

**ORISSA HIGH COURT  
CUTTACK**

**JCRLA NO. 25 of 2004**

From the order dated 17.10.2003 passed by Smt. V. Jayashree, A.S.J.-  
cum-C.J.M., Balasore in S.T. No.102/169 of 2002.

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Hapan Baske alias Hansda  
and another

.....

Appellants

Versus

State

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Respondent

For petitioner : Mr. Sudarsan Behera

For opp. parties : Mr. Sarbeswar Behera,  
Addl. Government Advocate

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**PRESENT :**

**THE HONOURABLE MR. JUSTICE PRADIP MOHANTY**

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Date of hearing and judgment : 01.02.2007  
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**PRADIP MOHANTY, J.** This appeal is directed against the judgment and order dated 17.10.2003 passed by the Assistant Sessions Judge-cum-C.J.M., Balasore in S.T. No.102/169 of 2002 convicting the appellants under Section 376 (2)(g) I.P.C. and sentencing each of them to undergo R.I. for ten years and pay a fine of Rs.5,000/- in default to undergo R.I. for a period of six months.

2. The case of the prosecution is that on 22.04.2002 at about 5.30 P.M., the I.I.C., Town Police Station, Balasore received a written report submitted by one Smt. Salma Murmu, P.W.1, alleging therein that on 21.4.2002 at 10.00 P.M. while she was sitting on the verandah of her house, one young man came, dragged her by pulling her hand, forcibly

took her to a nearby field by gagging her mouth and forcibly had sexual intercourse with her against her will. At that time, four other accused persons, who were hiding nearby, came and also sexually violated her by committing rape. When Police Patrol party came, they fled away from the spot. On receipt of the report, a case was registered and investigation was taken up, on completion of which charge-sheet was submitted against the accused-appellants.

3. In order to prove its case, the prosecution examined as many as nine witnesses including the victim and the doctor and proved nine exhibits. The defence has examined none.

4. The plea of the appellants is complete denial of the allegations.

5. The learned Assistant Sessions Judge-cum-C.J.M., Balasore, who tried the case, by his judgment dated 17.10.2003 convicted and sentenced the appellants as mentioned earlier.

6. Mr. Behera, learned counsel for the appellants submits that the victim was aged about 25 years at the time of occurrence and had given full consent to have sex with her. So, the question of rape does not arise. He further submits that P.Ws.2 and 3 cannot be relied upon as they are highly interested witnesses and related to the prosecutrix (P.W.1). There are also material contradictions in their statements, which affects the credibility of the prosecution case.

7. Mr. Sarbeswar Behera, learned Additional Government Advocate vehemently contends that no illegality has been committed by the trial court in passing the impugned judgment. He also submits that the evidence of P.W.1-prosecutrix alone is sufficient to convict the appellants for the above charge. She is a trustworthy witness and there is no reason to disbelieve her evidence.

8. Perused the evidence of the prosecution witnesses. In the instant case, the victim lady, who has been examined as P.W.1, is the most vital witness. She had lodged the F.I.R. on 22.04.2002 at 5.30 P.M. before the I.I.C., Balasore Police Station. The F.I.R. was lodged after 24 hours of the occurrence. In the F.I.R., P.W.1 had not disclosed the names of

the culprits. She also stated in her evidence that the accused Hapana dragged her from her verandah. When she tried to raise hulla, he gagged her mouth, took her to a nearby field and committed rape. Thereafter, the other four persons including accused Ramdhan also committed rape on her one after another. Then, the police patrolling came and the accused persons fled away from the spot. In her cross-examination, she stated that her eldest child is aged about 10 to 12 years. She is a female child. P.W.8, the doctor, who examined the victim, stated that there was no external injury on her person. She also stated that there was no foreign substance or any injury found on her private part or anywhere on her person. She specifically stated that there was no matting of public hair and hymen was completely absent. In her cross-examination she has stated that if a lady is forcibly raped on a rough surface like paddy field, there is every possibility of external injury on her person. P.W.4, the doctor, who examined the appellants on police requisition, says that there is no signs or symptoms of recent sexual intercourse on their genital.

9. The admitted position is that the prosecutrix is a fully grown up lady and habituated to sexual intercourse. She is much experienced inasmuch as she has given birth to seven issues, out of whom three are living. It is difficult on the part of a person to rape single handedly a grown up and an experienced woman without meeting the stiffest possible resistance from her. In the instant case, according to the evidence of P.W.1-prosecutrix, accused Hapana dragged her from her verandah while she was cooking food. She raised hulla, but the said accused gagged her mouth, took her to the nearby field and committed rape on her without her consent. Indeed, if this be so, one would expect the stiffest possible resistance from her resulting in injury on the penis or scrotum of the accused or abrasions on other parts of his body caused by the nails of the prosecutrix. But though this accused was medically examined, no injury was found on his private part. This is rather an important circumstance, which negates the allegation of rape.

10. In the circumstances, the question is why the prosecutrix should have silently abided to have the intercourse with the accused without putting up any resistance except shouting, particularly when she was a fully grown up lady. Admittedly, the accused was single handed and was not armed with any weapon which might have silenced the prosecutrix. Moreover, she had not disclosed the name of the accused while lodging F.I.R. which was lodged 24 hours after the occurrence. Moreover, P.W.7, the I.O., admitted in his evidence that one Baidhar Murmu and Balak Soren have got their houses near the spot. But none of them has been examined by the prosecution. The I.O. has also stated that he had not found any mark of violence at the spot. It has been stated by the prosecutrix that when the police patrolling came, the accused persons fled away from the spot. But the prosecution has examined none of the police officers, who were performing patrol duty.

11. In view of the above, the ingredients of Section 376, I.P.C. have not been proved by the prosecution and the accused-appellants are entitled to an order of acquittal. Therefore, the impugned order of conviction passed by the Asst. Sessions Judge-cum-C.J.M., Baripada is set aside and the accused-appellants are acquitted of the charge. They be set at liberty forthwith, if their detention in connection with any other case is not required.

12. The JCRLA is allowed.

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**PRADIP MOHANTY, J.**

Orissa High Court, Cuttack  
 1<sup>st</sup> February, 2007/ *Routray*