

# ORISSA HIGH COURT CUTTACK

## **CRIMINAL APPEAL NOS. 51, 61 AND 90 OF 2002**

From the judgment dated 22.07.2002 passed by Smt. V.Jayashree,  
A.S.J.-cum-C.J.M., Balasore, in Sessions Trial No.103/163 of 2000.

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### **IN CRLA NO.51 OF 2002:-**

Luna alias Chandra Sekhar Sahoo ..... Appellant

Versus

State of Orissa ..... Respondent

For Appellant : M/s B.Panda, N.K.Dash,  
M.R.Mohanty,  
R.R.Mohapatra and  
B.Mohanty

For Respondent : Addl. Standing Counsel

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### **IN CRLA NO.61 OF 2002:-**

Kuna alias Pitambar Das  
and another ..... Appellants

Versus

State of Orissa ..... Respondent

For Appellant : M/s Manas Chand,  
D.R.Parida, S.Khan,  
J.Rath & K.C.Baral

For Respondent : Addl. Standing Counsel

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### **IN CRLA NO.90 OF 2002:-**

Arun Mallik ..... Appellant

Versus

State of Orissa ..... Respondent

For Appellant : M/s S.P.Mishra,  
S.K.Mishra,  
S.Dash & S.Nanda

For Respondent : Addl. Standing Counsel

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**PRESENT :**

**THE HONOURABLE SHRI JUSTICE PRADIP MOHANTY**

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Date of judgment : 20.10.2006  
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**PRADIP MOHANTY, J.** These three appeals arise out of the judgment and order dated 22.07.2002 passed by the Assistant Sessions Judge-cum-Chief Judicial Magistrate, Balasore in S.T.Case No.103/163 of 2000 convicting the appellants under sections 395 and 376(g) IPC and sentencing them to undergo rigorous imprisonment for ten years and to pay a fine of Rs.5,000/-, in default to undergo rigorous imprisonment for six months, on each count; the sentences to run concurrently. Since all the appeals have been filed challenging the same order, they were heard together and are disposed of by this common judgment.

2. The case of the prosecution is that in the night of 04.07.1999 the informant and his family members, i.e., his wife, two daughters and one son, were sleeping in different rooms of their house. At about 11 p.m. to 12 p.m., some unknown persons by abusing him in filthy language knocked at his door. Out of fear, he opened the door and three persons being armed with deadly weapons like Bhujali, Lathi, etc., entered inside. One of them put Bhujali on his neck and another person tied his hands and asked him to give away the gold and cash by giving threats. Thereafter, the culprits removed Rs.1,500/-, which was kept below his pillow and also took away articles like gold chain, gold ring, torch light, wrist watch, etc., by opening the box. One of the accused persons entered inside the room of his son by scaling over the wall and opened the door. He also

opened door of the room where informant's wife and daughters were sleeping. The informant was also taken there and he found his wife and son being tied by the dacoits. He was also tied with a cycle by means of a napkin. After ransacking the rooms, three of the dacoits took their daughters outside forcibly showing Bhujali. At that time, two dacoits were guarding them and one was guarding outside. After 20 to 25 minutes, they brought back his daughters inside the room, locked the doors from outside and fled away. Information was lodged on 05.07.1999 at Khantapada Police Station. During investigation, it revealed that the culprits had committed gang rape on Basanti Mohanty and Malati Mohanty while committing dacoity. Police could apprehend one of the accused persons, namely, Arun Kumar Mallik, and basing upon his confessional statement they arrested all the accused persons and also recovered some stolen articles. Ultimately, charge sheet was submitted under Sections 395 and 376 (g), I.P.C against the appellants and one Babu.

3. The plea of the accused-appellants was complete denial of the allegations. It was further pleaded by them that nothing was seized from their possession. As regards identification, they stated that while they were in police custody, the witnesses had the occasion to see them.

4. In order to prove its case, the prosecution examined as many as 19 witnesses. P.Ws.1 and 4 are the two daughters of the informant and victims of the gang rape. P.W.5 is the wife of the informant. P.W.6 is the son of the informant and P.W.13 is the informant himself. These two witnesses were injured in course of the incident. P.Ws.9 and 19 are medical officers, who had examined the victims of rape, namely, Malati and Basanti. P.Ws.14 and 15 are the Judicial Magistrates First Class, who had conducted the T.I. parade in respect of the articles and suspects. Besides oral evidence, the prosecution has proved 23 exhibits including the F.I.R., T.I. parade report, seizure list, medical report, etc.. The appellants did not

choose to adduce any oral or documentary evidence. The learned Assistant Sessions Judge-cum-C.J.M., Balasore, who tried the case, on appreciation of the evidence and materials available on record, by her judgment dated 22.07.2002, while acquitting one Babu, a co-accused, convicted the appellants under Sections 395 and 376(g), I.P.C. and sentenced them to undergo imprisonment, as indicated earlier.

5. Counsel for the appellants contended that in the FIR, which was admittedly lodged by the father of the victims of rape, there was no allegation of rape. Subsequently, in their statement recorded under section 161 Cr.P.C., the victims alleged about the rape. The doctors, P.Ws.7, 8 and 11 have not supported the allegation of rape. He further contended that the T.I. parade was conducted one month after the occurrence, which is fatal to the prosecution. P.W.4 has stated in her evidence that she closed her eyes at the time of rape due to fear. As such, it might not have been possible on her part to see Ramakanta, who allegedly committed rape on her. P.W.4 also stated in her evidence that the culprits dragged her up to 500 meters and committed rape, but the doctor did not notice any injury. P.W.6, the brother of the victims also did not state anything regarding rape. He further contended that there was no specific mark of identification in the stolen articles and no recovery memo was prepared at the spot. There is also no corroboration by any witness regarding the identity of the stolen articles.

6. Mr. Pradhan, learned Addl. Standing Counsel vehemently contended that there were eye witnesses to the occurrence. The stolen articles were recovered from the possession of the appellants and the inmates of the house identified the accused persons in presence of the Judicial Magistrate. He further contended that P.Ws.1 and 4 have stated in their deposition regarding rape having been committed on them. Such statement is corroborated by medical evidence. Moreover, although P.Ws.1 and 4 have undergone

the rigors of lengthy cross-examination, nothing has been elicited from them to disbelieve their testimony. The evidence of P.Ws.1, 4, 5, 6, 9, 13, 15 and 19 are sufficient to establish the charge under Sections 395 and 376, IPC.

7. P.W.1 has vividly described the occurrence. She specifically stated in her examination-in-chief that it was accused Ramakanta (by identifying the accused) who lifted her younger sister to outside. Thereafter, accused Pitamber and Arun (both were identified by the witness) dragged her to outside. Accused Chandrasekhar dragged her saree and also torn her Shaya into pieces. Thereafter, Arun and Pitamber raped her one after another. Another person also attempted to commit rape on her but could not succeed, as she gave a tooth bite to his hand and left the place. She further stated that she saw accused Ramakanta committing rape on her younger sister. Since it was a moonlit night, she could be able to identify the culprits. From her cross-examination, nothing has been elicited to disbelieve the testimony of this witness. P.W.4, the younger sister of P.W.1, who is an ocular witness and a victim of rape, fully corroborated the evidence of P.W.1. She also stated in her examination-in-chief that Ramakanta made her flat and forcibly cohabited with her. She also saw two persons forcibly raping her sister Basanti. There is no reason to disbelieve the evidence of P.W.4. P.W.19, the doctor, who examined P.W.1-Basanti opined that the injuries in the vagina can be possible by forcible intercourse. She further stated in her cross-examination that the injuries found in the vagina could not be possible by forcible introduction of foreign object within vagina. The evidence of P.W.1 coupled with the evidence of P.Ws.4 and 19 proves the allegation of gang rape on P.W.1. Further, P.W.9, the doctor, who examined P.W.4, specifically stated that her hymen was ruptured with recent tears and there was recent sexual intercourse. Thus, there is ample corroboration to the evidence of P.W.4 regarding rape having been committed on her. Since it was a

moonlit night, it was possible on the part of the victims to identify the accused persons who committed rape on them. Moreover, at the time of commission of dacoity, they had the occasion to identify the accused persons in the light of Dibri. P.Ws.1 and 4 also identified the culprits in the T.I. parade and in the dock. In view of the above, it has been clearly established that Ramakanta had committed rape on P.W.4 and that Arun and Pitambar had committed gang rape on P.W.1, in which act Chandrasekhar was the abetter.

8. There is no dispute that in the night of 04/05.07.1999 some unknown culprits entered into the dwelling house of the informant and committed dacoity by showing deadly weapons. The stolen articles were recovered from the accused persons. The accused persons and the articles were identified in the T.I. parade. P.W.15 is the Judicial Magistrate, who conducted T.I. parade in respect of the suspects and P.W.14 is another Judicial Magistrate, who conducted T.I. parade in respect of the articles. There is no ambiguity in the evidence of P.Ws.14 and 15 who conducted the T.I. parade both in respect of the articles and suspects. P.Ws.1, 4, 5, 6 and 13 have stated about the dacoity in their house. All of them have implicated the accused persons in the crime. There is no reason to disbelieve the statement of these witnesses. Therefore, this Court is of the considered opinion that the allegation of commission of dacoity in the house of the informant by the accused-appellants has been proved beyond doubt.

9. A contention has been raised by the appellants with regard to non-disclosure of the factum of rape in the FIR. According to the learned counsel for the appellants, such non-disclosure is fatal to the prosecution. In this connection, it is worthwhile to mention that the two victims of rape are the grown up daughters of the informant. In the Indian tradition, it might not be possible on the part of the victims to disclose about the rape on them by the dacoits to their father immediately. Moreover, FIR is not the encyclopedia of the

entire case. It is not possible to disclose all the facts. But at the first opportunity of the investigation, both the victims alleged about the factum of rape and they were immediately sent to the Medical Officers for their examination. The Medical Officers have also opined about forcible intercourse having been committed on the victims. Therefore, it cannot be said that it is a development of the prosecution case. Moreover, in a society like ours, it is not expected of two young girls to make false allegation of rape on them touching their chastity and dignity. Therefore, this contention is not acceptable.

10. In view of the discussions made above, this Court entirely agrees with the order of conviction as recorded by the trial court. However, it is found that maximum sentence, as provided under section 395 IPC, i.e., R.I. for ten years, has been inflicted upon the appellants, which, in the opinion of this Court should be reduced to seven years, and this Court so directs. The fine imposed for the said offence is maintained. The sentence of imprisonment and fine, as awarded for the offence under section 376(g) IPC, is found to be adequate and is confirmed. The sentences shall run concurrently.

11. In the result, the appeals are dismissed subject to the modification of sentence, as indicated above.

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**PRADIP MOHANTY, J.**

Orissa High Court, Cuttack  
 October 20, 2006 / ***Samal***