THE HIGH COURT OF ORISSA : CUTTACK

No.XI-06/2024/**5557(30)** / Dated: **06.04.2024**

From

Suman Kumar Mishra,
Registrar (Judicial)

To

The District & Sessions Judge..... (All)

Sub: Judgment dated 28.03.2024 passed in JCRLA No.14 of 2021 (Dabu @ Santosh Kumar Munda Vrs. State of Odisha) and CRLA No.135 of 2021 (Mukuna @ Dhanu @ Dhanuram Kerei) regarding non-disclosure of identity of victim in sexual offence cases.

Sir,

I am to say that in paragraph 8 of judgment dated 28.03.2024 passed in JCRLA No.14 of 2021 (*Dabu @ Santosh Kumar Munda Vrs. State of Odisha)* and CRLA No.135 of 2021 *(Mukuna @ Dhanu @ Dhanuram Kerei)* the Hon'ble High Court of Orissa, with reference to the provisions contained in section 228-A of Indian Penal Code, 1860 and section 33(7) of POCSO Act, 2012, has been pleased to observe as follows:

> ***"In the deposition sheet of the victim of rape, the learned trial Court has recorded the name of the victim, which should not have been done. He/she should be mentioned as 'victim' therein. The signature of the victim in his/her deposition should not be taken on the deposition sheet but should be taken in a separate sheet by the learned trial Judge and the said sheet of paper with the signature and certificate of the Judge with date shall be kept in sealed cover. A noting should be given in the deposition sheet so also in the order sheet of that day regarding taking of signature of the victim in a separate sheet and keeping the same in sealed cover. The said procedure should also be followed while recording statement of the victim under section 164 of Cr.P.C. In the judgment, the name of the victim should never be mentioned by the Judge."***

As directed, a copy of the aforementioned judgment dated 28.03.2024 is communicated herewith for information and circulation of the same among all the Judicial Officers working in the respective judgeships for compliance of the observations made in Paragraph-8 of the judgment scrupulously.

Yours faithfully,

Registrar (Judicial)

Encl: As above

IN THE HIGH COURT OF ORISSA, CUTTACK

JCRLA No.14 of 2021

From the judgment and order dated 13.01.2021 passed by the Additional Sessions Judge -cum- Special Judge, Keonjhar in Special Case No.29 of 2017.

Dabu @ Santosh Kumar Munda ..... Appellant

-Versus-

State of Odisha ..... Respondent

For Appellant: - Mr. Bibhuti Ranjan Mohanty
Amicus Curiae

For Respondent: - Mr. Rajesh Tripathy
Addl. Standing Counsel

CRLA No.135 of 2021

Mukuna @ Dhanu @ Dhanuram Kerei ..... Appellant

-Versus-

State of Odisha ..... Respondent

For Appellant: - Mr. Satyajit Mukherjee

For Respondent: - Mr. Rajesh Tripathy
Addl. Standing Counsel

P R E S E N T:

THE HON'BLE MR. JUSTICE S.K. SAHOO

Date of Hearing and Judgment: 28.03.2024

S.K. SAHOO, J. The appellant Dabu @ Santosh Kumar Munda in JCRLA No.14 of 2021 and the appellant Mukuna @ Dhanu @ Dhanuram Kerei in CRLA No.135 of 2021 faced trial in the Court of learned Additional Sessions Judge -cum- Special Judge, Keonjhar in Special Case No.29 of 2017 for offences punishable under section 450/34 of the Indian Penal Code (hereinafter 'I.P.C.'), section 506/34 of the I.P.C., section 376-D of the I.P.C. and section 6 of the Protection of Children from Sexual Offences Act, 2012 (hereafter referred to as 'POCSO Act').

The learned trial Court vide impugned judgment and order dated 13.01.2021 found the appellants guilty of the offences charged and sentenced each of the appellants to undergo rigorous imprisonment for a period of twenty years each and to pay a fine of Rs.50,000/- (rupees fifty thousand) each, in default, to suffer further rigorous imprisonment for one year each for the offence under section 376-D of the I.P.C., rigorous imprisonment for a period of one year each and to pay a fine of Rs.1,000/- (rupees one thousand) each, in default, to suffer further rigorous imprisonment for one month each for the

offence under section 506 of the I.P.C. and rigorous imprisonment for a period of five years each and to pay a fine of Rs.5,000/- (rupees five thousand) each, in default, to suffer further rigorous imprisonment for six months each for the offence under section 450 of the I.P.C. However, no separate sentence was imposed for the offence under section 6 of the POCSO Act in view of section 42 of the POCSO Act and the sentences were directed to run concurrently.

Since both the appeals arise out of same judgment, with the consent of learned counsel for the respective parties, those are heard analogously and disposed of by this common judgment.

Prosecution Case:

2. The prosecution case as per the first information report (Ext.1) lodged by Laxmi Munda (P.W.1), the mother of the victim (P.W.2) before the Inspector in-charge of Keonjhar Sadar police station on 20.03.2017, in short, is that she had been to Belda market on 18.03.2017 to purchase cattle leaving her children in the house. The victim (P.W.2), who was aged about fourteen years along with the niece of P.W.1 namely Sambari Munda (P.W.4), aged about twelve years and the son of P.W.1 namely Sanjay Munda (P.W.3), aged about sixteen years were

present in the house. At about twelve midnight on 18/19.03.2017, the appellants entered inside the house of P.W.1 by breaking open the window by switching off the light and they gagged the mouth of the victim and forcibly took her to a distance place from her house and removed her clothes and committed gang rape on her. It is further stated that they tried to kill the victim by means of a stone but the victim ran away in order to save her life from the spot. P.W.1 returned home on 19.03.2017 at about 4.00 p.m. and came to know about the occurrence from the victim and accordingly, she narrated the incident before the grama rakhi of the village, namely, Sudarsan Munda (P.W.6), who scribed the written report and the signature of P.W.1 was obtained on the written report and it was presented before the Inspector in-charge, who registered Keonjhar Sadar P.S. Case No.98 dated 20.03.2017 under sections 450/376-D/506 of the I.P.C. and section 6 of the POCSO Act against both the appellants.

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P.W.10 Srikanta Sahoo, S.I. of Police attached to Sadar police station, Keonjhar was directed by the Inspector in-charge to take up investigation of the case. P.W.10 examined the informant, the victim, other witnesses, seized the wearing apparels of the victim on her production as per seizure list Ext.3.

The victim was sent for medical examination on police requisition and the appellants were arrested on 21.03.2017 and then they were sent for medical examination to C.H.C., Padampur. After medical examination, the biological materials of both the appellants were collected and on being produced by the Havildar, the same was seized by the Investigating Officer as per seizure list Ext.10. The wearing apparels of the appellants were seized and the statement of the victim was recorded under section 164 Cr.P.C. The Investigating Officer (P.W.10) visited the spot on 22.03.2017 and prepared the spot map (Ext.14). He also seized the school admission register of the U.P. School where the victim was prosecuting her studies as per the seizure list Ext.4 and released the same in the zima of the Headmaster as per zimanama (Ext.5). He received the medical examination reports of the victim so also the appellants. He made prayer to send the exhibits to S.F.S.L., Rasulgarh, Bhubaneswar for chemical examination and accordingly, exhibits were sent. On completion of investigation, the Investigating Officer submitted charge sheet against the appellants on 18.05.2017 under sections 450/376-D/376(2)(i)/506 of I.P.C. and section 6 of the POCSO Act.

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Charges:

3. After submission of charge sheet, the learned trial Court framed charges against the appellants on 16.03.2018 as aforesaid and since they refuted the charges, pleaded not guilty and claimed to be tried, the sessions trial procedure was resorted to prosecute them and establish their guilt.

Prosecution Witnesses, Documents Exhibited & Material Objects Proved by the Prosecution:

4. During course of the trial, in order to prove its case, the prosecution examined as many as ten witnesses.

P.W.1 Laxmi Munda is the mother of the victim and the informant in the case and she supported the prosecution case.

P.W.2 is the victim who supported the prosecution case. She disclosed about the incident to P.W.1 and P.W.3.

P.W.3 Sanjay Munda is the son of the informant and brother of the victim. He stated about the disclosure made by the victim about the rape committed by the appellants on her.

P.W.4 Sambari Munda is the niece of the informant. She did not support the prosecution case and she was declared hostile and was cross-examined by the prosecution.

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P.W.5 Sarat Chandra Sethy was the Headmaster of Hatikucha Nodal U.P. School where the victim was prosecuting her studies. He produced the school admission register which contained the date of admission and date of birth of the victim with other particulars.

P.W.6 Sudarsan Munda is the scribe of the F.I.R. (Ext.1).

P.W.7 Anama Charan Giri was the Homeguard attached to Sadar police station, Keonjhar, who is a witness to the seizure of School Admission Register as per seizure list Ext.4.

P.W.8 Dr. Sobhan Kumar Padhy was working as Medical Officer, C.H.C., Padampur, who medically examined the appellants on police requisition and proved his reports vide Ext.7 and Ext.8.

P.W.9 Dr. Sobhagya Mohanty was working as Medical Officer at D.H.H., Keonjhar who examined the victim on police requisition on 20.03.2017 and proved her report vide Ext.9.

P.W.10 Srikanta Sahoo was working as S.I. of Police attached Sadar police station, Keonjhar and he is the Investigating Officer of the case.

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The prosecution exhibited seventeen documents. Ext.1 is the F.I.R., Ext.2 is the 164 Cr.P.C. statement of victim, Exts.3, 4, 10, 11, 12 and 13 are the seizure lists, Ext.5 is the zimanama, Ext.6 is the copy of admission register, Ext.7 is the medical report of appellant Santosh Kumar Munda, Ext.8 is the medical report of appellant Dhanuram Kerei, Ext.9 is the medical report of the victim, Exts.14 and 15 are the spot maps, Ext.16 is the prayer for sending the exhibits to S.F.S.L., Bhubaneswar for Chemical Examination, Ext.17 is the copy of forwarding letter and Ext.C-1 is the Chemical Examination Report.

The prosecution also proved fifteen material objects. M.O.I is the red-black golden mixed colour torn chudidar of victim, M.O.II is the faded blue colour chadi of the victim, M.O.III is the red colour full T-shirt of the appellant Santosh Kumar Munda, M.O.IV is the red colour half T-shirt of appellant Santosh Kumar Munda, M.O.V is the black colour half pant of appellant Santosh Kumar Munda, M.O.VI is the blue and yellow colour track full pant, M.O.VII is the white-blue colour half T-shirt of appellant Dhanuram Kerei, M.O.VIII is the blue with red colour half pant of the appellant Dhanuram Kerei, M.O.IX is the black colour chadi of appellant Dhanuram Kerei, M.O.X is the sealed vial containing sample semen of appellant Santosh Kumar

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Munda, M.O.XI is the sealed vial containing sample pubic hair of appellant Santosh Kumar Munda, M.O.XII is the sealed vial containing sample semen of appellant Dhanuram Kerei, M.O.XIII is the sealed vial containing sample pubic hair of appellant Dhanuram Kerei, M.O.XIV is the sealed vial containing sample of vaginal swab of the victim and M.O.XV is the sealed vial containing sample pubic hair of the victim.

Defence Plea:

5. The defence plea of appellants is that the victim was found talking with two persons in an isolated place by the side of the village pond in the night, which was seen by D.W.3 Ramrai Munda and the appellant Mukuna @ Dhanu @ Dhanuram Kerei and on seeing them, when D.W.3 shouted, those two persons, who were talking with the victim fled away and since the victim was assaulted by D.W.3, a false case has been foisted against the appellants.

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Six witnesses were examined on behalf of the defence in support of the defence plea including both the appellants as D.W.5 and D.W.6.

Finding of the Trial Court:

6. The learned trial Court after analyzing the oral and documentary evidence on record and on a conjoint reading of the

entry in school admission register, ossification test report and versions of the teacher and the doctor found the victim to be below eighteen years of age as on the date of occurrence. The learned trial Court accepted the evidence of the victim and held that there is consistency in the F.I.R. story, 164 Cr.P.C. statement of the victim and the testimony of the victim relating to forcible sexual intercourse on her and that she was subjected to gang rape is amply corroborated by medical evidence and that the testimony of the victim has not been demolished in any way. The learned trial Court disbelieved the defence plea and taking into account the presumption prescribed under section 29 of the POCSO Act came to hold that the prosecution has successfully established the charge under section 6 of the POCSO Act. It was further held that the prosecution has also successfully established the ingredients of the offences punishable under sections 376-D/506/450 of the I.P.C. against the appellants and accordingly found them guilty.

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Contentions of the Parties:

7. On 13.09.2023, when the matter was taken up for hearing, the previously engaged counsel Mr. Susanta Kumar Rout was not present to argue JCRLA No.14 of 2021, for which Mr. Bibhuti Ranjan Mohanty was engaged as Amicus Curiae for

the appellant Dabu @ Santosh Kumar Munda and a copy of the paper book was supplied to him for preparation.

Mr. Bibhuti Ranjan Mohanty, learned Amicus Curiae appearing for the appellant Dabu @ Santosh Kumar Munda (in JCRLA No.14 of 2021) and Mr. Satyajit Mukherjee, learned counsel for the appellant Mukuna @ Dhanu @ Dhanuram Karei (in CRLA No.135 of 2021) contended that the learned trial Court was not justified in coming to the conclusion that the victim was minor as on the date of occurrence. Though the school admission register of the victim was proved but there is no material as to on what basis the date of birth was entered into in the school admission register, moreover from the evidence of the mother of the victim, who was examined as P.W.1, it appears that the victim was more than eighteen years as on the date of occurrence. Learned counsel further argued that the victim's statement that the appellants entered into the room through the window which was of the dimension 1 feet X 1 feet appears to be an improbable story and moreover, the I.O. has not seized the broken window and therefore, the access to the room where the victim was sleeping in the occurrence night by the appellants is a doubtful feature. Learned counsel further submitted that it is the prosecution case that at the time of occurrence, the victim (P.W.2) was sleeping with her cousin sister (P.W.4) in the same

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room, but P.W.4 has not supported the prosecution case. Even though it is the victim's evidence that both the appellants committed sexual intercourse on her one after another for which there was bleeding from her private part, but the doctor (P.W.9) has not noticed any external injury over the body of the victim and therefore, the prosecution case that the victim was subjected to gang rape becomes suspicious and as such, it is a fit case where benefit of doubt should be extended in favour of the appellants.

Mr. Rajesh Tripathy, learned Additional Standing Counsel appearing for the State of Odisha, on the other hand, supported the impugned judgment and contended that the victim's evidence has remained unchallenged and the victim has disclosed about the occurrence not only before her mother (P.W.1) but also before her brother (P.W.3) and both of them have supported the prosecution case. Learned counsel further argued that the defence plea has not been taken in the 313 Cr.P.C. statements of the appellants and if it is the case of the defence that it was D.W.3 who noticed two persons were talking with the victim in an isolated place in the night, for which he shouted and also assaulted the victim then it is not understood as to why D.W.3 was left out by the victim being implicated as an accused in the case. Learned counsel further argued that the

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victim's evidence regarding commission of rape on her is getting corroboration from the medical evidence adduced by P.W.9, who noticed tears in the hymen at 3, 6 and 12 O' clock position and the hymen was found bleeding on touch and it was congested, redness and tenderness were present and the doctor opined that the findings suggested that there was recent sexual intercourse and the doctor clarified in the cross-examination that recent sexual intercourse means there was intercourse within seven days. Learned counsel further argued that both the appellants were examined by the doctor who stated that they were capable of committing sexual intercourse and the possibility of recent sexual intercourse cannot be ruled out. Learned counsel further submitted that in view of school admission register entry so also the ossification test report, the learned trial Court has rightly come to the conclusion that the victim was minor as on the date of occurrence. Learned counsel further submitted that when the occurrence took place in the intervening night of 18/19.03.2017, the mother of the victim i.e. P.W.1 was not present in the house and she returned back on the next day and came to know about the occurrence and thereafter F.I.R. was drafted and accordingly it was lodged on 20.03.2017 and as such there was no delay in the lodging of F.I.R. and therefore, the conviction of the appellants by the learned trial Court is quite justified.

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8. At the outset, before dealing with the contentions of the respective parties, it is felt necessary to point out a very disturbing feature on record that in spite of repeated pronouncement of judgments by the Hon'ble Supreme Court on section 228-A of the I.P.C. and in view of the provision under section 33(7) of the POCSO Act, not to disclose the identity of the child at any time during course of investigation or trial, the name of the victim is mentioned in the deposition sheet.

In the case of **State of Punjab -Vs.- Ramdev Singh reported in (2004) 1 Supreme Court Cases 421**, the Hon'ble Supreme Court has made the following observations:-

> "3.... Section 228-A Indian Penal Code makes disclosure of identity of the victim of certain offences punishable. Printing or publishing name or any matter which may make known the identity of any person against whom an offence under sections 376, 376-A, 376-B, 376-C or 376-D is alleged or is found to have been committed can be punished. True it is the restriction does not relate to printing or publication of judgment by the High Court or the Supreme Court, but keeping in view the social object of preventing social victimization or ostracism of the victim of a sexual offence for which section 228-A has been enacted, it would be appropriate that in the judgments, be it of

this Court High Court or lower courts, the name of the victim should not be indicated. We have chosen to describe her as "victim" in the judgment."

In the case of **Sangitaben Shaileshbhai Datanta -Vs.- State of Gujarat reported in (2019) 14 Supreme Court Cases 522**, it is held as follows:-

"10. The concern of the legislature in protecting the identity of the victim is further evident from the provisions of POCSO Act. Section 33(7) of the same casts a duty on the Special Court to ensure that identity of the victim is not disclosed at any time during the course of investigation or trial. Further, Section 23 of POCSO Act provides restriction on any form of media to disclose the identity of the victim which tends to lower her reputation or infringes upon her privacy. No disclosure of any particular(s) is allowed which can eventually lead to disclosure of the identity of the victim."

In the case of **Nipun Saxena and Another -Vrs.- Union of India and Others reported in (2019) 2 Supreme Court Cases 703**, the Hon'ble Supreme Court observed as follows:-

"9. Sub-section (1) of Section 228A, provides that any person who makes known the name and identity of a person who is an alleged victim

of an offence falling Under Sections 376, 376A, 376AB, 376B, 376C, 376D, 376DA, 376DB or 376E commits a criminal offence and shall be punishable for a term which may extend to two years.

10. What is however, permitted under sub-section (2) of Section 228-A Indian Penal Code is making known the identity of the victim by printing or publication under certain circumstances described therein. Any person, who publishes any matter in relation to the proceedings before a Court with respect to such an offence, without the permission of the Court, commits an offence. The Explanation however provides that printing or publication of the judgment of the High Courts or the Supreme Court will not amount to any offence within the meaning of the Indian Penal Code.

11. Neither the Indian Penal Code nor the Code of Criminal Procedure define the phrase 'identity of any person'. Section 228A Indian Penal Code clearly prohibits the printing or publishing "the name or any matter which may make known the identity of the person". It is obvious that not only the publication of the name of the victim is prohibited but also the disclosure of any other matter which may make known the identity of such victim. We are clearly of the view that the phrase "matter which may make known the

identity of the person" does not solely mean that only the name of the victim should not be disclosed but it also means that the identity of the victim should not be discernible from any matter published in the media. The intention of the law makers was that the victim of such offences should not be identifiable so that they do not face any hostile discrimination or harassment in the future.

12. A victim of rape will face hostile discrimination and social ostracisation in society. Such victim will find it difficult to get a job, will find it difficult to get married and will also find it difficult to get integrated in society like a normal human being. Our criminal jurisprudence does not provide for an adequate witness protection programme and, therefore, the need is much greater to protect the victim and hide her identity. In this regard, we may make reference to some ways and means where the identity is disclosed without naming the victim. In one case, which made the headlines recently, though the name of the victim was not given, it was stated that she had topped the State Board Examination and the name of the State was given. It would not require rocket science to find out and establish her identity. In another instance, footage is shown on the electronic media where the face of the victim is blurred but the faces of her relatives, her neighbours, the

name of the village etc. is clearly visible. This also amounts to disclosing the identity of the victim. We, therefore, hold that no person can print or publish the name of the victim or disclose any facts which can lead to the victim being identified and which should make her identity known to the public at large.

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The Hon'ble Supreme Court finally issued the following direction:

"50.1. No person can print or publish in print, electronic, social media, etc. the name of the victim or even in a remote manner disclose any facts which can lead to the victim being identified and which should make her identity known to the public at large."

In the deposition sheet of the victim of rape, the learned trial Court has recorded the name of the victim, which should not have been done. He/she should be mentioned as 'victim' therein. The signature of the victim in his/her deposition should not be taken on the deposition sheet but should be taken in a separate sheet by the learned trial Judge and the said sheet of paper with the signature and certificate of the Judge with date shall be kept in sealed cover. A noting should be given in the deposition sheet so also in the order sheet of that day regarding taking of signature of the victim in a separate sheet and keeping

the same in sealed cover. The said procedure should also be followed while recording statement of the victim under section 164 of Cr.P.C. In the judgment, the name of the victim should never be mentioned by the Judge.

Evidence of the victim and corroborating evidence:

9. In case of this nature, the evidence of the victim (P.W.2) is most material and law is well settled that a prosecutrix complaining of having been a victim of the offence of rape is not an accomplice and there is no rule of law that her testimony cannot be acted upon without corroboration in material particulars. She stands on a higher pedestal than an injured witness.

P.W.2 has stated that on the occurrence night, she along with her cousin sister (P.W.4) were sleeping in one room and her brother (P.W.3) was sleeping in another room. She further stated that the appellant Dhanu entered inside the room after breaking railings of the window and switched off the light and then the appellant Dhanu gagged her mouth and both the appellants lifted her and took her to outside of her house by unbolting the entrance door and then they removed her wearing apparels and they also became naked and then they committed sexual intercourse on her one after another. She further stated that due to sexual intercourse, blood was oozing out from her

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private part and the appellants threatened her to take away her life for which out of fear, she rushed to her house holding her wearing apparels. She further stated that her sister (P.W.4) unbolted the door and she went inside the house and narrated the incident before her sister and that her mother (P.W.1) returned home on the next day at about 4.00 p.m. and she also narrated the incident before her. In the cross-examination, the victim has stated that the appellant Dhanu was her uncle as per village courtesy and appellant Santosh was her maternal uncle as per village courtesy. She further stated that the appellants entered into the room through window and the height of the said window was about six feet from the ground level and the dimension of the window was 1 feet X 1 feet. She further stated that she had no knowledge about the breaking of the window and when she got up, she found light was off and the appellant Santosh switched off the light. She denied the suggestion given by the learned defence counsel that she had got illicit relationship with some other persons and while the accused persons caught them red handed, she and her family members have foisted a false case against the appellants. Nothing has been brought out in the cross-examination of the victim to disbelieve her evidence.

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The evidence of victim has not been corroborated by P.W.4, who has not supported the prosecution case and declared hostile by the prosecution.

P.W.3 Sanjaya Munda, the brother of the victim has stated that on the occurrence night, the victim knocked the door and when it was unbolted, the victim was found to be holding her undergarments with her hands and upper dress was torn and the victim disclosed that the appellants had committed sexual intercourse on her forcibly one after another and at that time, his mother (P.W.1) was absent. P.W.3 has specifically stated that they did not take any step to lodge F.I.R. at police station and waited for the arrival of his mother, who returned on the Sunday evening and they narrated the incident before his mother, who went to the police station with Grama Rakhi of their village and thereafter the matter was reported at the police station. Nothing has been brought out in the cross-examination of P.W.3 to disbelieve his evidence.

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The mother of the victim being examined as P.W.1 has stated that after her arrival in the house on 19.03.2017 at about 4.00 p.m., the victim and P.W.4 disclosed before her about the occurrence. She further stated that she narrated the incident before the Grama Rakhi and they went to Keonjhar Sadar police

station and the F.I.R. was scribed by the Grama Rakhi as per her version and then it was lodged.

The disclosure made by the victim (P.W.2) first before P.W.3 and then before P.W.1 is very much relevant and it is admissible as res gestae under section 6 of the Evidence Act. Law is well settled that to be relevant under section 6 of the Evidence Act, such statement must have been made contemporaneously with the fact in issue, or at least immediately thereupon and in conjunction therewith. If there is an interval between the fact in issue and the fact sought to be proved then such statement cannot come within 'res gestae' concept.

After the F.I.R. was lodged on 20.03.2017, the victim was sent for medical examination and P.W.9, the Medical Officer at District Headquarters Hospital, Keonjhar examined the victim on 20.03.2017 and found that hymen had tears at 3, 6 and 12 O' clock position and it was bleeding on touch and the hymen was congested, redness and tenderness were present. The doctor further stated that the ossification test report of the victim indicated that she was fourteen to sixteen years at the time of his examination and the findings suggested that there was recent sexual intercourse on the victim. He proved the ossification report marked as Ext.9/2 and his own report marked as Ext.9. In the cross-examination, the doctor has stated that recent sexual

intercourse means there was intercourse within seven days and he could not say the exact time of sexual intercourse and that he had given the ossification report basing on x-ray report. Therefore, the evidence of the victim regarding commission of rape is getting corroboration not only from the oral evidence of P.W.1 and P.W.3 but also from the medical evidence.

The appellants were sent for medical examination and P.W.8 examined them on 21.03.2017 and both the appellants were found to be capable of sexual intercourse and the doctor opined that the possibility of sexual intercourse cannot be ruled out. The reports have been marked as Ext.7 and Ext.8 respectively.

Delay in lodging of F.I.R.:

10. As rightly pointed out by the learned counsel for the State that delay in lodging of the F.I.R. has been successfully explained by the prosecution inasmuch as the occurrence took place in the midnight of 18/19.03.2017. The victim along with her cousin sister (P.W.4) and brother (P.W.3) were only present in the house. The mother of the victim was not present in the house at that time and therefore, everybody waited for the arrival of the mother (P.W.1) and after P.W.1 returned on the next day in the afternoon, she came to know about the

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occurrence and the F.I.R. was drafted and then lodged before the police station.

In view of the nature of accusation and since in case of this nature, the family members used to take time to decide whether to lodge the F.I.R. and proceed with the case or not and therefore delay in such cases does not necessarily indicate that the F.I.R. was tainted or it was deliberate or intentional to falsely implicate the appellants in the commission of crime and therefore, I am of the view of the prosecution has successfully explained the delay, if any, in lodging the F.I.R.

Age of the victim:

11. So far as age of the victim is concerned, the victim being examined as P.W.2 has stated that she could not correctly say about her age. The Court assessed her age to be sixteen years and mentioned in deposition sheet. The ossification test report which has been proved by the doctor (P.W.9) indicated that the age of the victim was fourteen to sixteen years at the time of examination. The Headmaster of the school where the victim was prosecuting her study being examined as P.W.5 has stated that during course of investigation, the police seized the school admission register and the relevant entry so far as the date of birth of the victim is concerned was at page no.80 and it was mentioned to be 15.05.2001. Since the occurrence took

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place on 18.03.2017 night, therefore, the conjoint reading of school admission register and the ossification test report indicate that the victim was minor as on the date of occurrence. No doubt mother of the victim being examined as P.W.1 has stated that her marriage was solemnized twenty two years back and her son was her eldest child and he was born one year after her marriage and after her eldest child was aged about two years, the victim was born and that she could not say the date of birth of the victim, but in view of the school admission register coupled with ossification test report, I am of the humble view that the findings of the learned trial Court that the victim was minor as on the date of occurrence is quite justified.

Analysis of defence plea:

12. Coming to the defence plea of the appellants, in the 313 Cr.P.C. statements of both the appellants, no such specific plea has been taken rather the plea was of complete denial and false implication. However, six witnesses were examined on behalf of the defence. The defence plea cannot be based on surmises and speculation though the burden can be discharged by showing preponderance of probabilities in favour of the plea either by adducing positive evidence or by reference to circumstances transpiring from the prosecution evidence itself.

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D.W.3 Ramrai Munda, who is the elder brother of the appellant Dabu @ Santosh Kumar Munda has stated that he had been to the pond side of the village at about 8.00 p.m. to 9.00 p.m. and found the victim was talking with two persons and when he shouted, those two persons fled away and he along with the appellant Dabu @ Santosh Kumar Munda assaulted the victim by giving slaps and at that time, the other appellant was also present. He further stated that he disclosed about the incident to the informant. However, the informant (P.W.1) has not stated about any such disclosure being made by D.W.3.

The appellant Mukuna @ Dhanu @ Dhanuram Kerei being examined as P.W.6 has stated that he along with D.W.3 had been to pond where they found the victim was engaged in a compromising condition with two persons and seeing them, those persons fled away for which they abused the victim and assaulted her by giving slaps. D.W.6 has not stated about the presence of appellant Dabu @ Santosh Kumar Munda at the spot. Similarly, D.W.3 has stated that the victim was talking with two persons whereas D.W.6 has stated that the victim was in a compromising condition with those two persons. If D.W.3 marked the victim in the company of two persons, shouted and assaulted the victim and also informed the informant (P.W.1), it

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is not understood as to why the victim left him being implicated in the case. In view of these discrepancies, the learned trial Court has rightly not placed any reliance on the defence plea.

Conclusion:

13. Law is well settled that if the evidence of the victim in a case of rape appears to be clear, trustworthy and above board, the conviction can be sustained on the sole testimony of the victim. In this case, the evidence of the victim has remained unchallenged and it clearly points out the complicity of both the appellants in the commission of gage rape on her. The evidence of victim's mother (P.W.1) and brother (P.W.3) corroborates the evidence of the victim before whom the victim has made disclosure about commission of rape on her by the appellants and moreover, the medical evidence also corroborates about the commission of rape on the victim.

In view of the foregoing discussion, I find that both the appellants not only committed trespass into the house of the victim in the midnight but also committed gang rape on her and committed the act of criminal intimidation. The learned trial Court has rightly found the appellants guilty under the offences charged and the sentence imposed for the offence under section 376-D of the I.P.C. i.e. for twenty years is the minimum

punishment prescribed for such offence and the sentence awarded for the other offences i.e. sections 506 and 450 of the I.P.C. is quite justified. Accordingly, the conviction of the appellants and sentence awarded by the learned trial Court is upheld.

In the result, both the Jail Criminal Appeal and the Criminal Appeal being devoid of merits, stand dismissed.

Lower Court Records with a copy of this judgment be sent down to the learned trial Court forthwith for information and necessary action.

The Registry shall place the judgment before Hon'ble the Chief Justice seeking permission to circulate the copies of this judgment to all the District Judges for onward circulation amongst the Judicial Officers under his judgeship for complying the observations made in paragraph 8 of the judgment.

Before parting with the case, I would like to put on record my appreciation to Mr. Bibhuti Ranjan Mohanty, the learned Amicus Curiae in JCRLA No.14 of 2021 for rendering his valuable help and assistance towards arriving at the decision above mentioned. The learned Amicus Curiae shall be entitled to his professional fees which is fixed at Rs.7,500/- (rupees seven thousand five hundred only). This Court also appreciates the

valuable help and assistance provided by Mr. Satyajit Mukherjee and Mr. Rajesh Tripathy, learned Additional Standing Counsel.

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S.K. Sahoo, J.

Orissa High Court, Cuttack
The 28th March 2024/RKMishra/Sipun

