

**ORISSA HIGH COURT,  
CUTTACK**

**JAIL CRIMINAL APPEAL NO. 211 OF 2000**

From the judgment dated 12.05.2000 passed by Sri S.K. Mohapatra, Asst. Sessions Judge, Bhanjanagar in Sessions Case No.23 of 1999 (S.C. 205/99 GDC).

Bhaskar Swain	----- .....	Appellant
	Versus	
State	.....	Respondent

For appellant : Miss Deepali Mohapatra.

For respondent : Mr. Pattnaik,  
Addl. Government Advocate.

**PRESENT :**

**THE HONOURABLE SHRI JUSTICE PRADIP MOHANTY**

-----  
Date of hearing and judgment : 04.07.2007  
-----

**PRADIP MOHANTY, J.** This Jail Criminal Appeal is directed against the judgment and order of conviction passed by the Asst. Sessions Judge, Bhanjanagar in S.C. No.23 of 1999 corresponding to S.C.No.205/99 GDC.

2. The case of the prosecution is that the victim girl is the minor sister of the informant. She is afflicted by polio and being handicapped uses a crutch for walking. On 10.10.1998 at about 5.00 P.M. she went towards the back side of her house to attend the call of nature. When she did not return home till 7.00 P.M., the informant and his mother became apprehensive. They along with others searched for her, but in vain. At about mid-night, there was a knock on the door. When the door was

opened, the victim was found with blood soaked clothes and there were swelling injuries on her neck. On being asked, she disclosed that after attending the call of nature, when she was coming back, the accused-appellant met her and offered her ten rupees to have sexual intercourse. On her refusal, he put his palm on her mouth, carried her to a lonely place and raped her. He also threatened her not to shout and not to disclose the matter before anybody. Thereafter, he pressed the crutch of the victim on her neck, as a result of which she became unconscious. On regaining sense, she came back by crawling. F.I.R. was lodged by the informant before the O.I.C., Buguda police-station, who, after due investigation, submitted charge-sheet against the accused-appellant under sections 376/307/366/506 IPC.

3. The defence plea was one of complete denial and false implication.

4. In order to prove its case, prosecution examined as many as ten witnesses. P.W.1 is the victim, P.W.2 is the informant, P.W.3 is the mother of P.Ws.1 and 2, P.W.4 is the scribe of the F.I.R., P.Ws.5, 6 and 9 are co-villagers, P.W.7 is also a co-villager who did not support the prosecution, P.W.8 is the I.O. and P.W.10 is the doctor who examined the victim and the accused on police requisition. The defence did not prefer to examine any witness.

5. The learned Assistant Sessions Judge, Bhanjanager, who tried the case, by his judgment dated 12.05.2000 convicted the accused-appellant under sections 366/376/307/50-6 IPC. For the conviction under sections 366/376/307 IPC, he sentenced the appellant to undergo R.I. for ten years and pay a fine of Rs.3,000/-, in default to undergo S.I. for one year, on each count. The trial court also sentenced the appellant to undergo R.I. for two years for his conviction under section 506 IPC and directed the sentences to run concurrently. Against the said order of conviction and sentence, the appellant has approached this Court.

6. Miss Mohapatra, learned counsel for the appellant, submits that this is a case of sexual intercourse with the consent of the

victim and there is no material to convict the appellant under section 376 IPC. Moreover, the victim having gone with the accused on her own volition, no case is made out against the appellant under section 366 IPC. She further submits that there is no material on record to convict the appellant under sections 307 and 506 IPC.

7. Mr. Pattnaik, learned Additional Government Advocate vehemently contends that there is direct allegation the appellant. The victim being a polio afflicted girl was taking the help of crutches to walk. He further submits that the age of the victim at the relevant time was below 13 years. There is no reason to disbelieve the evidence of P.W.1, which is corroborated by the medical evidence of the doctor who examined her. According to Mr. Pattnaik, the trial court has rightly convicted the appellant under sections 376/366/307/506 IPC and there is no scope for interference with the same by this Court.

8 Perused the deposition of the witnesses. P.W.1 is the victim who elaborately stated about the occurrence. She stated that while she was coming back after attending the call of nature, the accused met her and offered her ten rupees for having sexual intercourse with her. When she refused to accept the same, the accused-appellant forcibly carried her. She tried to shout, but the accused put his palm on her mouth. He carried her under a mango tree and committed forcible rape. Thereafter, the accused-appellant put her crutch on her neck and pressed the same by standing on it. She further stated that she was aged 12 years at the time of occurrence. P.W.3 also stated the age of the victim to be 13 years at the time of her examination in Court, which corroborates the version of P.W.1. P.W.10 is the doctor who examined the victim girl and found that her labia majora and labia minora were not developed. Pubic hairs were matted with blood. Blood was coming out of the vagina. Dried blood stains were present on the medial aspect of the left thigh. She complained of pain and there was tenderness in her private part. P.W.10 also found a longitudinal 5 cm long perineal tear, which started from posterior forni and hymen going up to the anterior border of annus and the posterior commissure and forteache were

torn and the margins were red and inflamed. There were tears at 11, 3, 6 and 8 O'clock position and the margins of the tears including the perineal tear were oedemateous, red, inflamed. Fresh bleeding was occurring during the time of examination. He also found abrasions and scratches on the person of the victim girl. He specifically stated that the injuries to the private part of the victim were due to forceful penetration of an organ like adult penis into the vagina about 36 to 48 hours prior to her examination. P.W.10 also found an abrasion of the size 7 cm X 4 cm horizontally placed in front of the neck starting 2 cm above the sternal nuch and going up to the root of front of the neck. He opined that the injury could be possible by pressing a crutch on the neck. On radiological test, P.W.10 opined that the age of the victim was between 12 and 14 years. Though P.W.10 was cross-examined by the defence, nothing has been elicited from him to disbelieve his testimony. The evidence of P.Ws.3, 5 and 6 shows that the victim had disclosed the incident before her mother, brother and the villagers.

9. From the above discussion, it is clear that the prosecution has proved the case under sections 376/307 IPC beyond all reasonable doubt. However, there is no material on record to show that the victim was kidnapped from her lawful guardian. Nothing is also there on record to prove the ingredients of the offence under section 506 IPC against the accused-appellant.

10. For the foregoing discussions, the accused-appellant is found not guilty under sections 326/506 IPC. Therefore, the order of his conviction and sentence under those sections is set aside and he is acquitted of those charges. However, from the evidence of the victim girl, which has been corroborated by the medical evidence of the doctor, there is no doubt that the accused forcibly raped the victim and thereafter attempted to kill her by pressing the crutch against her neck. The acts committed by the accused-appellant falls within the ambit of sections 376/307 IPC and the trial court has rightly convicted him thereunder.

11. At this stage, Miss Mohapatra submits that since the date of occurrence, the accused-appellant is languishing in jail custody. The

period of his detention comes approximately to nine years. The accused-appellant is a young man of 30 years. She prays that the appellant may be dealt with leniently in the matter of sentence. Considering the facts and circumstances of the case and the submissions made, this Court, while maintaining the conviction of the appellant under sections 376/307 IPC feels that the period of imprisonment already undergone by him will meet the ends of justice.

12. In the result, this Jail Criminal Appeal is allowed in part. The conviction and sentence of the appellant under sections 366/506 IPC are set aside and he is acquitted of those charges. However, his conviction and sentence under sections 376/307 IPC are confirmed, but the sentence is reduced to the period of imprisonment already undergone. The fine imposed by the trial court is waved. The appellant be set at liberty forthwith if his detention in jail is not required in connection with any other case.

.....  
**PRADIP MOHANTY, J.**

Orissa High Court, Cuttack  
 July 04, 2007 / *Routray*