

IN THE HIGH COURT OF ORISSA, CUTTACK

JCRLA No.88 of 2019

Appeal from judgment and order dated 12.04.2019 passed by the Additional Sessions Judge -cum- Special Judge, Children's Court, Keonjhar in Special Case No.12/03 of 2019.

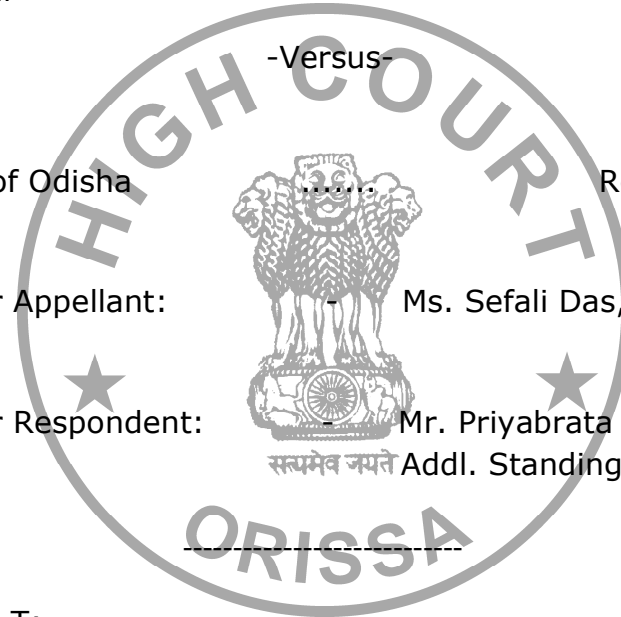
Ganesh Munda @ Appellant
Balabhadra Munda @
Sunidhi

-Versus-

State of Odisha Respondent

For Appellant: Ms. Sefali Das, Advocate

For Respondent: Mr. Priyabrata Tripathy
Addl. Standing Counsel



P R E S E N T:

THE HONOURABLE MR. JUSTICE S.K. SAHOO

Date of Hearing and Judgment: 09.08.2023

S.K. SAHOO, J. The appellant Ganesh Munda @ Balabhadra Munda @ Sunidhi faced trial in the Court of learned Additional Sessions Judge-cum-Special Judge, Children's Court, Keonjhar in Special

Case No.12/03 of 2019 for commission of offences under sections 376AB/323 of the Indian Penal Code (hereinafter "the I.P.C.") and section 6 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter "the POCSO Act") on the accusation that on 09.01.2019 at about 6.00 p.m. near Dalkinala of village Nuagaon, he committed forcible sexual intercourse with the victim, who was then aged about seven years, and also voluntarily caused hurt to her and committed aggravated penetrative sexual assault on her.

Learned trial Court vide judgment and order dated 12.04.2019, found the appellant guilty under section 376AB of the I.P.C. and section 6 of the POCSO Act and acquitted him of the charge under section 323 of the I.P.C. and sentenced him to undergo rigorous imprisonment for a period of twenty years and to pay a fine of Rs.5,000/- (rupees five thousand), in default, to undergo rigorous imprisonment for a further period of one year for the offence under section 376AB of the I.P.C. No separate sentence was awarded for commission of the offence under section 6 of the POCSO Act in the view of section 42 of the said Act.

The Prosecution Case:

The prosecution case as per the First Information Report (hereinafter 'F.I.R.') lodged by P.W.2 (Jabini Munda) is that the victim (P.W.3) is his daughter who was aged about seven years at the time of occurrence. On 09.01.2019 at about 6.00 p.m., while the victim was playing in the house of the appellant, he offered to drop her at her house but when the victim accompanied him, he took her inside a jungle and committed rape on her. The victim sustained bleeding injury and after she regained her sense, she returned to her house crying and disclosed before her family members that the appellant committed rape on her and also assaulted her. The victim was first taken to Barbil hospital with the help of the ward member and later, she was shifted to District Headquarters Hospital (hereinafter 'D.H.H. '), Keonjhar where she was admitted.

On the written report of P.W.2 before the I.I.C., Rugudi Police Station, Rugudi P.S. Case No.02 dated 10.01.2019 was registered under sections 376AB/323 of the I.P.C. read with section 4 of the POCSO Act. The I.I.C., Rugudi Police Station (P.W.16), on receipt of the written report of the informant (P.W.2), took up investigation. During the course of investigation, he examined the informant, scribe of the F.I.R.

and other witnesses, visited the spot along with the informant near the Bank of Dalkinal and as per his direction, T. Mahanta, Constable guarded the spot till the scientific team, D.F.S.L., Keonjhar visited the spot for collecting material evidence. On the same day, he seized one blood stained pink colour frock, one blood stained black and white colour baby pant and the Aadhaar card of the victim girl being produced by Raghu Munda, grandfather of the victim and prepared seizure list marked as Ext.18. He further stated that he made requisition to I.I.C., Town Police Station for deputation of one lady police officer for recording the statement of the victim under section 161 of the Cr.P.C. He also seized one star printed orange-white colour baby full top of the victim, one blood stained blue colour 1/3rd pant of the victim on production by the informant and prepared seizure list marked as Ext.20.

The I.O. also seized the biological materials of the victim being collected by the medical officer and prepared the seizure list marked as Ext.21. He again visited the spot along with the scientific team and prepared spot map marked as Ext.22. On 11.01.2019, at about 7.00 a.m., after verification of Aadhaar card, he apprehended the appellant. On the same day, he seized the wearing apparels of the appellant along with his

Aadhaar Card on being produced by him and prepared seizure list marked as Ext.1. The I.O. deputed one ASI of police Rama Mahanta to Madangjhir M.E. School, Sonua, West-Singhbhum, Jharkhand for the purpose of seizure of school admission register for ascertaining the actual date of birth of the appellant. He sent the appellant for his medical examination through requisition marked as Ext.23. Subsequently, he received the medical examination report of the appellant along with his biological materials collected by the medical officer and on being produced by Purandara Barik, Constable, he prepared seizure list marked as Ext.24. He received the xerox attested copy of the extract of school admission register of Madangjhir M.E. School, Sonua, West Singhbhum, Jharkhand containing the date of birth of the appellant along with seizure list and zimanama on being produced by ASI, Rama Chandra Mahanta and prepared seizure list marked as Ext. 25. Thereafter, he produced the appellant before the Principal Magistrate, Juvenile Justice Board, Keonjhar.

On 12.01.2019, the I.O. seized the Register of the Anganwadi Centre, Nuagaon on being produced by Janaki Kissan (P.W.10), Anganwadi Worker and prepared the seizure list marked as Ext.5 and examined other witnesses. On 14.01.2019, the I.O. had been to Madangjhir M.E. School, Sonua West

Singhbhum, Jharkhand and examined the Headmaster and other witnesses. On 16.01.2019, he made a prayer before the Principal Magistrate, Juvenile Justice Board, Keonjhar for sending seized exhibits for chemical examination to S.F.S.L., Bhubaneswar. The chemical examination report was received from the S.F.S.L. marked as Ext.29. On the same day, he made a requisition to Superintendent, S.C.B. Medial College and Hospital, Cuttack for obtaining injury report in respect of the victim and on 19.01.2019, he received the same. On the same day, he made a prayer for recording the statement of the informant under section 164 of the Cr.P.C. and witness Lemba Munda before the Juvenile Justice Board. After completion of the investigation, the I.O. submitted the charge sheet under section 376AB/323 of the IPC and section 6 of the POCSO Act against the appellant.

Prosecution & Defence Witnesses:

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

P.W.1 Maniki Munda is the father of the victim (P.W.2) who stated about being informed about the unfortunate incident over telephone by his wife. He supported the prosecution case.

P.W.2 Jabini Munda is the mother of the victim so also the informant in this case. She stated that on the fateful day, when the victim came back to the house, she was crying and blood was oozing out of her private part. She supported the prosecution case.

P.W.3 is the victim in this case who stated that the appellant had taken her to Dalkinala in his armpit and forcibly committed sexual intercourse with her.

P.W.4 Bulu Bahadur is a driver and a co-villager of the victim and the appellant and he is a witness to the seizure of the wearing apparels of the appellant vide seizure list Ext.1.

P.W.5 Nandini Munda was the Ward Member of Nuagaon and wife of P.W.4 who stated that the parents of the victim came to her house and narrated the incident before her and her husband. She also stated to have witnessed blood oozing out of the private part of the victim.

P.W.6 Shailendra Narayan Dhal was working as the Supervisor of Sree Metallic Company who scribed the F.I.R. as per the version of the informant (P.W.2) and read over and explained the contents thereof to the informant.

P.W.7 Dillip Kumar Purty was a co-villager who stated that on 09.01.2019, at about 06:00-06:30 p.m. while he

was returning from his duty, he found the appellant going towards Dalkinala along with the victim. After about one hour, he heard that the appellant had committed sexual intercourse on the victim.

P.W.8 Dr. Sine Subhadarsini Rout was posted as the Medical Officer, D.H.H., Keonjhar who medically examined the victim and she proved her report vide Ext.3. In her cross-examination, she admitted that she has no post-graduate degree in Gynecology and she handled a case under the POCSO Act for the first time.

P.W.9 Lemba Munda is a co-villager who stated that when she had gone to the house of P.W.1 and when she was present there, the victim came crying and the wearing apparels of the victim was stained with blood. On examination, she found blood was oozing out from her private part. She further stated that the victim disclosed the incident before her.

P.W.10 Janaki Kissan was working as an Anganwadi worker in the village Nuagaon who stated that on 12.01.2019, the police had been to the Angawadi Centre and seized the family detail register of Anganwadi Centre, Nuagaon Gudasahi on her production and prepared the seizure list and she is a witness to the said seizure list vide Ext.5.

P.W.11 Gangaram Tiria was working as a constable at the Rugudi Police Station who stated that on the instruction given by the I.I.C., Rugudi Police Station, he went to S.F.S.L. Bhubaneswar along with the exhibits and collected the chemical examination report and handed over the same to the I.I.C., Rugudi Police Station.

P.W.12 Chittaranjan Satapathy was working as a Pharmacist at the D.H.H., Keonjhar who stated that the police seized the bed head ticket of the victim from his possession and prepared the seizure list marked as Ext.9.

P.W.13 Hemanta Kumar Pani was working as the Medical Record Keeper in charge at the S.C.B. Medical College & Hospital, Cuttack who stated that the police seized the original bed head ticket of the victim from his possession and prepared the seizure list marked as Ext.12.

P.W.14 Dr. Byasadev Mishra was posted as the Assistant Professor, O & G Department, S.C.B. Medical College & Hospital, Cuttack who medically examined the victim and submitted his report vide Ext. 15.

P.W.15 Dr. Soubhagya Rashmi Ranjan Samal was posted as the Medical Officer, C.H.C., Barbil who examined the

appellant and also conducted his ossification test. He submitted his report vide Ext.16.

P.W.16 Manas Ranjan Barik was posted as the Inspector-in-Charge of the Rugudi Police Station, Keonjhar who is the Investigating Officer of this case.

The prosecution exhibited thirty-eight numbers of documents. Exts.1, 5, 9, 12, 18, 20, 21, 24 & 25 are seizure lists, Ext.2 is the F.I.R., Ext.3 is the medical examination report of the victim, Ext.4 is the bed head ticket, Exts.6, 10, 13, 26 & 36 are seizure lists. Ext.7 is the date of birth of the victim entered in the Anganwadi register, Ext.11 is the original bed head ticket, Ext.14 is the original bed head ticket, Ext.15 is the medical examination report of the victim, Ext.16 is the medical examination report of the appellant, Ext.22 is the spot map, Ext.29 is the chemical examination report and Exts.33,34 & 35 are the 164, Cr.P.C. statements of P.W.2, P.W.9 and the victim respectively.

The defence plea of the appellant is one of the complete denial. No witness was examined on behalf of the defence.

Finding of the Trial Court:

The learned trial Court, after assessing the oral and documentary evidence on record and taking into due consideration the findings of the S.F.S.L. report (Ext.29), has been pleased to hold that the prosecution proved through cogent, credible and unimpeachable evidence that the victim was raped by the appellant and she was less than twelve years of age at the time of occurrence. Therefore, it held that the prosecution has been successful in proving the offences punishable under section 376AB of the I.P.C. and section 6 of the POCSO Act against the appellant. The learned trial Court, however, did not find the appellant guilty for commission of the offence under section 323 of the I.P.C. and accordingly, acquitted him of such charge. Looking at the seriousness of the offences involved and the manner in which it has been committed by the appellant against the minor rustic victim girl, the learned trial Court further held that it is not expedient in the interest of justice to extend the benefit of Probation of Offenders Act in his favour and accordingly, passed sentence under section 376AB of I.P.C. as already stated.

Contentions of Parties:

Ms. Sefali Das, learned counsel for the appellant contended that the parents of the victim (P.W.3) being examined as P.W.1 & P.W.2 have neither stated about the date of birth nor the age of the victim and the victim has also not whispered anything about the same. Therefore, she argued that the findings of the learned trial Court that the prosecution has well proved that the victim was less than twelve years of age as on the date of occurrence is based on no evidence. It is further argued that the informant (P.W.2) did not know Odia language and she only knew Munda language and the scribe of the F.I.R. (P.W.6) stated that he did not know Munda language, therefore, doubt is created as to how the F.I.R. was scribed in Odia language. Learned counsel further argued that no medical document from Barbil hospital, where the victim was first taken for her medical examination, has been proved and also she pointed out that the doctor who treated the victim at D.H.H., Keonjhar was not having a Post-Graduate Degree in Gynecology and therefore, she urged that the findings recorded by the learned trial Court against the appellant must be outrightly discarded and he should be acquitted of all the charges.

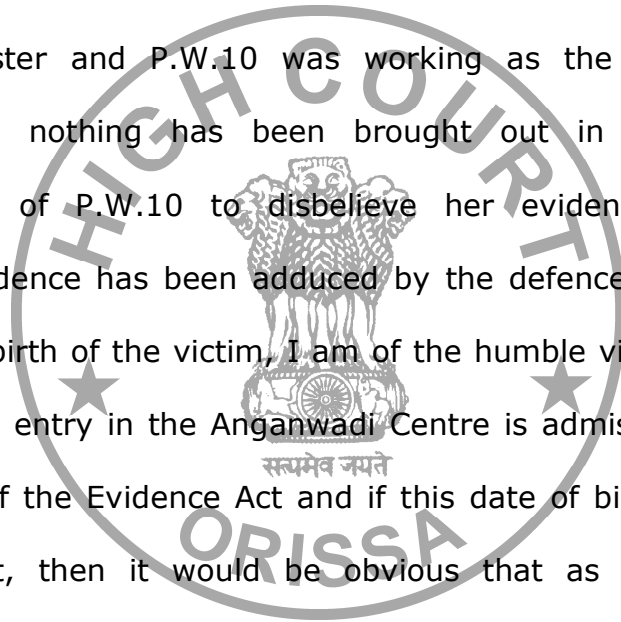
Mr. Priyabrata Tripathy, learned counsel for the State, on the other hand, submitted that even though the evidence of the parents of the victim so also the victim is silent about the date of birth of the victim and her age but the evidence of the Anganwadi Worker (P.W.10), who proved the family details register of Anganwadi Centre, Nuagaon Gudasahi indicates that the date of birth of the victim was mentioned to be 29.07.2012 and since the occurrence in question took place on 09.01.2019, the victim was about seven years of age as on the date of occurrence. The learned counsel further submitted that the F.I.R. has been scribed by P.W.6 on the version of the informant (P.W.2), the mother of the victim and he has proved his handwriting and signature on the same and therefore, the discrepancies regarding P.W.6 not knowing Munda language cannot be a factor to disbelieve the entire prosecution case and this solitary aspect cannot propel the Court to believe that lodging of the F.I.R. is shrouded in mystery. Learned counsel further submitted that the evidence of the victim, who is a minor girl, aged about seven years has remained unchallenged and unshaken. Further, her evidence that she was forcibly raped by the appellant for which she had suffered pain all over her body and there was bleeding from her private part is getting

corroboration from the evidence of the two doctors, i.e., P.W.8 and P.W.14 and the victim, immediately after the occurrence, has disclosed before her parents, i.e., P.W.1 and P.W.2 about the same and so also before P.W.9. Thus, he argued that the prosecution has successfully established the charges under section 376AB of the I.P.C. so also under section 6 of the POCSO Act against the appellant beyond all reasonable doubt and therefore, the appeal being devoid of merit should be dismissed.

Age of the Victim:

Adverting to the contentions of the learned counsel for the respective parties and evidence available on record regarding the age of the victim at the time of occurrence, it appears that the evidence of the parents of the victim is totally silent as to what was her age on the date of occurrence and what was her date of birth. The victim also, being examined as P.W.3, on a question put by the learned trial Court regarding her age stated that she could not say about the same. However, P.W.10, the Anganwadi worker of the village has stated about the seizure of the family detail register of the Anganwadi Centre, Nuagaon, Gudasahi as per seizure list Ext.5 and it was produced in the learned trial Court and proved, wherein it was mentioned that the date of birth of the victim is 29.07.2012. She specifically

stated that they were entering the family details and date of birth of the children of the villagers. She further stated that the serial number of the house of Maniki Munda (P.W.1) is 055 and she had entered the entry herself. She has proved the date of birth entry in the register marked as Ext.7. P.W.10 specifically stated in her cross-examination that she was appointed as the Anganwadi Worker on 29.03.2012 and she had been continuing in that job even on the date of her deposition. Therefore, when the date of birth of the victim was mentioned in the Anganwadi Centre register and P.W.10 was working as the Anganwadi Worker and nothing has been brought out in the cross-examination of P.W.10 to disbelieve her evidence and no contrary evidence has been adduced by the defence relating to the date of birth of the victim, I am of the humble view that the date of birth entry in the Anganwadi Centre is admissible under section 35 of the Evidence Act and if this date of birth is taken into account, then it would be obvious that as on date of occurrence (09.01.2019), the victim was aged about seven years. Therefore, there is no perversity in the finding of the learned trial Court that as on the date of occurrence, the victim was less than twelve years of age.



Discrepancies relating to lodging of the F.I.R.:

Now coming to the lodging of F.I.R. by P.W.2, it appears that P.W.2 is an illiterate lady and she has given left thumb impression (L.T.I.) on her deposition sheet. It further appears that when she was examined in the learned trial Court, she stated that she did not know Odia language and therefore, the learned trial Court appointed one Sushanta Kumar Bodra as the interpreter and he translated Munda language into Odia language and vice versa and accordingly, the evidence was recorded. The scribe of the F.I.R. is none else than P.W.6, who has stated that the F.I.R. was written by him as per the version of P.W.2 and he has proved his signature along with the endorsement in the same. He further stated that the F.I.R. was read over and the contents of the written report were explained to the informant. He further stated in his cross-examination that when he had come to the police station on 10.01.2019 for some personal work, P.W.2 was present in the police station and she requested him to write the F.I.R. and as per her instruction and narration, the report was written by him. Therefore, there is no suspicious feature in the lodging of the F.I.R., particularly when not only P.W.2 stated that it was lodged on being scribed by

P.W.6 but also P.W.6 stated that on the version of P.W.2, he has written the F.I.R.

Effect of non-examination of doctor of Barbil Hospital:

The learned counsel for the appellant contended that though the victim was first taken to the Barbil hospital, but no medical document from the said hospital was exhibited and no doctor from the hospital was examined, which weakens the prosecution case and raises a reasonable doubt. However, such contention of the learned counsel for the appellant does not hold much water in view of the submission made by the learned counsel for the State who rightly pointed out from the evidence of father of the victim that as there was no adequate facility in the Barbil Hospital, the Medical Officer referred the victim to D.H.H., Keonjhar and accordingly, he brought the victim to D.H.H., Keonjhar. Thus, it is apparent that the victim was not treated at Barbil hospital and she was taken to D.H.H., Keonjhar as per the advice of the Medical Officer posted at the Barbil Hospital. Therefore, non-examination of any doctor of Barbil Hospital or non-proving of any medical document of such hospital is no way fatal to the prosecution case.

Analysis of the medical evidence:

P.W.8, the Medical Officer who examined the victim at D.H.H., Keonjhar, noticed that there was external injury present on the private part of the victim and there were abrasions on the inner aspects of labia majora and labia minora, her hymen was ruptured and destroyed and laceration extended from hymen to posterior commissure then to anus. P.W.8 also found redness, congestion and tenderness on the private part of the victim. The defence has failed to dislodge the version of the doctor, i.e., P.W.8 which is corroborated by the evidence of P.W.14, the Associate Professor, O &G. Department of S.C.B. Medical College & Hospital, Cuttack. On 11.01.2019, the victim complained of pain in her abdomen and pain while urinating and defecating (passing stool). P.W.14 opined that the entire external genitalia was inflamed and inner aspect of labia majora was excoriated (reddish) with a tear in between the urethral opening and vagina of size 5 x 2.5 cm. red in colour and another tear in between vagina and anus in the midline of size 2 x 2.5 cm. and vaginal swab and smear were collected. The doctor of Surgery Department also examined the victim and noticed perineal tear and anal incontinence (flowing of stool involuntarily). Accordingly, the victim was subjected to surgical

repair of rent in the pouch of the douglas and a loose colostomy was conducted. The injuries found on the victim are consistent with the history of sexual assault on her. The age of injury on the date of examination was found to be within one to two days.

Analysis of Other Evidence:

The victim, being examined as P.W.3, has specifically stated that the appellant took her to Dalkinala in his armpit, where he committed forcible sexual intercourse with her. She has further stated that after the incident, she felt pain all over her body and blood was oozing out from her private part. She denied the suggestion given by the learned defence counsel that she fell on a split wood and sustained injury on her private part. After giving a careful and judicious consideration to the aforesaid medical findings, I am constrained to hold that the prosecution has successfully established the factum of rape on the innocent minor victim and that she had sustained injuries on account of such bestial act by the appellant which is corroborated by medical evidence.

It is apparent that when the victim first came to the learned trial Court for examination on 14.02.2019, the learned trial Court put some questions to her and the victim required some time to depose. Therefore, it was deferred to the next day.

On 15.02.2019, again she was put some questions by the learned Court and it was found that the victim was able to give rational answers to the questions put to her and she was declared to be a competent witness. However, the recording of the evidence of the victim was deferred and it was taken on 01.03.2019 when she gave her evidence and stated about commission of rape on her by the appellant.

P.W.1, the father of the victim, in his statement deposed that when he got information over telephone from P.W.2 (informant) that the appellant had committed rape on the victim, he came to the house and reached there at 8.30 p.m. and found that the victim was crying and blood was oozing out from her private parts. Then, the victim was taken in 108 ambulance to Barbil Hospital for her treatment. Thereafter, she was referred to D.H.H., Keonjhar for treatment and from there, she was referred to S.C.B. Medical College & Hospital, Cuttack.

P.W.2, the mother of the victim, also stated that the victim had gone to the house of the appellant for playing and the appellant took her into the jungle and committed sexual intercourse on her and when the victim returned to the house crying, she found that blood was oozing out from the private part

of the victim (P.W.3) and on being asked, the victim narrated the incident before her.

P.W.9, a co-villager has stated that when she went to the house of P.W.1, the victim came to her house crying and her wearing apparels were stained with blood. On examination, she found that blood was oozing out from her private parts. The victim disclosed that the appellant had taken her to Dalakinala in his armpit and removed her wearing apparels and committed rape on her. Nothing has been brought out in the cross-examination of either the victim or P.W.1 or P.W.2 or P.W.9 to disbelieve their evidence.

Law is well settled that the Court must accord due importance to the testimony of the victim, if she is found to be clear, cogent and trustworthy. Evidence of a victim of rape stands at a higher pedestal than the evidence of an injured witness as she suffers from emotional injury. It would be wise on the part of this Court to recall the following authoritative pronouncement made by the Hon'ble Apex Court in the case of **Deepak Gulati -Vrs.- State of Haryana reported in (2013)**

7 SCC 675:

"20. Rape is the most morally and physically reprehensible crime in a society, as it is an

assault on the body, mind and privacy of the victim. While a murderer destroys the physical frame of the victim, a rapist degrades and defiles the soul of a helpless female. Rape reduces a woman to an animal, as it shakes the very core of her life. By no means can a rape victim be called an accomplice. Rape leaves a permanent scar on the life of the victim, and therefore a rape victim is placed on a higher pedestal than an injured witness. Rape is a crime against the entire society and violates the human rights of the victim. Being the most hated crime, rape tantamounts to a serious blow to the supreme honour of a woman, and offends both, her esteem and dignity. It causes psychological and physical harm to the victim, leaving upon her indelible marks."

Therefore, in view of the non-teetering evidence of the victim regarding commission of the heinous crime upon her, this Court has scant hesitation in accepting her version. Further, the conduct of the victim in disclosing the occurrence before her family members, immediately after she returned from the jungle, is relevant and admissible as *res gestae* under section 6 of the Evidence Act. The said provision says, "*Facts which, though not in issue, are so connected with a fact in issue as to form part of the same transaction, are relevant, whether they occurred at the*

same time and place or at different times and places.” In the case in hand, the victim did not try to cover-up the incident at any point of time; rather she immediately reported the same to her parents. Such conduct on the part of the victim manifests the crying demand of a ravaged soul for protection and justice, which is not only relevant but also incriminating against the appellant.

The evidence of the victim coupled with her parents and an independent witness like P.W.9 so also the doctors P.W.8 and P.W.14 clearly substantiate that the appellant committed rape on the victim, who was then aged less than twelve years. Therefore, the learned trial Court has rightly found the appellant guilty under section 376AB of the I.P.C. and section 6 of the POCSO Act. Since in view of section 42 of the POCSO Act, the Court has to impose punishment for the crime of greater degree, the trial Court has rightly awarded the sentence for the commission of offence under section 376AB of the I.P.C. as the minimum sentence prescribed for such offence is twenty years. Ergo, there is no illegality or impropriety in the judgment and accordingly, the Jail Criminal Appeal being devoid of merits stands dismissed.

Before parting with the case, I would like to put on record my appreciation for Ms. Sefali Das, learned counsel for the appellant for rendering her valuable help and assistance towards arriving at the decision above mentioned. The learned counsel shall be entitled to her 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. Priyabrata Tripathy, learned Additional Standing Counsel.

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S.K. Sahoo, J.

Orissa High Court, Cuttack
The 9th August, 2023/Amit

