

**A.F.R.**

**IN THE HIGH COURT OF ORISSA AT CUTTACK**  
**CRLA No.681 of 2016**

(An appeal U/S.374 of the Code of Criminal Procedure, 1973 against the judgment passed by Sri. Sashikanta Mishra, Special Judge, Keonjhar in Special Case No.114 of 2014 corresponding to GR Case No. 765 of 2014 arising out of Joda PS Case No.188 of 2014 of the Court of learned JMFC, Badbil)

***Upendra Munda and others ... Appellants***

***-versus-***

***State of Odisha ... Respondent***

***For Appellant : Mr. P. Jena, Advocate  
(for Appellant No.1)  
Mr. C.R. Sahu, Advocate  
(for Appellant Nos.2 & 3)***  
***For Respondent : Mr. P.K. Mohanty, ASC***

**CORAM:**

**HON'BLE MR. JUSTICE D. DASH**  
**HON'BLE MR. JUSTICE G. SATAPATHY**

**DATE OF HEARING :06.12.2023**

**DATE OF JUDGMENT:08.01.2024**

**G. Satapathy, J.**

**1.** Grieved by their conviction in the impugned judgment passed on 10.11.2016 by the learned Sessions Judge, Keonjhar in Special Case No.114 of 2014 for commission of offence punishable

U/Ss.302/376(D)/324/34 of IPC read with Section 4 of POCSO Act, the appellants named above have preferred this appeal.

The learned Sessions Judge, Keonjhar by the impugned judgment has sentenced each of the appellants to undergo imprisonment for life and to pay a fine of Rs.2,000/- for offence U/Ss.302/34 of IPC, to undergo Rigorous Imprisonment (RI) for 20 years and to pay a fine of Rs.2,000/- in default whereof, to undergo RI for two years for offence U/S.376(D) of IPC, to undergo RI for two years for offence U/S.324 of IPC and to undergo RI for seven years and to pay a fine of Rs.1,000/-, in default whereof, to undergo RI for one year for offence U/S.4 of POCSO Act with further direction for running of all the sentences concurrently.

**An overview of prosecution case:**

**2.** The prosecution case depicts a very cruel and diabolical crime being committed upon innocent tribal people due to suspicion and superstition, which traced its origin before some days of the occurrence which

commenced on 24.11.2014, when one Nidhi Munda of village Kolhahundula Janka Sahi had called a 'Raulia' (Sorcerer) to perform some puja for the well-being of his daughter-in-law Sabita Munda who was stated to be suffering from some fever continuously and as a sequel of event on 25.11.2014, a coconut used in the said puja was taken around the village by co-accused Sena Munda, who entered into the house of Pandu Munda-the deceased and threw it on the earthen pot containing Handia (rice water liquor), as a result, said pot broke and, thereafter, the deceased Pandu Munda demanded cost of the broken pot from the appellant Nidhi Munda and his son, appellant Upendra Munda which resulted in a quarrel and the incident was informed to PW12-Sukamati Munda, the Ward member of the village and her husband Dania Munda. On this issue, a village meeting was scheduled at about 8 O' Clock in the morning to settle the dispute and, accordingly, PW7-Sunamani Munda served a notice on appellant No.1 (A1) Upendra Munda, but before the meeting could be convened on 30.11.2014 at about 8

AM in the morning, the appellants came to the house of PW12 and informed her that after receiving the notice, all three of them (appellants) have committed the murder of Pandu Munda and his wife Meta Munda.

On hearing this news, PW7, her husband PW1-Niranjan Munda, villagers PW2-Sridhar Munda, PW4-Maguni Munda and others went to the house of the deceased Pandu Munda where his elder daughter (victim) informed them that on previous night while she was sleeping with Tuni Munda (sister of A-1) in the later's house, all the appellants forcibly carried her to the threshing floor and committed gang rape on her one after other and left her (victim) on there, but in the morning, when she returned home, her younger two sisters informed that the appellants had come to their house in the previous night and committed murder of their parents by severely assaulting them by means of Thenga and Sticks and carried the dead bodies.

On hearing this news, PW7 and others thereafter searched for the dead bodies along with the

villagers and found the appellants to have concealed the dead bodies under a heap of straw in the threshing floor of deceased Pandu Munda. It was also learnt by them that the appellants had also severely assaulted the two minor daughters of the deceased by means of Thenga and Sticks causing grievous injuries to them.

On the above incident on 30.11.2014, PW7-Sunamani Munda lodged an FIR against the appellants before the IIC, Joda under Ext.4 which was scribed by PW6-Bishnu Khillar and, accordingly, Joda PS Case No.188 of 2000 was registered and the investigation ensued by PW21-Prasanta Kumar Samal who in the course of investigation arrested the appellants, sent the dead bodies for autopsy, seized the weapon of offence and upon completion of investigation, PW21 submitted charge-sheet against the appellants for commission of offence punishable U/Ss.341/ 302/ 307/ 323/ 376-D/ 201/ 34 of IPC read with Section 4 of POCSO Act and against accused Kanju @ Surendra Naik and Sena Munda for commission of offences punishable U/Ss.302/109/376-D/34 of IPC read with

Section 4 of POCSO Act and Section 5 of Orissa Prevention of Witch Haunting Act (in short "the OPWH Act") resulting in trial in the present case after denial of the accused persons to the charge framed against them.

**3.** In support of the charge, the prosecution examined PWs.1 to 21, proved certain documents under Exts.1 to 40 and identified material objects vide MOI to II as against no evidence whatsoever by the defence. Of the witnesses examined in this case, PWs.1 to 5, 17 and 20 are co-villagers of the deceased and the appellants, PWs.8 to 11 are the four daughters of the deceased, out of whom one is victim of gang rape and two are injured-victim of assault and last one is a post occurrence witness. PW12 is the Ward member of Anseikala GP, whereas PW7 is the informant-Ward member Ward No.3 of Kolhahundula of Anseikala GP. PWs.16 and 19 are the two doctors who conducted autopsy over the two dead bodies of the deceased persons, whereas PW18 is the doctor who conducted medical examination of the victim of

gang rape as well as that of the other two injured daughters of the deceased, PW14 is another doctor who had examined and collected biological materials of the appellants and lastly, PW21 is the IO.

**4.** The plea of the appellant in the course of the trial was denial simplicitor.

**5.** After appreciating the evidence on record upon hearing the parties, the learned Sessions Judge, Keonjhar while acquitting co-accused Sena Munda and Kanju @ Surendra Naik has, however, convicted the three appellants for the offences as indicated supra by mainly relying upon the oral evidence of PWs.8 to 10 as well as the evidence of extra judicial confession of the appellants which was made before PW7 and the evidence of recovery of MOI and II (lathis and sticks) pursuant to the disclosure statement of A-2.

**Rival Submissions:**

**6.** In assailing the impugned judgment of conviction and order of sentence, learned counsels appearing for the appellants have attacked the evidence of extra judicial confession of appellants

made before PW7 by *interalia* submitting that the said evidence is inherently a weak piece of evidence and cannot be relied upon. It is further submitted that of course the prosecution has relied upon the direct evidence of PWs.8 and 10 who are the minor daughters of the deceased persons, but they being child witnesses, their evidence has not been properly scrutinized and appreciated by the learned trial Court and since they being subject to tutoring, their evidence should not be relied upon without corroboration by the evidence of other witnesses and, thereby, the evidence of child witnesses being found to be not corroborated by the other witnesses cannot be acted upon to convict the appellants. Further, it has been seriously assailed by the appellants that the evidence of the victim of gang rape reveals only general and omnibus allegation of gang rape against the appellants which may not be sufficient to convict the appellants. Further, it has been seriously criticized that the evidence of recovery of MOI and II and the CE report being silent about finding of any blood stain on



MOI and II, the evidence of recovery of MOI and II becomes insignificant. While summing up the argument, it is submitted for the appellants that the evidence being quite deficient to convict the appellants, benefit of doubt ought to have been extended to the appellants and, thereby, their conviction in this case being unsustainable in the eye of law is required to be set aside. Accordingly, it is prayed to allow the appeal by setting aside the impugned judgment of conviction and order of sentence.

In reply, Mr. P.K. Mohanty, learned ASC has submitted that the prosecution not only has established the guilt of the appellants by way of direct evidence, but also has established their guilt through circumstantial evidence of recovery and the CE report clearly stating about participation of the appellants in committing rape upon the victim and the impugned judgment of conviction by no stretch of imagination can be questioned in any way. Mr. Mohanty has further submitted that the evidence on record clearly

established beyond all reasonable doubt the guilt of the appellants for the offences and, thereby, the appeal merits no consideration.

### **Analysis of law and evidence**

7. In order to test the sustainability of the conviction of the appellants, the impugned judgment was considered minutely keeping in view the evidence on record in the light of rival submissions. Quite understandably, it is not only claimed, but also found from the judgment that the prosecution has been successful in establishing the guilt of the appellants for commission of offence punishable U/Ss.302/376(D) /324/34 of IPC read with Section 4 of POCSO Act which needs to be examined individually by way of re-appreciation of evidence by sieving out inadmissible and unacceptable evidence. The appellants admittedly being found convicted for murder of two persons, it would be relevant to examine the opinion of doctors who conducted post mortem examination over the dead bodies of the deceased persons to find out as to whether the deceased persons had suffered homicidal

death or death otherwise. While one of the doctor namely Soubhagya Rasmi Ranjan Samal examined as PW16 has testified in the Court that he had conducted PM examination over the dead body of Meta Munda and opined the cause of death of deceased to be due to intra cranial haemorrhage and rupture of lungs. The specific evidence of PW16 is that the death of deceased Meta Munda was homicidal in nature. Similarly, the other doctor, PW19-Sachindra Kumar Das has opined in his evidence that the death of the deceased Pandu Munda was homicidal in nature. Neither the evidence of PW16 nor that of PW19 was challenged by the defence with regard to the cause of death of the deceased persons to be homicidal in nature. In view of the unchallenged evidence of PWs.16 and 19, this Court has no hesitation that the prosecution has led sufficient evidence to prove the homicidal death of the deceased Meta Munda and Pandu Munda beyond all reasonable doubt.

**8.** Once, it is found that the deceased persons had suffered homicidal death, the next question

naturally comes for consideration is to who is or are responsible for such homicidal death of the deceased. In this case, the prosecution has examined PWs.8 and 10 as eye witnesses to the occurrence of assault and murder of the deceased persons. In her evidence, PW8 who is none other than one of the daughter of the deceased has clearly and categorically stated in her evidence that on the date of occurrence, she, her parents and her younger sister Tara (PW10) were present in their home and the appellants (Nidhi, Aiban and Upendra) came to their house being armed with lathis and all of them dragged her father out of their home and took him towards cultivable lands and assaulted her father and committed his murder. The evidence of PW8 further transpired that the appellants again came and dragged her mother out and assaulted as well as committed murder of her mother. It is her further evidence that the appellants also assaulted her and her sister (PW10) and being frightened, they both left their house when the appellants drank water in their house. It cannot be disputed that PW8 was a

child when she tendered evidence and before recording evidence, the learned trial Court has tested her competency to depose evidence and found her to be competent to tender evidence, and after recording a certificate, the learned trial Court has recorded the evidence of PW8. What is most important is that PW8 although admitted in cross examination that police brought her to the Court, but she came with an explanation that since they are staying in local Ashram, they are produced by the police and she has not been tutored by the police as to what she is to state before the Court and police brought her from the Ashram telling that she has to attend the Court for her evidence and police had not advised her to state before the Court about the occurrence. One of the distinguished features of evidence of PW8 is that she not only withstood the grueling cross examination by the defence, but also answered the question of defence very smartly by giving true and genuine answer in cross examination. In her cross examination, PW8 clearly admitted that there is no

provision of electric light in their house, but it was moonlit night and she identified the accused persons (appellants) in the moonlit night. It was also elicited from her lips that she had gone asleep when the accused persons (appellants) dragged her parents, but she woke up on hearing the cries of her mother, but she had not gone to the place, to which her parents were dragged, but she had seen accused persons (appellants) assaulting her parents outside their room and she had seen them holding lathis and the appellant Aiban and Nidhi were assaulting her father and all the three appellants assaulted her mother and while her parents were being assaulted, they were present outside their room and they raised cries for help during such assault, but none had come up for their help.

**9.** It, therefore, clearly appears that the defence could not able to make any inroad to the evidence of eye witness PW8, but the evidence of other eye witness needs to be examined in the circumstance. The other eye witness is none other than the another

daughter of the deceased persons who being examined as PW10, has reiterated what PW8 had stated in her evidence like by saying that during that night, her elder sister (PW8) and her parents were sleeping after taking dinners and the appellants came to their house and assaulted their parents outside their house by lathis, as a result, her parents sustained bleeding injuries and subsequently died. It is also categorically stated by PW10 that the accused persons (appellants) also assaulted them. The defence has tried its level best to break the evidence of PW10, but remained unsuccessful, rather the defence has ended up explaining in cross examination that PW10 had seen the lathis during that night being used by the appellants. It is very surprising that the defence instead of taking any plea has suggested to PW10 that their parents being intoxicated had assaulted each other and thereby met their death, which in the circumstance, is hardly believable in view of the strong, credible and acceptable evidence of PWs.8 and 10 which in any way has not been demolished by the

defence. The evidence of PWs.8 and 10 were not only credible, but also corroborated to each other in material particulars like assault made by the appellants on the deceased persons resulting in their death and the above evidence of PWs.8 and 10 is also corroborated by the medical evidence on record which unambiguously go to suggest the homicidal death of the deceased persons. Besides, MOI and II were also produced before PWs.16 and 19 for their opinion as to whether the injuries noticed on the dead body of the deceased persons were possible by such weapon of offence and both PWs.16 and 19 had given their opinion affirmatively which was never challenged by the defence in the cross examination.

**10.** In addition to the evidence of eye witnesses as well as medical evidence, the prosecution has also come up with further evidence of extra judicial confession of the appellants before PW7 who in her evidence has stated that they have already settled the dispute by committing murder of Pandu Munda and Meta Munda, which was also never challenged by the



defence in the cross examination. It is, however, true that extra judicial confession is a inherently weak piece of evidence, but it can be utilized to prove the commission of crime, when the same is corroborated by other evidence. In this case, not only the extra judicial confession of the appellants is corroborated by the evidence of eye witnesses, but also is further invigorated by the medical evidence as well as recovery evidence and this Court does not see any reason to disbelieve such extra judicial confession which in fact was in the form of appellants stating before PW7 to glorify their guilt by speaking before her who in her evidence stated to have served the notice on A1 to attend a meeting on Sunday morning at about 8 AM, but the appellants have informed her on Sunday at about 6 AM in the morning that they have settled the dispute by committing murder of Pandu and Meta. Further, the evidence of PW7 also suggests that on Saturday evening at 9.15 PM she heard cries of some persons that they were being assaulted and as she was alone, she did not dare to go there as it

was night hours, which appears to be a natural conduct of a women in such situation. Besides, PW7 is the informant and her evidence is corroborated by the FIR itself Ext.4 with regard to the extra judicial confession made by the appellants before her. Further, the above evidence is also corroborated by the statement of PW7 recorded U/S.164 of Cr.P.C. under Ext.5.

**11.** It appears from the evidence of PW7 that on knowing about the extra judicial confession of the appellants, PW7 had also called her neighbours, PW2-Sridhar Munda, PW4-Maguni Munda and others including her husband, PW1-Niranjan Munda who all went to the house of the deceased. The evidence of PW1 is very clear and transpires that the appellants have returned the notice issued by PW7 (his wife) by telling that on the previous night they have committed murder of the deceased persons by assaulting them and went away. Similarly the above evidence was reiterated by PW2 saying that the appellants told the informant about committing murder of the deceased

persons, but PW4 did not support the prosecution case. Law is well settled that no particular number of witnesses is required to prove a fact and if it is established by the prosecution by evidence of some witnesses, it may not be required to be reiterated to establish such fact by the evidence of all witnesses. The above evidence of witnesses never discloses that the extra judicial confession of the appellants was ever extracted, rather it was made voluntary by the appellants to glorify their shameless deeds.

**12.** Another item of evidence is the recovery of MOI and II pursuant to the disclosure statement of A2-Nidhi Munda which was exhibited in evidence vide Ext.29 which was also spoken to by PW3 in his evidence as well as by the IO-PW21 in the manner prescribed U/S.27 of Indian Evidence Act and the seizure of MOI and II was also established through the evidence of these two witnesses and, therefore, there is nothing brought on record by the defence to disbelieve the recovery evidence which was in fact established by the prosecution to the effect that A2

had gave out MOI and II from a bamboo bush which were seized by PW21. It is, however, disputed by the defence that since MOI and II do not contain the signature of the witnesses, the recovery cannot be believed, but such assertion of the defence has no legal sanctity in view of the clear evidence of PWs.3 and 21. A careful perusal of the impugned judgment would go to disclose that the defence in the course of argument before learned trial Court had taken the disability of A1 to get rid of the prosecution allegation, but it was never suggested to the eye witnesses much less to the IO that A1 being differently abled was not able to commit the offence or nor had he committed the offence. On the other hand, it is otherwise explained by the defence in cross examination of PW1 that appellant Upendra Munda who is differently abled can stand by holding any wall or any fence and he is capable of climbing tree and able to swim. Further, it is borne out from the evidence on record that the offences were committed by all the appellants in furtherance of their common intention and, thereby,

no specific overt act is required to be attributed to each of them individually and their guilt can still be established by proving the manner of their participation in the crime in furtherance of their common intention. In view of the evidence of eye witnesses PWs.8 and 10 which is further invigorated by the extra judicial confession of the appellants before PW7 and the recovery evidence of MOI and II as well as the medical evidence clearly establishing the homicidal death of the deceased persons, this Court has no manner of doubt that the prosecution has established the charge of murder against the appellants beyond all reasonable doubt.

**13.** Another item of charge is causing disappearance of evidence by the appellants and the evidence of PWs.8 and 10 as well as that of PWs.1 to 3 and 7 clearly reveals that the dead bodies were recovered from a heap of straw and it has already been established by the prosecution that the appellants were found guilty of the murder of the deceased and they having found to have concealed the

dead bodies under a heap of straw by the evidence of above witnesses, the charge U/S.201 of IPC against the appellants stand established beyond all reasonable doubt.

**14.** One of the important charge against the appellants is committing Gang Rape upon the victim who is one of the daughter's of the deceased persons and the victim having examined as PW9 has stated in her evidence that on Saturday night, she was sleeping with Tuni Munda, the sister of the accused Upendra Munda in their house and during mid-night, the appellants arrived there and dragged her to the thrashing floor of A1 and all of them committed rape upon her and being frightened, she remained in that thrashing floor during that night, but on the next morning, she found her sisters present in the house of PW3-Balaram Munda and on seeing her, both of her sisters cried and informed that all the appellants had committed murder of their parents. Nothing substantial benefiting the defence was elicited from the lips of PW9, rather the defence has ended up in

eliciting from the lips of PW9 that the occurrence took place during a moon-lit night. Further, the defence only unsuccessfully suggested to PW9 to have falsely implicated the appellants. In the backdrop of the unchallenged evidence of PW9 with regard to gang rape by the appellants, this Court now wants to scrutinize the evidence of doctor, who had examined the victim and such doctor was examined by the prosecution as PW18 whose examination-in-chief with regard to the examination of the victim is as under:

*(i) Swelling of left hand with pain which suggests tussle.*

*(ii) Blood stained under garments were noticed which suggests sexual offence.*

*(iii) On genital examination, whitish stain sticking to valva was noticed.*

*(iv) Dried clot sticking to hymenal margin was also noticed and on cleaning hymen was found to be congested with oedematous margin with tenderness and recent multiple tears. Age of such injuries was within 12 to 24 hours of my examination.*

*(v) Vaginal swab dried and wet, vaginal smear, whitish stain found on the vulva, sample pubic hair, blood sample and a piece of sample gauge were collected, sealed and handed over to accompanying constable.*

*(vi) Her blood group was 'A' positive.*

*(vii) On ossification test, her age was found within 14 to 15 years.*

*(viii) Her genital findings strongly suggests case of sexual intercourse.*

**15.** Although, PW18 was cross examined by the defence, but nothing was brought from her mouth to discredit the evidence of Rape of the victim. The evidence of PW14-Dr Jagadish Prasad Sahoo- who had examined the appellants, transpires that recent sexual intercourse cannot be ruled out in respect of any of these accused persons (appellants). Further, PWs.14 and 18 had collected the biological materials of the victim and the appellants which were sent to SFSL, Bhubaneswar for chemical examination and the chemical examination report was received under Ext.40 wherein the semen of O-Group was found on the undergarments of the victim and the sample semen of the appellants Nidhi and Upendra were found to be human origin of "B and O" and "A and O" Group. The above evidence appears to have corroborated the evidence of the victim with regard to gang rape upon her.



**16.** It is also not disputed that the victim girl was aged about 11 years, which is less than 18 years as on the date of occurrence which evidence finds support from the evidence of the doctor and the evidence otherwise borne out from the record clearly discloses that the appellants were found to have committed gang rape upon the victim as revealed from the sole testimony of the victim, which being found to be credible and cogent, the same can be acted upon without any corroboration and in this case, the main substratum of evidence of the victim having not demolished in cross examination and the same finding support from the medical evidence, it can be said that not only the charge for offence of gang rape against the appellants is found established, but also the offence U/S.4 of POCSO Act against them stands proved beyond all reasonable doubt and the finding arrived at by the learned trial Court on this score does not warrant any interference. Similarly, the find of learned trial Court with regard to the guilt of the appellants for offence U/Ss.324/34 of IPC for

assaulting PWs.8 and 10 by means of lathis being clearly borne out from the direct evidence of PWs.8 and 10 which was further supported by the medical evidence of PW18, this Court considers that the finding of the learned trial Court holding the accused persons(appellants) guilty for offence U/S.324/34 of IPC cannot be questioned.

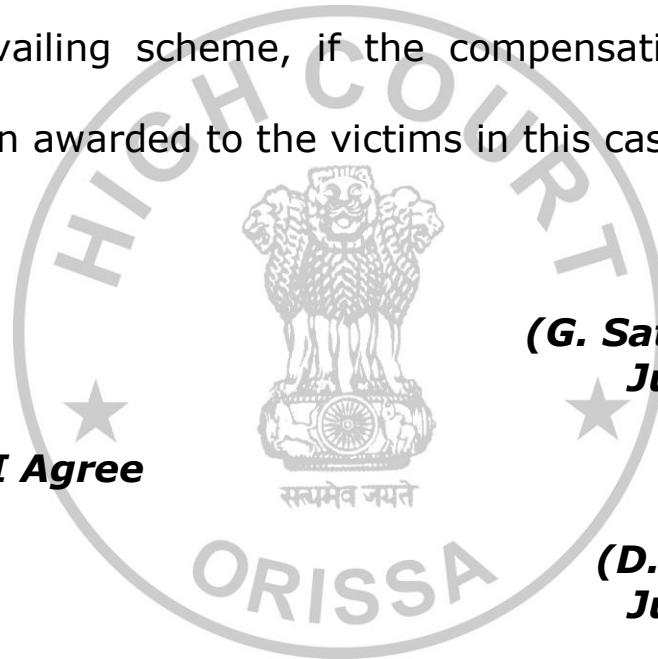
**17.** On a conspectus of the evidence on record together with the discussion made hereinabove and the appellants having not been able to impeached or got over the direct evidence of the victim and eye witnesses, the findings arrived at by the learned trial Court cannot be considered to be unsustainable in the eye of law. Further, the positive evidence brought out by the prosecution clearly establishing the guilt of the accused persons for the charge U/Ss.302/376-D/324/34 of IPC read with Section 4 of POCSO Act against the appellants appears to have been established beyond all reasonable doubt.

**18.** Resultantly, the appeal having been found unmerited stands dismissed on contest, but no order

as to costs. Consequently, the impugned judgment of conviction and order of sentence as recorded on 10.11.2016 by the learned Sessions Judge, Keonjhar in Special Case No.114 of 2014 are hereby confirmed.

**19.** Since the offences appear to have been committed upon the victim, the DLSA, Keonjhar may proceed to award compensation in terms of the prevailing scheme, if the compensation has not yet been awarded to the victims in this case.

**I Agree**



**(G. Satapathy)  
Judge**

**(D.Dash)  
Judge**

*Orissa High Court, Cuttack,  
Dated the 8<sup>th</sup> day of January, 2024/Subhasmita*