

**IN THE HIGH COURT OF ORISSA, CUTTACK**

**JCRLA No.20 of 2021**

From judgment and sentence dated 09.03.2021 & 16.03.2021 passed by the learned Assistant Sessions Judge (S.T.C.), Deogarh S.T. Case No.63/05 of 2014.

-----  
Sanu Munda

.....

Appellant

-Versus-

State of Odisha

.....

Respondent

For Appellant:



Mr. Chandan Samantaray  
Advocate

For Respondent:

Mr. Manoranjan Mishra  
Addl. Standing Counsel

-----  
सत्यमेव जयते

P R E S E N T:

**THE HONOURABLE MR. JUSTICE S.K. SAHOO**

-----  
Date of Hearing and Judgment: 19.07.2023  
-----

**S.K. SAHOO, J.** The appellant Sanu Munda faced the trial in the Court of learned Assistant Sessions Judge (S.T.C.), Deogarh in S.T. Case No.63/05 of 2014 for commission of offence under section 376(2)(f) of the Indian Penal Code on the

accusation that on 16.03.2014 at about 8.00 p.m. in the jungle of village-Satakiari, being the brother-in-law (husband's younger brother) of the victim, he committed rape on her. The learned trial Court vide impugned judgment dated 09.03.2021 held the appellant guilty of the offence under section 376(2)(f) of the Indian Penal Code and vide order dated 16.03.2021 sentenced him to undergo rigorous imprisonment for ten years and to pay a fine of Rs.5,000/- (rupees five thousand), in default of payment of fine, to undergo rigorous imprisonment for one year more.

**Factual Background:**

The victim (P.W.4) lodged the first information report before the Inspector-in-charge, Reamal Police Station on 18.03.2014 stating therein that on 15.03.2014 during the evening hours, she had been to the village Satakiari to grind paddy, but the mill owner refused to grind the same as that was a Purnima Day. On such refusal, while the victim was returning back home at about 8 p.m. with her breast-feeding child, on the way, there was a jungle and while she was passing through that jungle, the appellant, who is her brother-in-law, committed rape on her. It is

further stated in the F.I.R that as she was late in returning to the house, her husband Sama Munda (P.W.9) came in search of her and noticed the incident. A meeting was convened in the village over this issue on 17.03.2014, but the appellant did not confess his guilt in the meeting.

As per the advice of the villagers, the written report was scribed by P.W.1 Pratap Biswal and presented in the police station. On such report, Reamal P.S. Case No.52 dated 18.03.2014 was registered under section 376(2)(f) of the Indian Penal Code against the appellant. The I.I.C., Reamal Police Station after registration of the case, entrusted P.W.15 (Smt. Santoshi Mohanta), S.I. of Police of the said police station to take up the investigation.

During course of investigation, P.W.15 examined the victim, issued requisition for her medical examination to the Medical Officer, Community Health Centre, Chhatabar and sent the victim along with a woman constable. The I.O. examined other witnesses, visited the spot, prepared the spot map and also seized the wearing apparels of the victim as per seizure list vide Ext.5. The appellant was arrested and his wearing apparels were also seized as per seizure list

vide Ext.7/2. Then the appellant was sent for medical examination on police requisition. The biological samples of the victim and of the appellant, collected by the respective Medical Officers, were seized by the I.O. Medical examination reports of the appellant and the victim were collected. The appellant was forwarded to the Court on 09.03.2014. The I.O. made a prayer before the learned S.D.J.M., Deogarh for sending the exhibits to R.F.S.L., Sambalpur. Accordingly, the same was done and on completion of investigation, charge sheet was submitted under section 376(2)(f) of the Indian Penal Code against the appellant.

**Prosecution & Defence Witnesses:**

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

P.W.1 Pratap Biswal is the scribe of the F.I.R. which was lodged by the victim. After scribing the same, he read over and explained the contents thereof to the victim.

P.W.2 Dusmanta Pradhan @ Dusha is the mill owner. He stated that on the fateful day, the victim had

come to his huller to grind paddy but by that time the operator had already left the mill. The victim requested him for grinding as she had no rice to eat. He gave her some rice from the mill and then the victim left the mill.

P.W.3 Benudhar Banichur is a co-villager. He stated that the husband of the victim had called a village meeting and in that meeting, the victim as well as the appellant were present. The husband of the victim stated in the meeting that on previous day during the evening time, while his wife (victim) was returning from a huller situated in village Satkiari, on the way the appellant committed rape on her and he witnessed the occurrence.

P.W.4 is the victim in this case. She stated that on the fateful day, she had been to village Satkiari to grind paddy in the huller of one Dusha and as the paddy could not be grinded, she left the paddy in the huller. Thereafter, when she was returning, the appellant restrained her on the way and forcefully committed rape on her.

P.W.5 Dr. Purna Chandra Pradhan is the Medical Officer of CHC, Chhatabar. He examined the appellant and found him to be capable of having sexual intercourse.

P.W.6 Siril Ekka was the Constable of Reamal Police Station. He had taken the appellant for medical examination.

P.W.7 and P.W.8 were working as Constables in the Reamal Police Station and they are the witnesses to the seizure as per the seizure list Ext. 3/1 and Ext. 4 respectively.

P.W.9 Sama Munda is the husband of the victim (P.W.4). He stated that on the relevant day, the victim had been to village Sundhinali for milling the paddy holding her breast-feeding child. After sunset, when the victim did not return, he went in search of her. On the way, he found the appellant was committing rape on the victim and the child was lying adjacent to the victim. Then he picked up the child and backed few steps and thereafter, the victim got up and dealt two slaps to the appellant.

P.W.10 Smt. Sunita Parida was the Constable of Reamal Police Station, who took the victim to CHC, Chhatabar for her medical examination.

P.W.11 Etua Badra is a relative of the informant and the victim who subsequently turned hostile. He deposed that after the death of the wife of the appellant, he kept a lady which was opposed to by both the victim and the informant. He further stated to have heard the informant threatening the appellant to leave that lady or else she would foist a false rape case on him.

P.W.12 Sidheswar Sahu was working as a Constable in the Reamal Police Station.

P.W.13 Bhikari Behera turned hostile and stated that he did not know anything about the case. He also deposed that he had put his signature on a blank paper at the instance of the police.

P.W.14 Dr. Arpita Santi Lakra was posted as the Medical Officer of CHC, Chhatabar who examined the victim. She deposed that the victim had no bodily injury on her person and there was no sign and symptom of any recent sexual intercourse.

P.W.15 Smt. Santoshi Mohanta is the Investigating Officer, who investigated the matter.

The prosecution exhibited ten numbers of documents. Ext.1 is the F.I.R., Ext.2 is the medical examination report, Ext.3/1 is the seizure list, Ext.4 is the seizure list, Ext.5 is the seizure list, Ext.6/1 is the medical examination report, Ext.7/2 is the seizure list, Ext.8 is the spot map, Ext.9 is the requisition to the learned S.D.J.M., Deogarh for sending of exhibits to RFSL, Sambalpur and Ext.10 is the chemical examination report.

The defence plea of the appellant is that he was a married person and after the death of his wife, he got another lady as concubine, who had two children which was opposed to by the victim and her husband and a false case has been foisted against him.

The defence examined four witnesses.

D.W.1 is the elder brother of the appellant. He stated that the appellant did not commit rape on the victim. He further stated that the victim did not discuss in the house before lodging the FIR and stated that no village meeting was held to discuss the incident in question.

D.W.2 is the sister-in-law of the victim.

D.W.3 is the co-villager who stated that after the death of first wife of the appellant, he brought a lady and kept her as mistress. Thereafter, the relationship between the appellant and informant got strained and the informant asked the appellant to desist from marrying for the second time so that her son would succeed to the property share of the appellant.

D.W.4 stated that there was a land dispute between the informant and the appellant. He further deposed that no meeting was held in the village to discuss the incident in question.

**Finding of the Trial Court:**

The learned trial Court, after assessing the oral and documentary evidence, has been pleased to hold that the evidence adduced by the victim (P.W.4) is quite akin to the narration made in the F.I.R. (Ext.1) lodged by her. It also held that the contradictions that appeared in the evidence of P.W.9, husband of the victim are minor and do not affect the overall testimony about the incident. It was further held that semen stain of blood group 'B' on the saya of the victim did not belong to the accused who has the

blood group of 'A<sup>+</sup>ve'. It was further held that the medical evidence and the R.F.S.L. report are not helpful to the case of the prosecution and the testimonies of the other witnesses, who are mostly post-occurrence witnesses, are not at par with that of P.W.4 and P.W.9 except to corroborate the incident.

The learned trial Court further held that delay in lodging the F.I.R. has been satisfactorily explained. It did not give any importance to the defence plea and observed that the evidence of the victim (P.W.4) has remained unassailed in so far as the allegation of rape on her by the appellant is concerned and the evidence of other witnesses also indicated that the appellant committed rape on the victim. Accordingly, the appellant was found guilty under section 376(2)(f) of the Indian Penal Code.

**Contentions of Parties:**

Mr. Chandan Samantaray, learned counsel for the appellant argued that the evidence of the victim indicates that she was a consenting party and after having been caught red-handed with the appellant in a compromising position in the jungle by her husband, who all

of a sudden arrived at the scene of the occurrence, the victim tried to put the entire blame upon the appellant to save her own skin for which she made false accusation against the appellant for commission of rape. Mr. Samantaray further argued that the conduct of the victim in not protesting to the act committed by the appellant, not raising any *hulla* to draw the attention of others and absence of any injury on her person substantiate the possibility of a consensual intercourse, which the learned trial Court has overlooked. He further submitted that even if a plea of consent in a rape case is not specifically taken, if the surrounding circumstances justify that there was consent of the victim, then the Court can take into account such aspect. The learned counsel for the appellant placed reliance on the decision of the Hon'ble Supreme Court in the case of **Santosh Prasad @ Santosh Kumar -Vrs.- The State of Bihar reported in (2020) 3 Supreme Court Cases 443** wherein it was held that there can be a conviction solely based on the evidence of the prosecutrix, however, the evidence must be reliable and trustworthy. Learned counsel for the appellant also placed reliance on

the decision of the Hon'ble Apex Court in the case of **Pratap Misra & others -Vrs.- State of Orissa reported in (1977) 3 Supreme Court Cases 41** wherein the Supreme Court has noted that the opinions of medical experts show that it is very difficult for any individual to single-handedly rape a grown up and an experienced woman without meeting stiffest possible resistance from her. In case of stiffest possible resistance from the victim, it is expected to have resulted injury over the penis or scrotum of the accused or abrasions over other parts of the body caused by the nails of the prosecutrix. It was further held that there was no reason as to why the prosecutrix would silently abide to have intercourse without putting up any resistance, particularly when she was a fully grown up lady and experienced in sexual intercourse. Learned Counsel urged that it is a fit case where benefit of doubt should be extended in favour of the appellant.

Mr. Manoranjan Mishra, learned counsel for the State, on the other hand, submitted that the learned trial Court has taken into account the provision under section 114-A of the Evidence Act, which provides that where the

sexual intercourse by an accused is proved and the question is whether it was without the consent of the woman alleged to have been raped and such woman states in her evidence before the Court that she did not consent, the Court shall presume that she did not consent. Mr. Mishra further submitted that in view of the evidence of the victim that there was no consent and the appellant committed forcible rape on her, this Court has to presume that the victim did not accord her consent. He further submitted that the victim has stated that though she raised hue and cry, none came as it was a jungle area. Therefore, it cannot be said that the victim did not protest to the heinous act committed by the appellant. Learned counsel for the State further argued that that the credibility and trustworthiness of the victim has not been shaken and she appears to be reliable and trustworthy. Therefore, without any further corroboration, the conviction of the appellant can be sustained on the sole testimony of the victim. To that effect, he relied on the decision of the Hon'ble Supreme Court in the case of **Phool Singh -Vrs.- The State of**

**Madhya Pradesh reported in (2022) 2 Supreme Court Cases 74.**

**Analysis of the Evidence:**

Section 376(2)(f) of the Indian Penal Code prescribes punishment for commission of rape on a woman by an accused, who is either relative, guardian or teacher or a person in a position of trust or authority towards that woman.

The victim being examined as P.W.4 has stated that the appellant is the younger brother of her husband. The husband of the victim, being examined as P.W.9, has stated that the appellant is his younger brother. In the statement recorded under section 313 of the Cr.P.C., the appellant was asked whether he is the younger brother of the husband of the victim to which he answers in affirmative. Therefore, the appellant being the brother-in-law of the victim comes within the category 'relative' as mentioned under section 376(2)(f) of the Indian Penal Code.

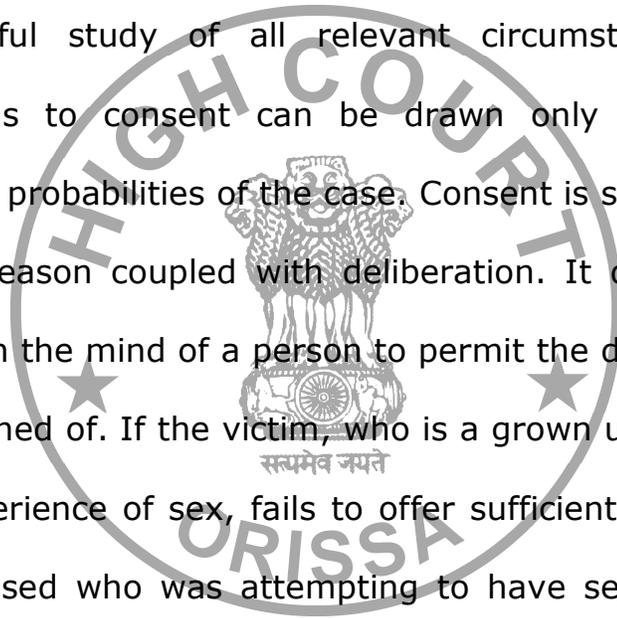
The victim (P.W.4) has categorically stated that while the incident in question was going on, her husband

(P.W.9) came there for which she gave a kick to the appellant and the appellant fled away from the spot. P.W.9, the husband of the victim has stated that the victim had been to the mill to grind paddy, holding her breast-feeding child. Even after the sunset, when she did not return, he went in search of her and on the way, he found that the appellant was committing rape on the victim and their child was lying adjacent to the victim. When he picked up the child, the victim dealt two slaps to the appellant. However, the husband of the victim has not stated to have heard any *hulla* raised by the victim at the spot.

The doctor (P.W.14), who medically examined the victim a day after the occurrence, stated that there was no bodily injury present on the victim and there was no sign and symptom of recent sexual intercourse and there was no evidence of bleeding injuries. She further stated that blood group of the victim was 'O<sup>+ve</sup>'.

This medical examination report of the victim indicates that she did not protest or resist to the act committed by the appellant. Being a married lady and accustomed to sexual intercourse, if the act was without her

consent, she could have protested or resisted and in that event, not only there would have been some injuries on the body of the appellant but also on her own body as well, since it was alleged to be a forcible intercourse. Therefore, it appears that there was no resistance or protest to the act of the appellant when the husband of the victim discovered both the appellant and her in a compromising position. 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 the mind of a person to permit the doing of the act complained of. If the victim, who is a grown up lady and having experience of sex, fails to offer sufficient resistance to the accused who was attempting to have sex with her single-handedly, the Court may find that there was no force or the said act was not against her will. Of course, a mere act of helpless resignation in the face of 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 consent, as envisaged in law. The evidence on record indicates that in order to save her own skin, the victim manipulated the occurrence as if the appellant was committing rape on her.

Another important aspect is that though the victim stated in her evidence that at the time of rape, her blouse got torn and bangles got broken but the seizure list of the wearing apparels of the victim marked as Ext.5 does not indicate that blouse of the victim was torn. Similarly the spot visit report indicates that no incriminating thing was found at the spot. Therefore, the evidence of the victim that there was protest from her side and the appellant committed sexual intercourse by tearing her blouse is not acceptable.

Further, the medical examination report of the victim proved by the doctor (P.W.14) indicates that the blood group of the victim is 'O<sup>+ve</sup>'. The medical examination report of the appellant proved by P.W.5, the doctor who examined the appellant, indicates that the blood group of the appellant is 'A<sup>+ve</sup>'. The wearing apparels of the victim as well as the appellant were sent for chemical examination

and the chemical examiner in his report vide Ext.10 indicates that human semen stain of group 'B' was found on the green colour saya of the victim. Therefore, the learned trial Court has rightly held in the impugned judgment that the human semen stain of group 'B' on the saya of the victim did not belong to the appellant.

The defence plea of the appellant is that after death of his wife, when he kept a concubine, who had two children, the same was resisted to by the victim (P.W.4) and her husband (P.W.9) and for that reason, a false case has been foisted. The victim herself has stated that prior to the date of occurrence, the wife of the appellant had died and thereafter, he had kept the wife of the brother-in-law of his brother. D.W.3 is the co-villager who stated that after the death of first wife of the appellant, he brought a lady and kept her as mistress whose husband was dead. Thereafter, the relationship between the appellant and informant got strained and the informant urged that the appellant should not marry for the second time so that her son (victim's son) would succeed to the share of the appellant.

Lastly, the presumption about want of consent under section 114-A of the Evidence Act is not conclusive. The presumption is rebuttable by contrary evidence. Even if a specific plea of consent of the victim is not taken by the accused, the Court can take into account the surrounding circumstances to arrive at a conclusion that the victim was a consenting party.

**Conclusion:**

In view of the forgoing discussions, when the medical examination report of the victim proved by P.W.14 suggests that there was no protest or resistance from the side of the victim to the act of the appellant and the manner in which the victim and the appellant were found inside the jungle by the husband of the victim, it is apparent that the victim was a consenting party. It seems that while the victim and the appellant were in a compromising position inside the jungle, where there was no one to see and object to the same, P.W.9 suddenly appeared in the scene of occurrence and thereafter, in order to save her own skin, the possibility of the victim kicking the appellant and bringing accusation of rape against him cannot be ruled out.

Since the victim was a consenting party, the conviction of the appellant under section 376(2)(f) of the Indian Penal Code is not sustainable in the eye of law.

Accordingly, the impugned judgment and order of conviction of the appellant passed by the learned Assistant Sessions Judge, Deogarh in S.T. Case No.63/05 of 2014 and the sentence passed thereunder are hereby set aside. The appellant is acquitted of the charge under section 376(2)(f) of the Indian Penal Code. The appellant, who is in judicial custody, be released forthwith if his detention is not required in any other case.

Before parting with the case, I would like to put on record my appreciation for Mr. Chandan Samantaray, learned counsel for the appellant for rendering his valuable help and assistance in arriving at the decision above mentioned.

The Jail Criminal Appeal is accordingly allowed.

.....  
**S.K. Sahoo, J.**

**Orissa High Court, Cuttack**  
The 19<sup>th</sup> July 2023/Amit