

1. Santosh Biswal	
2. Surendra Kumar Dash	
3. Krushna Behera	
4. Manoj Kumar Sahu	... Appellants/ Petitioners

State of Odisha	...	Respondent/ Opp. Party
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This is an application under Section 389 of Cr.P.C. for grant of bail.

The appellants-petitioners have been convicted under sections 376-D/506/34 of the Indian Penal Code and sentenced to suffer R.I. for twenty years each and to pay a fine of Rs.30,000/- (rupees thirty thousand) each, in default, to suffer further R.I. for six months each for the offence under section 376-D of the Indian Penal Code, R.I. for two years each for the offence under section 506/34 of the Indian Penal Code and both the substantive sentences were directed to run concurrently by the learned Additional Sessions Judge, Chatrapur in Sessions Trial No.398 of 2013.

Learned counsel for the petitioners submitted that the petitioner no.1 Santosh Biswal is known as Bulu

Bisoi, who has been named in the first information report whereas the other three petitioners i.e. petitioner no.2 Surendra Kumar Dash, petitioner no.3 Krushna Behera and petitioner no.4 Manoj Kumar Sahu have not been named in the first information report and the test identification parade was conducted in Berhampur jail and it is the statement of the victim, who was examined as P.W.3 that she identified all the four petitioners before a Magistrate inside the jail premises and she proved the test identification parade report marked as Ext.8 and her signature as Ext.8/1. He further submitted that the learned J.M.F.C., Berhampur, who conducted the test identification parade on 15.05.2013 was not examined during trial and therefore, the defence counsel could not get any opportunity to cross-examine the Magistrate and in absence of the examination of the Magistrate, the report is not admissible. He relied upon a Full Bench decision of the Allahabad High Court in the case of **Sheo Raj -Vrs.- State reported in A.I.R. 1964 Allahabad 290** as well as a Division Bench of this Court in the case of **the State -Vrs.- Debraj Bhakta reported in 34 (1968) Cuttack Law Times 16**. He further submitted that the place of incident was a rough surface and when gang rape was committed on the victim, it was natural that there would have been injuries on different parts of the body of the victim particularly on the back and private part but the

doctor, who examined the victim has not been examined and the medical examination report of the victim which was marked as Ext.24 indicates that there was no injury present either on her person or in and around her private parts. He further submitted that in view of the available materials on record, there are good chances of success in the appeal, balance of convenience is in favour of the petitioners and the petitioners are in judicial custody since 07.05.2013 and thus they have undergone seven and half years of substantive sentence and there is no chance of early hearing of the appeal in the near future and therefore, the bail application of the petitioners may be favourably considered.

Learned counsel for the State, on the other hand, placed the evidence of the victim in which the victim not only identified the appellant no.1 Santosh Biswal in Court as the auto driver but also stated that other three petitioners standing inside the dock were present at the scene of occurrence and committed sexual intercourse with her but she could not say their names. She further stated that she identified the petitioners in the jail campus in presence of the Magistrate.

The points raised by the learned counsel for the appellants regarding the effect of non-examination of the learned Magistrate, who conducted the test identification parade as well as the doctor, who examined the victim are to be adjudicated at the time

of final hearing of the appeal.

In view of the available materials on record particularly the nature and gravity of the accusation and since it is a case of gang rape, in view of the evidence of the victim, at this stage, I am not inclined to release the petitioners on bail.

If the appeal is not ready for hearing even after the appellants have undergone half of the substantive sentence, then the appellants are at liberty to renew their prayer for bail.

Accordingly, the I.A. stands rejected.

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S.K. Sahoo, J.

I.A. No.992 of 2019

14. 25.02.2021 Heard.

There shall be stay of realization of fine amount imposed by the learned trial Court on the appellants-petitioners till disposal of the criminal appeal.

The I.A. is disposed of.

Urgent certified copy of this order be granted as per rules.

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S.K. Sahoo, J.