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LEGALFOXES LAW TIMES

JUDGEMENT ON CRIMINAL LAWS

By Supritha M A, Neha Rajesh and Nidhi J Shetty

IN THE HIGH COURT OF KALINGA

DECIDED ON: 10/10/2020

CRIMINAL APPEAL NO: 1/2020 &

CRIMINAL APPEAL NO: 2/2020

LALITHA NAIK .....APPELLANT

VERSUS

STATE OF KALINGA ……. RESPONDENT

C/w

HARIPRASAD ROUT ……...APPELLANT

VERSUS

STATE OF KALINGA ……..….RESPONDENT

AUTHOR: ABC (J)


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1. In appeal No. 1 of 2020, Lalitha Naik, mother of the victim has filed for an appeal under Sec. 372 of the Code of Criminal Procedure for the enhancement of sentence against the Impugned Order given by the Learned Sessions Judge.

2. Appeal No. 2 of 2020 has been filed by Hariprasad Rout, the accused, under Sec 386(b)(i) r/w 374(2) of the Code of Criminal Procedure against the Impugned Order delivered by the Learned Sessions Judge, for setting aside the order of conviction and for the suspension of execution of sentence on grounds of insufficient evidence to prove beyond reasonable doubt.

3. Since both the appeals are arising out of same impugned judgment passed by the Ld. Sessions Judge in CC no. 1/2020., both the appeals are taken up together u/s 219 of Cr.P.C for common disposal.

4. The victim, a minor, resides with her parents, Mrs. Lalita Naik and Mr. Prashant Naik in Bala–e–Shore district of Kalinga. The 10 year old belongs to the 'GOND' caste under ST category. Aggrieved by her family members she ran away from her home and came to Ekamra Kshetra by bus on 03.02.2020. She got down from the bus at Shantivihar at around 20:00 PM and while she was eating corn, the 17 year old accused, who belongs to 'KHANDAYAT' caste (general category), came to her and enquired about her identity and assured her that he would drop her at Central Bus Stand from where she can avail a bus to return home. Believing the words of the accused, the victim sat on his motorcycle but he took her to a Govt. High School Campus of Sastrinagar and undressed her and committed rape on her forcibly even after she warned him to not to commit such an illicit act.

5. The accused thereafter took her to Central Bus Stand, gave her food in a Dhaba and as there were no buses for her village, took her back to the said school and committed aggravated penetrative assault on her again. He also forced her to drink his urine and then left her alone on a road and fled away. Before fleeing away, the accused insulted

her by using derogatory words. At around 23:00 PM, the victim went to Mahila Police Station in Ekamra Kshetra and filed an F.I.R against the accused.

6. After proper investigation and following all due procedures the charge sheet arising out of Mahila Police Station Case No. 20 dtd. 03.02.2020 under Sections 363/ 366/ 366A/ 376(2)(j)(n)/ 376(3)/ 376AB of the Jambudvipian Penal Code, 1860 (hereinafter referred to as 'JPC') and under Sections 3 r/w 4/ 5(l)(m)(p) r/w 6 of the Protection of Children from Sexual Offences Act, 2012(hereinafter referred to as 'POCSO Act') and under Section 3(1)(a)(e)(r)/ 3(1)(w)(i)/ 3(2)(v) Scheduled Caste and Scheduled Tribe (Prevention of Atrocities)Act,1989(hereinafter referred to as 'SC & ST (PA) Act').and under Section 3 r/w 181 of the Motor Vehicles Act, 1988.

I.WHETHER THE CASE IS MAINTAINABLE BEFORE THE HON'BLE HIGH COURT OF KALINGA?

1. **WHETHER THE APPEAL MADE BY VICTIM'S MOTHER IS MAINTAINABLE BEFORE THIS HON'BLE COURT?**

7. The victim's mother, Lalitha Naik is representing her minor daughter before this Hon'ble court to increase the sentence awarded to the accused for the crimes committed by him against her daughter. The counsel for the prosecutrix asserted that the minor was raped twice by the accused for which he is to be punished for not less than 20 years under Section 376AB and not less than 10 years under Section 376(2)(j)(n) of JPC. In addition, under Sec.3 r/w 4/ 5(l)(m)(p) r/w 6 of POCSO Act the punishment for rape shall not be less than 10 years. Further the accused insulted the victim by using words like 'pallan', 'pallapayal', 'parayan' and 'paraparayan' and forced her to drink his urine which is an obnoxious substance under Sec. 3(1)(i) of SC & ST (PA) Act. Further, according to Sec. 3(2)(v) of the same Act rape of a woman belonging to Scheduled Tribe is punishable with an imprisonment of more

than 10 years under this Act. The accused is charged with all of the heinous crimes and none of it prescribes a punishment of imprisonment below 10 years. It is, hence, unjust to award him with a sentence of 7 years though he is being treated as an adult. On these grounds it was pleaded by the counsel that he should be awarded a sentence concurrent with the prescribed limits of the above Acts.

8. The appeal by the victim demanding extension of sentence is futile as it is not provided under the criterion mentioned in Sec 372 of the Cr.P.C. The Section states as under:

"372. No appeal to lie unless otherwise provided.—No appeal shall lie from any judgment or order of a Criminal Court except as provided for by this Code by any other law for the time being in force:
1[Provided that the victim shall have a right to prefer an appeal against any order passed by the Court acquitting the accused or convicted for a lesser offence or imposing inadequate compensation, and such appeal shall lie to the Court to which an appeal ordinarily lies against the order of conviction of such Court.]."

9. It has occurred to the court that the appeal made by the victim's mother under Sec 372 of the Cr.P.C is baseless because the section does not permit any Court to increase the sentence awarded to the accused on grounds of inadequacy. In order to substantiate more on this point, I would like to cite the case, *Parvinder Kansal v State of NCT of Delhi and anr.* [(2010),12 SCC 599],where Justice Ashok Bhushan and Justice R. Subhash Reddy while dismissing the appeal said, "Section 377, Cr.P.C gives the power to the State Government to prefer appeal for enhancement of sentence. While it is open for the State Government to prefer appeal for inadequate sentence under Section 377, Cr.P.C but similarly no appeal can be maintained by victim under section 372, Cr.P.C on the ground of inadequate sentence."

The appeal by the victim's mother is, thus, not maintainable before this Hon'ble Court.

2. WHETHER THE APPEAL MADE BY THE ACCUSED IS MAINTAINABLE BEFORE THIS HON'BLE COURT?

10. The defense has bought an appeal before the Hon'ble High Court of Kalinga against the impugned order passed by the Trial Court on the grounds that there was insufficient evidence on record to point to the guilt of the accused and for the suspension of execution of sentence so passed. The accused has approached this court in accordance with the provisions of Sec. 101(3) of Juvenile Justice(Care and Protection of children) Act, 2015(hereinafter referred to as JJ Act) r/w Sec. 374(2) and Sec386(b)(i) of Cr.P.C. For convenience, Sec. 101(5) of JJ Act is elaborated below:

    Sec. 101(5) of JJ Act- "Any person aggrieved by an order of the Children's Court may file an appeal before the High Court in accordance with the procedure specified in the Code of Criminal Procedure, 1973 (2 of 1974)."

11. As specified under Sec. 101(2) of the JJ Act, in case of unsatisfactory preliminary assessment, an appeal could be made before the Sessions Court. Instead of appealing in the initial stages, the accused is seeking relief before this Hon'ble High Court which indicates their ignorance and disregard towards the system and its procedures.

12. The court observes that the accused has an option to opt for an appeal before the High Court if he is dissatisfied with the decision of the Sessions Court under Sec.101(5) of JJ Act r/w Sec.374(2) and Sec386(b)(i) of Cr.P.C and hence his appeal is maintainable.

II.WHETHER THE CASE WAS MAINTAINABLE BEFORE THE SESSIONS COURT?

13. The counsel for the defense contended that the Sessions Court did not have the jurisdiction to try the case in the instant matter. The accused, aged 17 years, was charged under a list of Sections of the JPC, the POCSO Act, the SC & ST (PA) Act and the Motor Vehicles Act, 1988. On 05.02.2020, the Juvenile Board found accused to be well aware of the circumstance and consequences of his act and therefore, his case was committed to the Sessions Court finding him capax of committing the offence. The defense argued that the accused should have been tried before the Juvenile Justice Board since he was a minor and was not aware of the seriousness of his actions and repercussions. The accused did not compel the victim to accept his offer to drop her, rather the victim willfully agreed to accompany him.

14. The defense counsel alleged that the prosecutrix displayed desperate and reckless behavior as she ran away from her parent's home. In furtherance to the allegations, she availed lift from a stranger which is indicative of her impulsive and thoughtless behavior.

15. Further, the defense also argued that the Juvenile Board admitted the case on 5th of February, 2020 and the decision was made on the same day. It was submitted before the court that according to Sec 14(3) of the JJ Act, a preliminary assessment in case of heinous offences shall be disposed of by the Board within a period of three months from the date of first production of the child before the Board. As compared to the three month limit specified in the provision the one day time taken by the Board is preposterous.

16. With reference to Section 15(1) of the JJ Act which states the parameters to decide the capacity of the juvenile to commit the crime, the counsel emphasized that it is unconscionable how the Board could determine the physical and mental capacity of the child, with assistance from the assigned authorities, in a single day. Referring to

the case of *Durga v/s State Of Rajasthan* [(2019), CRL. Appeal No.27/2019] in which the court found that the juvenile in question was not properly assessed by the Board as it did not utilize the assistance of any psychologist nor associated any professional child psychologist during the process of assessment. The defense argued that such assistance was not provided for the accused and therefore it can be clearly stated that the Board has delivered a hasty decision without examining all the relevant facts and documents.

17. As opposed to the claim of the defense in the context of consensually accompanying the accused, it was argued that the accused had an ulterior motive behind him offering to provide lift. The accused deceitfully, as against his promise to drop her to the bus stand, took her to the Govt. High School Campus located at Sastrinagar and committed the alleged offence. Despite warning him about her social background as belonging to Schedule Tribe, the accused ignored her and committed rape. When the unavailability of buses to the girl's village came to the knowledge of the accused, he took advantage of the situation and raped her again in the same premises. Repetition of the act by him proves his mala fide intention. By doing so he has committed the offence of repeatedly raping the same woman incapable of giving her consent as stated under Sec 376(2)(j)(n) of the JPC. The accused was well aware of the fact that the girl was a minor and is therefore liable under Sec 376(3) of the JPC. He is also punishable for aggravated penetrative sexual assault on a minor, under Sections 3 r/w 4/ 5(l)(m)(p) r/w Sec 6 of the POCSO Act.

18. In response to the contentions made by the defense regarding the character of the victim, the counsel pointed out that the victim fled her home, aggrieved by her family. When she was offered assistance by the accused she agreed to go with him in confidence. He was in a in a position of trust and committed penetrative sexual assault on her. Being a 10 year old, she was vulnerable and naive to the outside world and could be easily deceived. The victim regarded the accused's offer to be genuine and readily accepted it without any forethought. The accused took the opportunity of the situation, deceived her and took her along with him with an intention to have

illicit intercourse with her. This makes him punishable for procuration of minor girl under Sec 366A of the JPC.

19. The counsel for the prosecutrix pleaded that the Juvenile Board was right in sending the accused to the Sessions Court as he was well aware of the circumstance and consequences of his actions. It was very evident from the facts that he was capable of understanding the situation and the outcome of his act. He initiated a conversation with the victim who was in a helpless state and collected all her information regarding her identity. He made use of the information which he procured and used the same to verbally abuse the victim with words such as 'pallan', 'pallapayal', 'parayan' and 'paraparayan'.

20. Citing the case of, *Arumugam Servai v State of Tamil Nadu,* [(2011), 6 SCC 40] it was held that calling a person `pallan', with an intention to insult a member of the Scheduled Caste, is an offence under SC & ST (PA) Act. Referring a person as `pallan' with an intention to insult a member of the Scheduled Caste is an offence under the Act.

1. WHETHER THE SESSIONS COURT HAD THE JURISDICTION TO TRY THE CASE?

21. The defense claimed that the said case should be heard before the Juvenile Board as the accused is a minor and has been categorised wrongly. The defense is of the opinion that the accused is incapable of grasping the consequences of his act owing to his young age. The accused wasn't given an adequate chance to represent himself and prove his innocence. The Board did not exercise the necessary procedures to a fair assessment and rather there existed a presumption of guilt and was, therefore, prejudiced. The counsel for the prosecutrix raised the contention that, since the matter was of grave importance there was a necessity to dismiss the assessment in order to deliver speedy relief to the aggrieved.

22. The court is disappointed that the Juvenile Board has not taken sufficient time to assess the accused and has speedily given the decision. However, the crime committed by the accused is heinous in nature. Hence, the board is not wrong in directing the matter to the Sessions Court. The Sessions Court, according to the notification of the Govt. of Kalinga, Home department, dated 09.10.2015, is the Children's Court which has jurisdiction to hear the matter.

2. WHETHER THE ACCUSED SHOULD BE TRIED AS AN ADULT?

23. The prosecutrix alleged that the accused enquired about her whereabouts. When he realized she belonged to a lower caste and him being in a higher position in the caste stratum, decided to assert his dominance by outraging her modesty. This is supported by the instances where the accused urinated on the victim and also hurled derogatory words which are indignant to a person belonging to a lower caste. He repeatedly raping her establishes that it was a calculated move made by him in full cognizance of his actions. The accused committed a heinous offence that includes the offences having a minimum punishment of 7 years imprisonment under any law in force at the given time, as given under the JJ Act. The various sections the accused is charged under, as stated earlier, are all offences punishable with imprisonment for a term beyond 7 years.

24. The procedure of trial of a child is mentioned under Sec 14(5)(f)(ii) of JJ Act. After preliminary assessment, by the Board under section 15 the Board passes an order that there is a need for trial of the said child as an adult and, the Board may order transfer of the trial to the Children's Court having jurisdiction to try such offences.

25. The defense enumerated that the accused did not possess any wicked intention of committing a crime. If he possessed any such intention then he would not have revealed his identity to the victim. This shows his child-like innocence. Further, Pradeep Kumar Kisan (P.W.13), the Manager of the Dhaba has identified the accused in the Test Identification Parade. This is proof that the accused took her to the Dhaba

and if she was distressed she could seek help from any bystander easily or flee away. However, she did not resort to any such means of escaping or availing help which shows that she was not threatened and rather felt safe with the accused.

26. The court upholds the Juvenile Board's decision to try the accused as an adult. The facts clearly determine that the accused was capable of understanding the situation. His altruistic gesture does not nullify or justify his ill actions towards the victim. It must be kept in mind that the victim is of a tender age and is in a position to get easily manipulated by the accused.

27. I would like to rely on the decision of *Virendra v State of U.P* [LQ 2002 HC 396] wherein the Court observed that "the act of rape shows depravity of mind. What is not decent or obscene is immoral. Rape cannot be treated to be an act which can be dubbed as a child's mistake committed during youth hood or adolescence. It is an act motivated with passion to ravish somebody's modesty". The Court further observed that "ends of justice" has not been defined under the Act but anything that militates against the justice would result in defeating the ends of justice. These days such crimes committed against minor girls are rampant".

28. The accused possesses the mental capacity of a grown individual as he deceitfully lured a minor and committed forced penetrative sexual assault on her. He was well aware of the caste system prevailing in the society and behaved in a manner to show his superiority. All of this indicates that he possesses the intellect of an adult and should be tried as one. Therefore, the accused rightly comes under the scope of Sec 18(3) of the JJ Act.

29. Looking into the facts and evidence presented, I have arrived at the conclusion that the Sessions Court, indeed, had the jurisdiction to try the matter. In the instant case the prescribed hierarchy of courts has been followed and therefore the accused was rightly tried in the Sessions Court.

III. WAS THE ACCUSED PROVED GUILTY BEYOND REASONABLE DOUBT?

30. The defense faced trial on a charge under Section 376 of the JPC. On evidence, learned Trial Judge concluded that the accused was guilty of committing the offence of rape. He proceeded to convict the accused and sentenced him for a term of 7 years as it was of the opinion that the prosecution has established his guilt on the basis of circumstantial evidence in the absence of any eye witness or direct evidence. The defense has filed an appeal before this Hon'ble court to set aside the order of conviction on the ground that the prosecution had not proved the case beyond all reasonable doubt. On the contrary, the prosecution has challenged before this court that the evidence produced on their behalf before the Trial Court was sufficient to prove him guilty of the offence without an iota of doubt.

1. WHETHER THERE WAS SUFFICIENT EVIDENCE TO PROVE THE GUILT OF ACCUSED?

31. To establish this, the prosecution has presented before the trial court several pieces of evidence consisting of circumstantial as well as documentary evidence and 18 witnesses. The statement given by the prosecutrix (P.W.1) in the F.I.R and as deposed before the Magistrate is identical. Similarly, the other witnesses presented, have stated the facts given by the victim along the same lines. The victim's mother, Lalitha Naik (P.W.2) has stated that her daughter has narrated every detail about the incident to her, WSI Gitanjali Misra (P.W.5) examined the victim, minor girl and recorded her statement, Mr. Ratikant Ho (P.W.3) & Mrs. Anjana Ho (P.W.4) have also narrated the incident before the Court as informed to them by the victim.

32. It is observed that there is no contradiction in any piece of fact narrated by the above witnesses whose source of information was the victim herself. The victim aged just 10 years has been firm on the facts that she has recited to all of the above mentioned people. For a child of such a small age to be definite about the occurrence of the events indicates the impression the incident has had in the mind of the child. It is quite impossible to falsely formulate such facts with so much precession and most importantly reiterate it with the same details.

33. The victim was at a corn stall at Shantivihar while the accused allegedly approached her. Mr. Sankalp Bhuiyan (P.W.14) the corn stall owner has identified the accused in the TI parade and has stated before the Court that the victim visited his stall. P.W.14 has also confirmed that the accused enquired about her whereabouts and they went away on the accused's bike. In addition, Mr.Tripathi (P.W.15), a fruit vendor at Shantivihar has stated before the Court that the victim came to his stall to recharge her mobile who also noticed the same. As stated by the prosecutrix in her statement that she was taken to a Dhaba by the accused, Mr. Pradeep Kumar Kisan (P.W.13), the manager of the Dhaba has confirmed it in his deposition that the accused had brought the victim along with him on 03.02.2020.

34. WSI Gitanjali Misra of Mahila Police Station (P.W.5) has revealed that she has visited the spot with the ACP Shri R.N. Choudhury where they found a pink stone from the victim's cloth and a necklace. This verifies that the said incident has taken place in the Govt. High School Campus of Sastrinagar. Two seizure witnesses namely, Rajnikanta Sabar (P.W.9) and Soumya Ranjan Mallick (P.W.10) were present during the spot investigation and have stated before the court that a necklace and one pink stone were seized from the spot i.e., Govt. High School and they have signed on the Seizure List after understanding the contents mentioned in it.

35. Dr. Renubala Dei, M.O., of Capital Hospital (P.W.17) who medically examined the victim, has affirmed based on the medical report that there were small abrasions on

the body of the victim and small abrasion on the fourchette. The medical examiner opined that there is physical sign and symptom of sexual intercourse.

36. Constable Sudhansu Barik at Mahila Police Station (P.W.16) took the accused for his medical examination and submitted all the records to the ACP. Dr. Dwarka Nath Satapathy, M.O, Capital Hospital (P.W.18) who examined the accused has stated before the court that there was no stain, discharge or bleeding on the body of the accused, no tear on prepuce, smegma and frenum, no discharge from meatus and no injury to the penis or scrotum etc. From the deposition made by the victim's medical examiner, the learned counsel for defense pointed out that the victim's vagina admitted two fingers firmly suggesting the absence of a recent penetration.

37. The ACP has seized the exhibits collected by the medical officer, like the pubic hair of the accused and victim, semen of accused and seized the caste certificates of victim, the motor cycle and its RC book and has sent the seized articles to SFSL for chemical examination.

38. The accused, whilst in the custody of the ACP, has confessed to the alleged crime committed by him. The said confession was witnessed by Trinath Sahoo (P.W.11) and Somnath Rout (P.W.12) .Though a vital part of the case, the accused's confession cannot be taken into consideration when indicting him as per the laws stated under Sec.25 and 26 of The Jambudvipian Evidence Act. According to the sections, no confessions made by a person in the custody of a police officer shall be used against him unless it is made in the immediate presence of a Magistrate. Article 20(3) of the Constitution of Jambudvipa gives the privilege of right to silence to accused. This is to ensure that the person in question is not coerced to confess a non-voluntary statement.

39. The Hon'ble Delhi High Court in the case of *Prem Singh vs. State (Govt. of NCT of Delhi)* [2011 IAD (DEL) 175] made following observations while dealing with circumstantial evidence-

"..... it is a well settled law that where there is no direct evidence against the accused and the prosecution rests its case on circumstantial evidence; the inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused. In other words, there must be a chain of evidence so complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability, the act must have been done by the accused. All the links in the chain of circumstances must be complete and should be proved through cogent evidence."

40. The prosecution is successful in establishing the chain of circumstantial evidence against the defense. I'm of the opinion that the prosecution has completed the chain of events as the statements made by the victim aligns with the evidence provided before the Learned Sessions Court and the guilt of the defense is proved beyond all reasonable doubt.

2. WHETHER TWO-FINGER TEST CAN BE USED AS A DETERMINANT OF RAPE?

41. The victim was taken to Capital Hospital for a medical examination and the two-finger test was conducted. The medical examiner, Dr Renubala Dei (P.W.17), in her evidence has deposed that there were small abrasions on the body of the victim and small abrasions on the fourchette. There was no fresh bleeding in the vagina, caruncula hymenalis was absent and it admitted two fingers very tightly. Further, she opined that there were physical signs & symptoms of sexual intercourse on the victim.

42. The counsel for the defense argued that, in this instance, the reports of the vaginal swab examination have not been presented before the Sessions Court. Thus there is, evidently, no conclusive evidence to prove that the offence of rape was committed by the accused.

43. The content of the medical examination disturbs the Court concerning the type of medical examination conducted on the victim. The court condemns the practice of two-finger test also known as the PV (Per Vaginal examination).The two-finger test conducted by the medical examiner is an intrusive physical examination which indignifies the victim. The test was originally practised to determine the laxity of vaginal muscles and whether the hymen has stretched due to sexual intercourse. During the examination if the victim's vagina easily accommodates the medical practitioner's fingers, it is presumed that the woman is sexually active and her hymen is not intact. In other words, it was used to substantiate whether the victim is a virgin or has a past sexual history.

44. The Department of Health Research (DHR) has also specified in the Guidelines and Protocols for the Medico-legal care for survivors/victims of sexual violence (2012) that the Two-Finger Test holds no validity and should not be practised to test the veracity of the victim's claims. The department has clearly instructed the doctors through Part-II of the guidelines that-

> "2. Per vaginum examination, commonly referred to by lay persons as 'two-finger test', must not be conducted for establishing an incident of sexual violence and no comment on the size of vaginal introitus, elasticity of the vagina or hymen or about past sexual experience or habituation to sexual intercourse should be made as it has no bearing on a case of sexual violence. No comment on shape, size, and/or elasticity of the anal opening or about previous sexual experience or habituation to anal intercourse should be made."

45. According to Sec. 164 (A) of the Cr.P.C, during the investigation of a rape victim it is proposed that the victim's consent or any such competent person to give consent on her behalf should be sent to the registered medical practitioner. Further, the model guidelines under Sec. 39 of POCSO Act mandatorily requires the parent/family to accompany the victim for such examination .The child and his/her family should be given information about the medical examination process and what is involved therein, so that they can choose whether or not to participate. Nothing in the facts discloses that the victim's parents were informed prior to the medical examination. The facts merely state that she was directly taken to the hospital for the examination right after filing the F.I.R. In addition to this, as pointed out previously by this court, the examiners have taken recourse to usage of the two finger test which is also against the guidelines prescribed under Sec. 39 of the POCSO Act which emphasizes on conducting the examination in the least disturbing and painless manner. The physical exam should not inflict trauma on the child.

46. It is appropriate at this point to quote Justice J.B. Pardiwala & Justice Bhargav Karia's opinion regarding the two-finger test in the case of *State of Gujarat vs. Rameshchandra Ramabhai Pancha* [Criminal Appeal No. 122 of 1996, 25 of 1996]

"The test itself is one of the most unscientific methods of examination used in the context of sexual assault and has no forensic value. Whether a survivor is habituated to sexual intercourse prior to the assault has absolutely no bearing on whether she consented when the rape occurred. Section 155 of the Jambudvipian Evidence Act, does not allow a rape victim's credibility to be compromised on the ground that she is "of generally immoral character."

47. Even during this era of scientific and technological advancement, the court refuses to understand why the medical practitioners, to this day, have to resort to such an obsolete method of examination of a rape victim which only causes further trauma and mental agony.

48. The two-finger test is not only intrusive and humiliating; it also violates the basic fundamental right guaranteed by the constitution. Using this unscientific method to determine the credibility of the victim's accusation infringes their right of dignity and privacy promised under Article 21 of the Constitution. The past sexual history is not a matter of concern to the court as the immediate problem to be addressed is whether the victim has undergone the traumatic experience of rape. A procedure which tampers with dignity and brings discomfort to the pride of the survivor shall not be entertained.

49. Considering International Covenant on Economic, Social, and Cultural Rights 1966; United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power 1985, assault survivors are qualified for legitimate plan of action that doesn't re-traumatize them or disregard their physical or mental trustworthiness and respect. They are likewise qualified for clinical systems led in a way that regards their entitlement to assent. Clinical techniques ought not to be completed in a way that establishes barbarous, cruel, or debasing treatment while managing sexual assault victims. The State is under a commitment to make such administrations accessible to overcomers of sexual viciousness.

50. In this context, I would like to draw attention to the landmark judgment delivered by the Hon'ble Supreme Court in the case of *Lilu alias Rajesh and Anr v. State of Haryana* [(2013) 14 SCC 643] wherein it was held that the two finger test and its interpretation violates the right of rape survivors to privacy, physical and mental integrity and dignity. Thus, this test, even if the report is affirmative, cannot ipso facto be given rise to presumption of consent."

51. Taking into account all the facts and precedents, I have arrived at a conclusion that the court will not entertain the inference arising out of the two-finger test as a valid evidence due to its questionable nature.

52. There cannot be any question to the fact that it is an instance of circumstantial proof as there was no observer to the event. It is a well established rule of law that an accused can be rebuffed on the possibility that he is seen as liable even in instances where circumstantial evidence is given. The indictment can demonstrate uncertainty of a chain of events and conditions which unquestionably centers towards the consideration and fault of the suspect. The accused won't be qualified for acquittal just in light of the fact that there is no observer for the situation. It is obvious that accused can be indicted based on proof subject to fulfillment of acknowledged standards in such manner.

53. *Rape is not just an offense against a woman, rather a wrongdoing against the whole society. It is an infringement of a basic human right under Article 21 of the Constitution. Along these lines, the matter should be managed with caution. Sexual brutality, aside from being a dehumanizing demonstration, is an unlawful interruption of protection and dignity of a lady. It is a genuine hit to her pre-eminent honor and insults her confidence and respect too. It debases and embarrasses the person in question and where the casualty is a powerless youngster or a minor, it leaves behind a horrendous encounter. An attacker causes physical wounds, yet scars the women's modesty, pride and honor for a lifetime.*

ORDER

i. Appeal No. 1/2020 made by the victim's mother under Sec 372 Cr.P.C stands dismissed before this court.

ii. Appeal No. 2/2020 made by the defense under Sec.101(3) JJ Act r/w Sec. 374(2) and Sec386(b)(i) of Cr.P.C is dismissed. The court finds the accused guilty of all charges and upholds the judgment made by the Learned Sessions Court of awarding 7 years imprisonment for committing the offense.

- ABC(J)

(HON'BLE JUDGE HIGH COURT OF KALINGA)

10/10/20