ORISSA HIGH COURT,
CUTTACK

JAIL CRIMINAL APPEAL NOS. 33 AND 34 OF 2001

From an order dated 27.07.2000 passed by Shri M.C.Rath, Sessions Judge, Mayurbhanj, Baripada, in S.T. Case No.25 of 1998.

Thunguru Tudu (In J.Crl.A. 33/01)
Tumba Tudu (In J.Crl.A. 34/01) ..... Appellants

Versus

State of Orissa .... Respondent

For Appellant - Miss B.L.Tripathy
(In J.Crl.A. 33/01)
A N D
Mr. G.S. Pani
(In J.Crl.A. 34/01)

For Respondent - Mr. P.Pattnaik,
Addl. Government Advocate

PRESENT:-

THE HON'BLE MR. JUSTICE PRADIP MOHANTY

Date of hearing and judgment : 21.06.2006

PRADIP MOHANTY,J. These two appeals arise out of the judgment and order dated 27.07.2000 passed by the learned Sessions Judge, Mayurbhanj, Baripada, in S.T.Case No.25 of 1998 convicting the appellants under sections 450/376(2)(g) IPC and sentencing each of them to undergo rigorous imprisonment for ten years for commission of offence under Section 376(2)(g) IPC and one year for commission of offence under Section 450 IPC.

2. The case of the prosecution is that on 07.10.1997 in the evening, informant Smt. Chita Tudu had been to the house of Thakur Tudu, one of her co-villagers, to bring money. After some time, when she returned home, she found her daughter Balhi Tudu, the victim, absent. Her youngest son Gura Tudu disclosed before her that Balhi had been carried away. She searched for Balhi in the village but could not get any trace. After some time, Balhi returned home and disclosed before the informant that the accused persons, by putting cloth on her eyes and mouth, carried her away from home and committed rape on her. On 08.10.1997, there was a Punch in the village, but the matter could not be decided. On 09.10.1997, in the morning, again a meeting was held in the village. In that meeting, the accused persons confessed their guilt and they were fined by the villagers. That day, at about 5.00 P.M., the informant (P.W.1) went to Jashipur police station and orally reported the above facts before the O.I.C., who reduced her oral report to writing, registered a case and took up investigation. On completion of investigation, charge-sheet under sections 450/376(2)(g) IPC was submitted against the accused-appellants.

3. The defence plea is one of complete denial.

4. In order to prove the case, prosecution examined as many as nine witnesses. P.W.1 is the informant, P.W.2 is the victim, P.W.3 is the younger sister of the victim, P.W.4 is the doctor who conducted ossification test on the victim to determine her age, P.W.5 is a co-villager who turned hostile to the prosecution, P.W.6 is a seizure witness, P.W.7 is the I.O., P.W.8 is the doctor who examined the accused persons and P.W.9 is the doctor who examined the victim. The prosecution also proved seven documents and three M.Os. The defence did not choose to examine any witness. The learned Sessions Judge, Mayurbhanj, Baripada, who tried the case, on consideration of the evidence and materials available on record, came to the finding that the prosecution has established its case beyond all reasonable doubt. On such finding,

he convicted the accused-appellants under sections 450/376(2)(g) IPC and sentenced them as indicated above.

5. Learned counsel for the appellant in both the cases submit that the F.I.R. has been lodged three days after the occurrence and in absence of any plausible explanation, the prosecution case is shrouded in deep mystery. They also submit that as per the ossification test, the victim was above 15 years and below 17 years of age at the time of occurrence. Margin of error in age ascertained by ossification test being two years in either side, it can be said that the victim was more than 16 years of age and she was a consenting party to the sexual intercourse. They finally submit that P.Ws.1, 2 and 3 being relations, their evidence should not be believed.

6. Mr. Pattnaik, learned Additional Government Advocate, on the other hand, submits that there are ample materials against the appellants. He also submits that merely because P.Ws.1, 2 and 3 are close relations, that by itself is no ground to disbelieve their evidence. With regard to delay in lodging the F.I.R., he submits that the same has been sufficiently explained by the prosecution.

7. Let us go through the oral evidence of the prosecution witnesses. P.W.1 is the informant and the mother of the victim. She has supported the F.I.R. version. P.W.2, the victim, has stated that at the relevant time, when her younger sister (P.W.3) and younger brother were present in their house along with her, all the accused persons came there and carried her to a nearby tree by tying her mouth. Thereafter, they raped her one after another. As she raised hullah, the accused persons fled away from the spot. She came back and disclosed the incident to her mother. Thereafter, in the Punch held in the village, the accused persons confessed their guilt. P.W.3, the younger sister of the victim, has corroborated the evidence of P.W.2 to the effect that the

accused persons came to their house and carried P.W.2 by tying a cloth on her mouth and that some time thereafter P.W.2 returned and disclosed about rape having been committed by the accused persons on her. P.W.9, the doctor who examined P.W.2 on 09.10.1997, has stated that no stain or foreign material was found on the private part of the victim.

8. Though P.W.2 has been cross-examined by the defence, nothing has been elicited from her with regard to her consent, as submitted by the learned counsel for the appellants. Though P.W.9 has stated about absence of stains or any foreign materials on the private part of the victim, it has to be remembered that the victim was examined by her on the third day of the occurrence. During that time, she must have taken bath and washed her private part. Therefore, it is but natural that no stain or foreign material would be available.

9. Considering the facts and circumstances of the case, this Court is of the opinion that P.Ws.1, 2 and 3 are credible and trustworthy witnesses and their evidence cannot be brushed aside merely because they are close relations. The categorical statement of P.W.2, which finds ample corroboration from P.Ws.1 and 3, is that the accused persons carried her away from her house and committed rape on her one after another. There is no reason to disbelieve such statement. Through these witnesses, the prosecution has been able to bring home the charge to the accused-appellants beyond doubt. In this view of the matter, this Court does not find any infirmity in the impugned judgment warranting interference.

10. At this stage, both the learned counsel for the appellants submit that the appellants were arrested two days after the occurrence and since then they are languishing in jail custody. They also submit that the appellants are young boys and they belong to the tribal community. Therefore, they pray to take a

lenient view in the matter. Considering the aforesaid submission, this Court feels it proper to reduce the sentence of R.I. for ten years for the offence under section 376(2)(g) IPC to R.I. for eight years and to maintain the sentence imposed by the trial court for the offence under section 450 IPC; and directs accordingly. Both the sentences are to run concurrently.

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

.....
Pradip Mohanty, J.

Orissa High Court, Cuttack
The 21st June, 2006/ *Routray*