rape on the daughter of the informant (i.e. victim) after abducting her from her house by wrongfully confining her at the spot.

5. The plea of the defence is one of complete denial and false implication of the accused persons. The specific plea/case of the defence, as it borne out from the statement of the accused persons U/s.313 of the Cr.P.C that, the accused persons were in no way connected with any offences alleged against them. But they have been implicated falsely at the instance of some of their villagers through the informant due to village party faction and political rivalry.

6. In order to substantiate the aforesaid charges against the accused persons, prosecution has examined altogether five nos of witnesses, but the defence has examined none on its behalf.

7. Out of the five witnesses of the prosecution, P.W.1 is the father of the victim-cum-informant. P.W.2 is the victim herself. P.W.3 is the mother of the victim. P.W.4 is the elder brother of the victim and P.W.5 is the I.O. himself, who had submitted charge sheet in this case after completing investigation.

8. Basing upon the story of the prosecution with above alleged criminal charges U/s.365, 342, r/w. Sec.34, Sec.376-D and 376(2)(k) of the I.P.C against the accused persons and the plea of the defence, the following sole point is required to be determined for just decision of the case and the said point is :

Whether, on dtd.07.03.2014 at about 9 P.M the accused persons had committed gang rape with the victim on the straw heap of Kailash Nayak of their village after kidnapping her (victim) from her house with tying her hands and legs by wrongfully confining there ?

9. The above sole point fixed for determination covering all the above points in which the accused persons have been charged with.

10. Out of all the witnesses of the prosecution, except the I.O. (P.W.5), other four witnesses i.e. P.Ws. 1 to 4 belong to one family and among them P.W.2 is the victim herself. P.Ws.1 and 3 are her parents and P.W.4 is her brother. In the above manner, P.Ws. 1, 3 and 4 are the own kin relatives of the victim (P.W.2).

11. This is a very peculiar nature of case, wherein all the aforesaid four witnesses of the prosecution i.e. P.Ws. 1 to 4 including the victim (P.W.2) herself have turned hostile to the prosecution and they have not at all supported to the story of the prosecution alleged against the accused persons in the F.I.R vide Ext.1 and as well as in the charge sheet made by the I.O. Though, the prosecution had tried to implicate the accused persons with the above alleged incident through the statement of the victim U/s.164 of the Cr.P.C vide Ext.5 recorded by the learned Magistrate during investigation, but the victim herself did not corroborate to aforesaid statements U/s.164 of the Cr.P.C vide Ext.5 in her evidence during trial.

The father of the victim i.e. informant has deposed in Para-6 of his evidence that, they have good relationship with the accused persons. They are his related nephews. He suspected about the involvement of the accused persons with the incident through the indications/signs of his daughter (victim). As per the signs/indications of victim through gestures, he along with his son (P.W.4) and his wife (P.W.2) discussed in their house and as per their discussions, they suspected about the involvement of these two accused persons with the

said incident and accordingly, he lodged the F.I.R, on the basis of their discussions. Now their family and the family of the accused persons are pulling well. He is not confirmed and sure, whether these two accused persons were involved with the alleged incident or not.

The mother of the victim i.e. P.W.3 has deposed in her evidence by stating that, they had implicated the accused persons in this case on suspicion. Till yet, the said suspicion in her mind is continuing. She had given statement before the police in a doubtful and suspicion manner against the accused persons. Accused persons are her relatives. They have visited terms to the house of the accused persons. Both the accused persons are married persons. She had not seen any injury on the body of her daughter (victim). Her wearing apparels were not turned. Victim had not stated anything to her implicating any of the accused persons with the said incident.

The brother of the victim i.e. P.W.4 has deposed in his evidence that, the victim had identified to the house of the accused persons, but she had not identified any of the accused persons personally. Both the accused persons are staying in their respective joint families having their adult male and female members.

When the victim (P.W.2) did not implicate the accused persons in her examination-in-chief by stating that, the accused persons standing in the dock are not connected with the said incident which was occurred in that night about eight months back, then she was declared hostile by the prosecution.

During cross-examination by the defence, the said victim has deposed that, she had implicated the accused persons with this case alleging allegations of rape on her at the instance of the some of their villagers, those are enmical disposed of with the accused persons due to some political rivalry and village party faction. She (victim, P.W.2) has further deposed in her cross-examination that, in fact, the accused persons have not done any sort of sexual activities with her in any manner at any point of time. She had not seen the accused persons on the date of incident and at the place of the incident. She knows both the accused persons since her childhood. The wife of accused Kalia is her friend. She has visiting term to his house till yet. The accused Loka is also her brother in distant relation. As the accused persons are in no way related with the said incident and she is confirmed about the same, for which the accused persons are not to be penalized in this case.

The I.O.(P.W.5) has deposed in his cross-examination that, he had not directed his investigation to obtain any writing from the victim regarding the participation and involvement of the accused persons with the alleged incident on her. He had not noticed any visible injury on the body of the victim during her presence at the Police Station before him. He had not noticed any mark of violence at the spot during his spot visit. His investigation does not reveal about any visible incriminating materials relating to the sexual activities on the seized wearing apparels of the accused persons and the victim. The accused persons are the residents of the same village of the victim. He had not directed his investigation to ascertain the relationship between the informant and the accused family members.

The medical examination report of the victim vide Ext.6/3 is going to show that, she (victim) is aged about 20 years more. The said medical examination report vide Ext.6/3 of the victim does not show any sort of sexual intercourse or penetration with her in any manner, but the same only shows tenderness with mild blood stained discharge without vaginal tear, which suggests there may be molestation.

12. In the above manner, all the aforesaid four witnesses of the prosecution starting from P.Ws.1 to 4 i.e. victim(P.W.2), her parents including informant i.e. P.W.1 and 3 and her elder brother (P.W.4) have given complete good-bye to the accused persons from the alleged incident. Because, the parents of the victim (P.W.s1 and 3) have specifically deposed in their evidence on oath in the court during trial as stated above that, they have implicated the accused persons on suspicion and with a doubtful manner.

It is the well settled proposition of law that, suspicion and conjectures have no place in criminal jurisprudence. In view of such principles of law, no person can be implicated in any doubtful evidence of the prosecution witness. For which, the evidence of the P.Ws. 1 and 3 have given clean-chit to the accused persons from the above alleged incident. In addition to that, the victim (P.W.2) has fully exonerated the accused persons from the alleged incident as stated above in her evidence in the court that, she has implicated the accused persons with this case alleging allegations of rape on her at the instance of their villagers those are enmically disposed of with the accused persons due to some political rivalry and village party faction and in fact the accused persons have not done any sort of sexual activities with her in any manner at any point of time and she had not seen the accused

persons on the date of incident including at the place of incident and the accused persons are in no way related with the said incident and she is confirmed about the same.

13. The above evidence of the P.Ws. 1 to 4 including the victim (P.W.2) are probalizing to the plea of the defence i.e. the false implication of the accused persons into the alleged incident at the instance of their some of the villagers, those were enmically disposed of with them due to some political rivalry and village party faction and the same is ultimately keeping them (accused persons) totally out from the alleged incident. The aforesaid evidence of the P.Ws. 1 to 4 on oath in the court during trial in support of their plea are fully probalizing to their plea regarding their false implication and the same is ultimately making the case of the prosecution doubtful.

The above propositions of law finds supports from the ratio of the following decision :-

1981 C.L.R.-Page-80- Ramanath Das Vrs. State of Orissa at Para-4.

Criminal Trial- Appreciation of defence version- When defence case finds support from the evidence of some of the prosecution witnesses, then plea of the accused persons shall be acceptable.

14. Here in this case at hand, when the witnesses of the prosecution as stated above including the victim have supported the plea of the defence i.e. the false implication of the accused persons at the instance of their some of the villagers, those are enmically disposed of with them due to village party faction and political rivalry, then in view of the propositions of law enunciated in the ratio of the decision referred to Supra has made their plea fully acceptable and the same has

ultimately made the case of the prosecution fully doubtful against them (accused persons).

15. In spite of none implication of the aforesaid witnesses i.e. P.Ws. 1 to 4 including the victim (P.W.2) to the accused persons with the above alleged incident during trial in their respective evidence, still then the learned Addl.P.P for state on behalf of the prosecution has argued to make the case of the prosecution acceptable against the accused persons as per the statements of the victim recorded during investigation U/s.164 of the Cr.P.C and the F.I.R of the informant vide Ext.1. The learned Addl.P.P for the state has argued to make the aforesaid statement U/s.164 of the Cr.P.C of the victim vide Ext.2 acceptable against the accused persons that, because the same was recorded on oath by the learned Judicial Magistrate. For which, the same can not be discarded out-rightly during trial and the same has some authentic value. As such, the same is required to be accepted and should be taken into account against the accused persons.

16. The aforesaid argument of the learned Addl.P.P for the state on behalf of the prosecution to rely upon the statement of the victim U/s.164 of the Cr.P.C vide Ext.5 solely during trial in absence of other evidence shall not at all be acceptable under law because it is the well settled propositions of law that, neither the F.I.R nor the statement of the victim recorded U/s.164 of the Cr.P.C like in this case at hand vide Ext.5 can not be said to be substantive pieces of evidence. The above propositions of law law finds support from the ratio of the following decisions :-

2014(4) Crimes- Calcutta- Page-108- Saidul Sk and another
Vrs. State of West Bengal.

Indian Penal Code, 1860- Sections 376/511/109- Attempt and abetment of rape-Tangible evidence- Neither F.I.R nor statement of victim recorded under Section 164 Cr.P.C can be said to be substantive pieces of evidence on the basis of which conviction may be founded- When victim had not deposed in court that appellants were the perpetrators of alleged offence then it was incorrect on part of Judge to rely on her statement recorded U/s.164 during investigation to come to a finding guilt of him against appellants- Finding of guilt is based on patently inadmissible evidence and is liable to be set aside- Judgment of conviction and sentence set aside and appellant acquitted.

2011(4) Crimes- Page-297 -Rajashtan- Devilal Vrs. State of Rajashtan.

Cr.P.C.1973 – Sec.164- Statement of witness recorded U/s.164 Cr.P.C is not a substantive evidence and conviction could not be based by relying on such statement.

17. As stated above, when the victim (P.W.2) herself, her parents (P.Ws. 1 and 3) and her brother have not at all deposed in their court in their evidence during trial implicating any of the accused persons with the alleged incident, rather, the evidence of the said P.Ws. 1 to 4 are totally keeping the accused persons out from the alleged incident, then in view of the propositions of law enunciated in the ratio of the decisions referred to Supra, neither the F.I.R vide Ext.1 nor the statements of the victim (P.W.2) U/s.164 of the Cr.P.C vide Ext.5 prepared during investigation can not and shall not help the prosecution to substantiate its case against the accused persons in any manner. For which, at this juncture, there is no other alternative for this trial court, but as per the analysis and discussions made above to hold

that, prosecution has not become able to establish in any manner against the accused persons that, they (accused persons) had committed gang rape on the victim (P.W.2) on dtd.03.07.2014 at about 9 P.M. on the straw heap of Kailash Nayak of their village after tying her hands and legs by confining her there.

18. On analysis of the facts and circumstances of the case, as per the discussions and observations made above, an irresistible conclusion is hereby drawn that, prosecution has not become able to establish any of the charges U/s. 365, 342, r/w. Sec.34, Sec.376-D and 376(2)(k) of the I.P.C against any of the accused persons beyond all reasonable doubt.

Therefore, I found the accused persons not guilty with any of the aforesaid charges U/s.365, 342, r/s. Sec.34, Sec.376-D and 376(2)(k) of the I.P.C. So, both the accused persons i.e. Kalia @ Kalandi Nayak and Loka @ Lokanath Moharana are acquitted U/s.235(I) of the Cr.P.C from the said charges U/s.365, 342, r/s. Sec.34, Sec.376-D and 376(2)(k) of the I.P.C on the ground of benefit of doubt. Accordingly, both the accused persons i.e. Kalia @ Kalandi Nayak and Loka @ Lokanath Moharana (those are present in the court today on being produced from the jail custody) are directed to be released from the jail custody forthwith, unless their detention is required in any other case.

The zimanamas vide Ext.3 and 16 be cancelled. The other seized articles beyond the above zimanamas be destroyed four months after the appeal period is over, if no appeal is preferred. But in case of an appeal, as per the direction of the Hon'ble Appellate Court.

Pronounced the judgment in open Court to day on this the 5th day of December, 2014 under my seal and signature.

Dictated & corrected by me

Addl. Sessions Judge,
Bhubaneswar.

Addl. Sessions Judge,
Bhubaneswar.

List of witnesses examined for the prosecution:

P.W.1	Babuli Charana Pradhan
P.W.2.	Kumari Babina Pradhan
P.W.3.	Smt. Sita Pradhan
P.W.4.	Krushna Chandra Pradhan
P.W.5.	Surendra Kumar Bala.

List of witnesses examined for the defence:

N i l

List of documents marked on behalf of prosecution:

Ext.1.	Written report
Ext.1/1.	Signature of P.W.1
Ext.2.	Seizure list
Ext.2/1.	Signature of P.W.1
Ext.3.	Zimanama
Ext.3/1.	Signature of P.W.1
Ext.4.	Seizure list.
Ext.4/1.	Signature of P.W.1
Ext.5.	Statement of P.W.2
Ext.5/1.	Signature of P.W.2.
Ext.6.	Signature of P.W.2
Ext.7.	Seizure list.
Ext.7/1.	Signature of P.W.2
Ext.6/1.	Signature of P.W.3

Ext.1/2.	Endorsement and signature of P.W.5
Ext.1/3.	Formal F.I.R.
Ext.1/4.	Signature of P.W.5
Ext.1/5.	Signature of informant
Ext.8.	Spot map
Ext.8/1.	Signature of P.W.5
Ext.6/2.	Requisition issued in favour of victim
Ext.9.	Requisition issued in favour of accd.Kalia
Ext.10.	Requisition issued in favour of accd.Loka
Ext.7/2.	Signature of P.W.5
Ext.11.	Seizure list.
Ext.11/1.	Signature of P.W.5
Ext.11/2.	Signature of accused kalandi Swain
Ext.12.	Seizure list.
Ext.12/1.	Signature of P.W.5
Ext.12/2.	Signature of accused Lokanath Maharana
Ext. 13.	Seizure list
Ext.13/1.	Signature of P.W.5
Ext.13/2.	Signature of Havildar Upendra Das
Ext.14.	Application of P.W.5
Ext.14/1.	Signature of P.W.5
Ext.5/2.	Endorsement of P.W.5 and certificate.
Ext.15.	Seizure list
Ext.15/1.	Signature of Headmaster Sudarsan Behera
Ext.16.	Zimanama
Ext.16/1.	Signature of P.W.5
Ext.16/2.	Signature of Headmaster Sudarsan Behera

- Ext.17. Copy of forwarding report to SFSL,BBSR
- Ext.17/1. Signature of P.W.5
- Ext.4/2. Signature of P.W.5
- Ext.3/2. Signature of P.W.5
- Ext.6/3. Medical examination report of the victim
- Ext.18. Medical requisition report of accused Kalandi Swain.
- Ext.19. Medical requisition report of accused Lokanath Maharana.

List of documents marked on behalf of defence:

N i l

List of M.O. on behalf of prosecution:

N i l

List of M.O. on behalf of defence:

Nil

Addl. Sessions Judge,
Bhubaneswar.

