

IN THE HIGH COURT OF ORISSA, CUTTACK

JCRLA No. 76 Of 2019

From judgment and order dated 30.08.2019 passed by the 3rd Additional Sessions Judge, Balasore in Sessions Trial No.22 of 2019 (191 of 2018).

Khudia @
Khudiram Tudu

.....

Appellant

-Versus-

State of Odisha

.....

Respondent

For Appellant:

Mr. Jagannath Kamila

For State:

Mr. Rajesh Tripathy
Addl. Standing Counsel

P R E S E N T:

THE HONOURABLE MR. JUSTICE S.K. SAHOO

Date of Hearing and Judgment: 22.03.2023

S.K. SAHOO, J. The appellant Khudia @ Khudiram Tudu faced trial in the Court of learned 3rd Additional Sessions Judge, Balasore in Sessions Trial Case No.22 of 2019 (191 of 2018) for offence punishable under section 376(2)(I) of the Indian Penal Code on the accusation that he being a relative of the son-in-law of the

informant (P.W.4) committed rape on the victim (P.W.9), the disabled daughter of the informant.

The learned trial Court vide impugned judgment and order dated 30.08.2019 found the appellant guilty under section 376(2)(I) of the Indian Penal Code and sentenced him to undergo R.I. for a period of ten years and to pay a fine of Rs.5,000/- (rupees five thousand), in default, to undergo R.I. for a further period of one year.

2. The prosecution case, as per the written report submitted by Lepa Hansda (P.W.4) on 17.06.2018 at Jaleswar Police Station, in short, is that on 15.06.2018 in the evening hours, the informant after returning from his work, came to know that during his absence, the victim (P.W.9) who is his elder daughter had gone somewhere with her mobile phone and when he tried to search her in the locality, he could not trace her out in that night. On 17.06.2018 at about 2.00 p.m., his son-in-law Banamali Tudu (P.W.5) informed him that on 15.06.2018, the victim (P.W.9) came to his house and stayed in the night but on the next day i.e. on 16.06.2018, she had gone towards the countryside but did not return in the night. On 17.06.2018 morning, the villagers noticed the victim lying on the village road in an abnormal condition. The villagers informed the family

members of victim who shifted her to Jaleswar hospital and found that the victim was deaf and dumb and was under treatment and thereafter the informant (P.W.4) came to know that the appellant had committed rape on the victim causing injuries on her person. Thereafter, P.W.4 lodged the first information report before the Inspector in-charge of Jaleswar police station on 17.06.2018.

On the basis of such written report, Bhaskar Chandra Patra (P.W.12), S.I. of Police, Jaleswar police station registered Jaleswar P.S. Case No.198 dated 17.06.2018 under section 376(2)(f)(I) of the Indian Penal Code and in absence of the Inspector in-charge of Jaleswar police station, he himself took up investigation of the case. He examined the informant and recorded his statement. Even though the I.O. requested one Priyanka Behera, a lady police officer to record the statement of the victim, but since the victim was a deaf and dumb girl and could not explain anything about the occurrence and her signs and gesture was not understandable, therefore, her statement under section 161 of Cr.P.C. could not be recorded. The father of the victim produced documents relating to her disability which were seized as per seizure list marked as Ext.2. The victim was sent for medical examination and P.W.10, the doctor of F.M.T.

Department of Fakir Mohan Medical College and Hospital, Balasore examined her. Thereafter the I.O. prepared the spot map marked as Ext.7. The appellant was arrested on 18.06.2018 and he was also sent for medical examination. The wearing apparels of the victim were seized. Prayer was made to the learned J.M.F.C., Jaleswar for recording of the 164 Cr.P.C. statement of the victim but it could not be possible. After completion of investigation, charge sheet has been submitted against the appellant under sections 376(2)(f)(l)(n) of the I.P.C. on 28.09.2018

3. During course of trial, in order to prove its case, the prosecution examined fourteen witnesses.

P.W.1 Gourahari Hui is the scribe of the F.I.R. (Ext.1) and he stated that on 17.06.2018 in the early morning, he noticed the victim lying on the village road in an abnormal condition and her wearing apparels were covered with mud and he further stated that as per his advice, the victim was shifted to the hospital.

P.W.2 Maina Tudu is the younger sister of the victim. She stated that the victim had been to their house during Raja festival on a Friday and on the next day, she had been to the village in the evening and did not return and the appellant had

also searched for her in her home in that night. She further stated that on the next day, she got information that the victim was lying unconscious in the field and her wearing apparels were torn. On getting such information, she herself, her husband and other co-villagers arrived there and found the victim in a state of unconsciousness. They took her to the house and thereafter, she was shifted to the hospital. She further stated that when the victim regained her sense, she asked the victim as to who was responsible for her such condition, but she could not tell anything and she asked the victim whether she could recognize the person responsible as she was raped. She further stated that her husband called her father, who is the informant in the case and asked him to lodge the F.I.R. at the police station and then the police brought the appellant to the police station where the victim could recognize him.

P.W.3 Salama Baskey, who is a co-villager of P.W.2, has been declared hostile by the prosecution.

P.W.4 Lepa Hansda, who is the father of the victim, is the informant in the case. He stated that on getting information from his son-in-law Banamali Tudu (P.W.5) that the victim had been raped, he went to the hospital and from the sign, the victim expressed him that the appellant raped her.

P.W.5 Banamali Tudu is the son-in-law of the informant and brother-in-law of the victim and he stated in the same manner as that of his wife (P.W.2).

P.W.6 Shaktipada Mishra was the constable attached to Jaleswar Police Station is a witness to the seizure of copy of the handicapped certificate and xerox copy of Aadhaar card from the possession of P.W.4 as per seizure list Ext.2.

P.W.7 Dangu Paraja was the O.A.P.F., Jaleswar Police Station and he is a witness to the seizure of copy of the handicapped certificate and xerox copy of Aadhaar card from the possession of P.W.4 as per seizure list Ext.2. He is also a witness to the seizure of biological sample of the appellant as per seizure list Ext.3.

P.W.8 Bhabanikanta Swain was the Assistant Teacher of the school and on being summoned by the police, he appeared before the Court of learned J.M.F.C., Jaleswar and he stated that he asked the victim as to what happened to her in sign as she was deaf and dumb but she could not follow his sign.

P.W.9 is the victim and being a deaf and dumb girl, her statement was recorded with the assistance of an interpreter (P.W.4), who is her father. She stated through the interpreter that while she had been to the marital house of her younger

sister on the Raja festival and while in the evening, she had been to the countryside to have a pleasure trip, the appellant took her forcibly, physically assaulted her, tore her wearing apparels and committed rape on her. She further stated that she disclosed the incident to her sister who took her to the hospital and she further stated that at the time of occurrence, she was wearing a red colour chudidar and a red pant.

P.W.10 Dr. Motirmay Giri is the Medical Officer who examined the victim on police requisition. He proved his report as per Ext.4.

P.W.11 Tapan Kumar Hazra was the constable attached to Jaleswar police station. He is a witness to the seizure of biological sample of the victim so also the wearing apparels of the appellant as per seizure lists Exts.5 & 6 respectively.

P.W.12 Bhaskar Chandra Patra was the S.I. of police, Jaleswar Police Station and he is the Investigating Officer of this case who on completion of investigation, submitted charge sheet.

P.W.13 Dr. Ganesh Chandra Pal was the Medical Officer who examined the appellant on 18.06.2018 on police requisition and proved the report vide Ext.8.

P.W.14 Dharanidhar Samantray who was the constable attached to Jaleswar police station and he is a witness to the seizure of biological samples of the victim as per seizure list Ext.5.

The prosecution exhibited eleven documents. Ext.1 is the F.I.R., Exts.2, 3, 5 and 6 are the seizure lists, Exts.4 & 8 are the injury reports, Ext.7 is the spot map prepared by the I.O., Ext.9 is the requisition for chemical examination of seized exhibits, Ext.10 is the spot map prepared by the Talasildar, Jaleswar and Ext.11 is the chemical examination report.

The prosecution also proved six material objects. M.O.I is the red colour chudidhar shirt, M.O.II is one red colour chudidhar pant, M.O.III is one sky blue colour half pant of appellant, M.O.IV is the pubic hair of the appellant, M.O. V is the pubic hair of the victim and M.O. VI is the vaginal swab of the victim.

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

5. The learned trial Court after assessing the oral and documentary evidence available on record, came to hold that there is no material that the victim had a strong motive to falsely implicate the appellant under the charge in question and in the

absence of any evidence showing the possibility of false implication with an ulterior motive, there being no theory of the previous enmity, the argument that the victim falsely implicated the appellant at the instance of her father does not appeal to reason. The learned trial Court further held that there is a ring of truth around the victim's testimony when she deposed about the act committed by the appellant against her body. It is further held that minor contradictions and inconsistencies are bound to occur in a criminal trial and that alone cannot be a basis to suspect the prosecution case as embroidered one. It was further held that except the bald statement of the appellant under section 313 of the Cr.P.C. that he has been falsely implicated and denied to have committed any offence as he is innocent, nothing has been brought on record that the victim (P.W.9) had any motive to falsely implicate him. Further no explanation has been furnished by the appellant as to why the victim had deposed against him in such a heinous crime. Moreover, there is no material to show that there is any inimical relationship between the victim or her family members and the appellant prior to the occurrence and accordingly, it was held that the prosecution has successfully established the charge against the appellant.

6. Mr. Jagannath Kamila, learned counsel for the appellant contended that the appellant has been seriously prejudiced as the State Defence Counsel was engaged by the learned trial Court on the date of examination of the victim (P.W.9), who is a very vital witness for the prosecution and no police papers were supplied to him and the learned trial Court asked the State Defence Counsel to go through the case record and cross-examine the victim. It is submitted that the learned State Defence Counsel must not have got opportunity to go through the case records deeply, to prepare the case thoroughly, to have an interaction with the appellant for such preparation for which he just put few questions to the victim in the cross-examination and closed it on account of pressure of the learned trial Court, which was not proper and justified and therefore, it is a fit case where the impugned judgment and order of conviction should be set aside and the matter be remanded to the learned trial Court for affording opportunity to the appellant to engage his own counsel, if he so likes and in case he expresses his inability, then to engage an experienced counsel well versed in criminal law and expertised in conducting criminal trial and to give sufficient time to him for preparation of the case. Learned counsel for the appellant further submitted on merit of the case

that mentioning the name of the appellant in the F.I.R. which was lodged on 17.06.2018 is a doubtful feature inasmuch as the evidence of P.W.2, the sister of the victim indicates that the victim could not recognize the person who was responsible for commission of rape on her. It is argued that though P.W.2 has stated that when the police brought the appellant to the police station, the victim could recognize him, but the same is not corroborated by the evidence of the I.O. Learned counsel further argued that though the appellant was arrested on 18.06.2018, the I.O. has not stated that at any point of time, the victim was called upon to the police station and was asked to identify the appellant. Learned counsel further submitted that in view of the evidence of the doctor (P.W.10) that there was no recent sign and symptom of penetrative sexual assault and intercourse on the victim, it is difficult to accept the evidence of victim regarding commission of rape on her. He further submitted that though the victim stated in her cross-examination that she bit the appellant in his two hands forcibly, but the doctor (P.W.13), who examined the appellant on 18.06.2018, specifically stated that he had not noticed any bite mark on both the hands of the appellant and even if the statement of the victim that the appellant took her forcibly, physically assaulted and tore her

wearing apparels is accepted but bereft of any clinching evidence regarding commission of rape on the victim, it may at best make out a case under section 354 of the Indian Penal Code.

Mr. Rajesh Tripathy, learned Addl. Standing Counsel for the State, on the other hand, argued that it seems that the victim has been cross-examined on every aspects and therefore, it cannot be said that the learned State Defence Counsel could not get opportunity to prepare the case. He further argued that even though the medical evidence does not corroborate the statement of the victim regarding rape committed on her, but that cannot be a ground to disbelieve the prosecution case. Learned counsel further submitted that though during the course of investigation, the I.O. tried to record the statement of the victim through one lady police officer, namely, Priyanka Behera, but it could not be successful as the lady police officer could not understand the sign of the victim and therefore, the learned trial Court has rightly engaged the father of the victim as he was the best person to follow the sign given by the victim and interpret before the Court. He further submitted that the victim has testified through his father as interpreter that she had been to the marital house of her sister at village Mahisamunda on account of Raja festival and on the next day evening, she had

been to the countryside to have a pleasure trip and the appellant took her forcibly, physically assaulted her, tore her wearing apparels and committed rape on her, which has not been shaken in the cross-examination. Learned counsel further argued that the material objects were called for by this Court and it was received and opened and it is found that in fact the statement of the victim that the appellant tore her wearing apparels, which are marked as M.O. I and M.O.II is found to be correct and therefore, the learned trial Court has rightly convicted the appellant under section 376(2)(I) of the I.P.C. as the documentary evidence as well as oral evidence indicates that the victim was a disabled lady.

Whether proper opportunity has been provided to the appellant during trial to defend his case:

7. Adverting to the contentions raised by the learned counsel for the respective parties, let me first deal with the point raised whether proper opportunity has been provided to the appellant during trial to defend his case particularly when the evidence of the victim (P.W.9) was recorded. The victim was examined on 11.04.2019. The order sheet dated 11.04.2019 of the learned trial Court is extracted herein below:-

“The accused Khudiram Tudu is produced from Dist. Jail, Balasore through escort parties. The

victim girl is present in the Court. The learned A.P.P and learned S.D.C. are also present. The interpreter, namely, Bhabani Kanta Swain who was summoned by this Court, is also present. The interpreter was examined on oath. He stated that earlier he was appointed as such in the Court of J.M.F.C, Jaleswar but he could not be able to interpret the signs of the victim and the victim was also unable to follow his sign due to lack of formal education. The interpreter was cross-examined and discharged as P.W.8. The learned A.P.P. files a petition to appoint the father of the victim girl as interpreter in this case as he is acquainted with the signs of the victim who is admittedly deaf and dumb. The learned S.D.C. was directed to file the objection to the petition but he sought for time and submitted that the accused is behind the bar and an opportunity is to be provided to him to file objection. Admittedly, the accused is behind the bar. It is 10 past 11 O' clock. Sufficient opportunity is given to the accused to file objection to the petition filed on behalf of the prosecution by the learned A.P.P. by 12 O' clock. As the accused has been in custody, his case is to be considered. Similarly, the victim girl who is a deaf and dumb who hails from Jaleswar which is a distance of 50 km. from this Court, is coming to the Court time and again knocking the door of the Court for

justice. So, in such backdrop of the case, the Court should not act as a mute spectator. It has some duty towards the accused, victim girl so also to the society. In such backdrop of the case, the conscience of the Court clinches not to return the victim girl again without her examination. Put up later at 12 O' clock. The learned Addl. P.P. is directed to serve the copy of the petition upon the learned S.D.C. forthwith.

Sd/-

3rd Addl. Sessions Judge, Balasore

Later/11.04.19

The learned S.D.C., namely, Radha Kanta Mohapatra files a memo on behalf of the U.T.P. mentioning therein that the petition for the first time was filed by the learned Addl. P.P. The copy was served with objection and the prayer of the learned S.D.C. seeking time to file objection was turned down by the Court for which the U.T.P. shall be highly prejudiced. It goes without saying that prior to today, the victim girl who is admittedly a dumb has come to the Court several times. The Court feels that it has also some duty towards the victim and the victim should not come to the Court time and again for her deposition. After filing the memo, the learned S.D.C. Sri Radha Kanta Mohapatra left the Court room and after call,

he did not appear to cross-examine the victim girl. Since the learned S.D.C. did not turn to cross-examine the victim girl who was discharged from this case and learned counsel Sri Bidyadhar Sahu whose name finds place in the list of S.D.C., was appointed afresh who has given sufficient time to inspect the case record and to thoroughly go through it. After inspecting and going through the record, the learned counsel Mr. B.D. Sahu became ready to cross-examine the victim girl and gave his consent to complete the cross-examination the victim girl today. Accordingly, the victim girl was examined and cross-examined through interpreter and discharged as P.W.9. Issue summons to the rest of the charge sheeted witnesses. This Court expresses its happiness and gives thank to the learned Advocate S.J. Bidyadhar Sahu for his abrupt action extending assistance to the Court and also ensuring justice, is being done to the victim. Put up on 18.04.19 for further trial.

Sd/-
(Illegible)
3rd Addl. Sessions Judge, Balasore"

The order sheet thus indicates that the learned Addl. Public Prosecutor filed a petition on 11.04.19 to appoint the father of the victim girl as interpreter to the evidence likely to be given by the victim and copy of the petition was handed over to

the learned S.D.C. and time was granted by the Court to the learned S.D.C. from 11.10 a.m. till 12 noon to file objection to such petition and when learned S.D.C. sought for time to file objection, the learned trial Court rejected the same mainly on the ground the victim girl had come to the Court several times. Then the learned S.D.C. left the Court room and did not appear for the recording of the evidence of the victim and since he did not turn up, another counsel Mr. Bidyadhar Sahu, whose name found place in the list of State Defence Counsel was appointed and he was given time to inspect the case record and after inspecting the record, learned counsel Mr. Bidyadhar Sahu got ready to cross-examine the victim and gave his consent to complete the cross-examination of the victim on that day and accordingly, the evidence of victim girl was recorded taking the assistance of her father as interpreter and she was discharged.

On going through the order sheet of the learned trial Court dated 11.04.2019, it appears that the Court was bent upon to complete the recording of the evidence of the victim on that day itself. Though it is observed in the order dated 11.04.2019 that prior to that date, the victim had come to the Court several times, but I have gone through the order sheet and it appears that after the charge was framed on 15.02.2019, the date of trial

was fixed to 11.03.2019 and on that day, P.W.1, P.W.2 and P.W.3 were examined and on the next date i.e. on 20.03.2019, P.W.4 and P.W.5 were examined and then on 25.03.2019, P.W.6 and P.W.7 were examined. The order sheet does not indicate that after framing of the charge and prior to 11.04.2019, on any date the victim had appeared to give her evidence. Therefore, the observation made by the learned trial Court that prior to that day, the victim girl had come to the Court several times is not acceptable.

Potter Stewart quotes, "Fairness is what justice really is". The engagement of State defence counsel in the trial Court should not be a mere compliance of provisions of law or an empty formality. It must not be a sham or an eye-wash but with all intent, purpose and sincerity, the lawyer must conduct the case of the accused. The due process of law incorporated in our constitutional system demands that a person not only be given an opportunity of being heard before being condemned, but also that such opportunity be fair, just and reasonable. If the conducting counsel engaged for an accused appears to be superfluous and there is real contest, right to fair trial would be denied. It is the duty of the Court while appointing the State defence counsel to supply him all relevant papers and to give sufficient time to him for preparing the

defence, otherwise such defence would only be a farce without its real purpose.

In the case of **Kamala Domen -Vrs.- State reported in 1971 (1) C.W.R. 636**, it is held that the duty of the Sessions Judge in appointing State Defence Counsel is to give sufficient time to the counsel for preparing the defence and supply him all the relevant papers, otherwise there cannot be a proper and fair trial. In an appropriate case, there should be a remand for fresh trial.

In the case of **Mangulu Behera -Vrs.- State reported in 1971 (2) C.W.R. 422**, where the State defence counsel was appointed when the Court began its sitting for taking evidence in a sessions trial and no time was there for the counsel to be acquainted with the facts of the case and to find out what defence is to be taken, it was held that there was no scope for the counsel to get instruction for cross-examination of the prosecution witnesses and the trial was therefore held to be vitiated and retrial was ordered.

In the case in hand, the State Defence Counsel refused to act when the learned trial Court did not grant time to file objection to the petition filed by the Addl. Public Prosecutor seeking permission for taking assistance of the father of the

victim as an interpreter and left the accused undefended. In such a situation, it was the duty of the trial Judge to provide him legal assistance at State's expense by appointing a State Defence Counsel, who would faithfully, diligently and to the best of his abilities discharge his duties in defence of the accused. The words employed in section 304(1) Cr.P.C. i.e. "...the accused is not represented by a pleader", do not and cannot mean a kind of paper and sham representation as distinguished from a substantial, bonafide and diligent representation. Not ensuring the reasonable and diligent representation by counsel or pleader to the accused would not relieve the State of its obligation under section 304(1) Cr.P.C. and could not pass the test of fairness which every action of the State must withstand in keeping with the obligation under Articles 14 and 21 of the Constitution.

In the case of **Mohd. Hussain -Vrs.- The State (Govt. of NCT) Delhi reported in (2012) 2 Supreme Court Cases 584**, it is held as follows:-

"51. In my opinion, the right of a person charged with crime to have the services of a lawyer is fundamental and essential to fair trial. The right to be defended by a legal practitioner, flowing from Article 22(1) of the Constitution has further been fortified by the introduction of the directive principles of State policy embodied in Article 39-

A of the Constitution by the Forty-second Amendment Act of 1976 and enactment of sub-section (1) of Section 304 of the Code of Criminal Procedure. Legal assistance to a poor person facing trial whose life and personal liberty is in jeopardy is mandated not only by the Constitution and the Code of Criminal Procedure but also by International Covenants and Human Rights Declarations. If an accused too poor to afford a lawyer is to go through the trial without legal assistance, such a trial cannot be regarded as reasonable, fair and just. The right to be heard in criminal trial would be inconsequential and of no avail if within itself it does not include right to be heard through counsel.

52. One cannot lose sight of the fact that even intelligent and educated men, not trained in law, have more than often no skill in the science of law if charged with crime. Such an accused not only lacks both the skill and knowledge adequately to prepare his defence but many a time loses his equilibrium in face of the charge. A guiding hand of counsel at every step in the proceeding is needed for fair trial. If it is true of men of intelligence, how much true is it for the ignorant and the illiterate or those of lower intellect! An accused without the lawyer faces the danger of conviction because he does not know how to establish his innocence.”

In the case of **Anokhilal -Vrs.- State of Madhya Pradesh reported in (2019) 20 Supreme Court Cases 196**, the Hon'ble Supreme Court taking into account Articles 39-A and 21 of the Constitution of India, held as follows:-

31.1. In all cases where there is a possibility of life sentence or death sentence, learned advocates who have put in minimum of 10 years' practice at the Bar alone be considered to be appointed as Amicus Curiae or through legal services to represent an accused.

31.2. In all matters dealt with by the High Court concerning confirmation of death sentence, Senior Advocates of the Court must first be considered to be appointed as Amicus Curiae.

31.3. Whenever any learned counsel is appointed as Amicus Curiae, some reasonable time may be provided to enable the counsel to prepare the matter. There cannot be any hard and fast rule in that behalf. However, a minimum of seven days' time may normally be considered to be appropriate and adequate.

31.4. Any counsel, who is appointed as Amicus Curiae on behalf of the accused must normally be granted to have meetings and discussion with the concerned accused. Such interactions may prove to be helpful as was noticed in **Imtiyaz Ramzan Khan -Vrs.- State of Maharashtra : (2018) 9 Supreme Court Cases 160.**"

In the case of **Ramanand -Vrs.- State of Uttar Pradesh reported in 2022 SCC OnLine SC 1396**, it is held as follows:-

“120. It is by far now well-settled for a legal proposition that it is the duty of the Court to see and ensure that an accused put on a criminal trial is effectively represented by a defence counsel, and in the event on account of indigence, poverty or illiteracy or any other disabling factor, he is not able to engage a counsel of his choice, it becomes the duty of the Court to provide him appropriate and meaningful legal aid at the State expense. What is meant by the duty of the State to ensure a fair defence to an accused is not the employment of a defence counsel for namesake. It has to be the provision of a counsel who defends the accused diligently to the best of his abilities. While the quality of the defence or the caliber of the counsel would not militate against the guarantee to a fair trial sanctioned by Articles 21 and 22 of the Constitution, a threshold level of competence and due diligence in the discharge of his duties as a defence counsel would certainly be the constitutional guaranteed expectation. The presence of counsel on record means effective, genuine and faithful presence and not a mere farcical, sham or a virtual presence that is illusory, if not fraudulent.”

When the learned Additional Public Prosecutor filed a petition on 11.04.2019 to appoint P.W.4, the father of the victim girl as an interpreter to the recording of evidence of the victim and the copy was served on the learned State Defence Counsel Mr. Radha Kanta Mohapatra and he was given time only from 11.10 a.m. till 12 noon to file objection to such petition, he filed a memo on behalf of the U.T.P. seeking time to file objection but that was turned down by the learned trial Court and the reason assigned that the victim had come to the Court several times is not borne out from the record. When the learned State Defence Counsel did not appear when the evidence of the victim was recorded with the help of her father as interpreter, the learned trial Court not only engaged another State Defence Counsel, namely, Shri Bidyadhar Sahu whose name found place in the panel of State Defence Counsel, but also obtained consent from him to complete the cross-examination of the victim on that day itself. This is clearly not in consonance with law in view of the settled principle enunciated in different decision of this Court as well as the Hon'ble Supreme Court. When the accused was facing trial for an offence which carries punishment of rigorous imprisonment for a term which shall not be less than ten years, but which may extend to imprisonment for life, which shall mean

imprisonment for the remainder of his natural life and he shall also be liable to fine, the learned trial Court should not have hurriedly recorded the evidence of the victim without giving proper opportunity to the learned State Defence Counsel to prepare the case, obtain instruction from the accused and file objection to the petition filed by the learned Addl. Public Prosecutor. Engaging a new State Defence Counsel without providing him police papers and just asking him to inspect the case record and to cross-examine the victim and also taking consent from him to conclude the cross-examination on that day itself, in my humble view, is a gross illegality and the accused has been seriously prejudiced by such action of the trial Court. *A criminal trial is not an IPL T20 match where every 'substitute player' can be an 'impact player'.*

In view of the foregoing discussions, I am of the humble view that no proper opportunity has been provided to the learned State Defence Counsel to prepare the case thoroughly and to cross-examine the victim. Accordingly, the impugned judgment and order of conviction of the appellant under section 376(2)(I) of the Indian Penal Code is hereby set aside and the matter is remanded to the learned trial Court.

The trial shall now commence from the stage of giving opportunity to the learned defence counsel for further cross-examination of the victim (P.W.9). The learned trial Court shall give due opportunity to the appellant to engage his own counsel, if he so likes and if the appellant expresses his inability to engage his own counsel, a State Defence Counsel shall be engaged to defend the accused. While engaging the State Defence Counsel, the learned trial Court shall see that a competent counsel who is having extensive practice in criminal law particularly having vast experience in conducting sessions trial and ability to provide meaningful assistance to the accused is engaged. The copies of complete police papers and other documents as required to be supplied to the accused under section 207 of Cr.P.C., copy of heading of charge in Form No.32, the deposition copies of all the witnesses, copies of exhibited documents be supplied to the engaged counsel at least a week before the date is fixed for recording further cross-examination of the victim for preparation and opportunities shall be granted to the counsel to have meetings and discussion with the accused so that the accused would feel confident that the counsel chosen by the Court has adequate time and material to defend him properly. The learned defence counsel shall be provided

opportunity not only to further cross-examine the victim but also the other witnesses, who have been examined by the prosecution, if the learned counsel so desires by filing a petition under section 311 of Cr.P.C. for recall indicating specific questions to be put to the witnesses and thereafter opportunity shall be provided to adduce defence evidence, if any and then argument shall be heard and after assessing the evidence on record, fresh judgment shall be pronounced in accordance with law. The evidence of the victim shall be recorded in Vulnerable Witness Deposition Centre, Balasore. The case is remanded to the Court of learned trial Court with a direction to dispose of the case as early as possible preferably within a period of three months from the date of receipt of copy of this judgment.

Since I have remanded the matter to the learned trial Court for fresh adjudication and the appellant is in judicial custody since 19.06.2018, he shall be released on bail on such terms and conditions as may deem just and proper by the learned trial Court with a specific condition that he shall appear before the Court on each date when the case would be posted for trial and shall not try to tamper with the evidence.

The original lower Court records, which have been received along with the material objects, be sent down to the learned trial Court immediately.

Before parting with the case, I would like to put on record my appreciation to Mr. Jagannath Kamila, the learned counsel for rendering his valuable help and assistance towards arriving at the decision above mentioned.

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S.K. Sahoo, J.

Orissa High Court, Cuttack
The 22nd March 2023/PKSahoo/RKMishra

