IN THE HIGH COURT OF ORISSA AT CUTTACK

CRLA No.1135 of 2025
CNR No.010704742025

(In the matter of an application under Section 374(2) of the Criminal Procedure Code, 1973)

Baina @ Baikuntha Nayak ……. ***Appellant***

-Versus-

State of Odisha ……. ***Respondent***

For the Appellant : Ms. Susmita Pattnaik, Advocate
For the Respondent : Mr. R.B. Dash, ASC

CORAM:

THE HONOURABLE SHRI JUSTICE SIBO SANKAR MISHRA

Date of Hearing: 11.09.2026 : Date of Judgment: 31.10.2026

S.S. Mishra, J. The present Criminal Appeal is arising out of the judgment of conviction and order of sentence dated 04.09.2025 passed by the learned Adhoc Additional Sessions Judge-cum-Fast Track Special Court under POCSO Act, Puri in T.R. No.134/40 of 2023/2018 arising out of Special G.R. Case No.17 of 2018 corresponding to Satyabadi P.S. Case No.66 of 2018, whereby the learned trial Court, while acquitting the appellant of the charges under Sections 452, 376/511 and 506 of the Indian Penal Code read with Sections 4 and 18 of the Protection of Children from Sexual Offences

Act, 2012, convicted him under Section 354 of the Indian Penal Code and sentenced him to undergo rigorous imprisonment for one year and to pay a fine of Rs.5,000/-, in default to undergo rigorous imprisonment for a further period of one month.

2. Heard Ms. Susmita Pattnaik, learned counsel appearing for the appellant and Mr. R.B. Dash, learned Additional Standing Counsel appearing for the Respondent-State.

3. The prosecution case, in brief, is that on 23.03.2018 the victim girl was alone in her house. The appellant came to the house and initially enquired about her parents and also about a hammer which, according to the evidence, had earlier been given to the father of the victim for repair. It is alleged that thereafter the appellant caught hold of the victim, made her lie on the ground and attempted to disrobe her with the intention of committing rape. The victim raised an alarm, whereafter the appellant left the place and allegedly threatened her with consequences if she disclosed the incident to anyone. On the basis of the written information lodged on the same day, Satyabadi P.S. Case No.66 of 2018 was registered and investigation was taken up.

4. During investigation, the Investigating Officer examined the witnesses, visited the spot, seized the relevant documents and articles, caused the statement of the victim to be recorded under Section 164 of the Code of Criminal Procedure and, on completion of investigation, submitted charge-sheet against the appellant for the offences punishable under Sections 452, 376/511 and 506 of the Indian Penal Code read with Sections 4 and 18 of the POCSO Act.

5. The prosecution examined nine witnesses, including the victim as P.W.3 and the Investigating Officer as P.W.9, and exhibited documents including the HSC certificate of the victim, the F.I.R., her statement under Section 164 Cr.P.C., seizure lists and medical reports. The defence was one of complete denial.

6. The learned trial Court, upon appreciation of the evidence of P.Ws.1 to 9 and the documents exhibited by the prosecution, held that the victim was aged about 17 years and 4 months on the date of occurrence and was, therefore, a child within the meaning of the POCSO Act. However, the learned trial Court found that the prosecution failed to establish the charges under Sections 452, 376/511 and 506 of the I.P.C. read with Sections 4 and 18 of the

POCSO Act beyond reasonable doubt. It was held that the entry of the accused into the house was initially connected with his purpose of taking back a hammer and there was no sufficient evidence of premeditation to commit rape; further, there was no penetration, no injury on the victim and the seized wearing apparel was not found torn. The charge under Section 506 I.P.C. was also held not proved for want of evidence that the alleged threat caused alarm to the victim. Nevertheless, relying upon the credible portion of the testimony of the victim that the accused caught hold of her and attempted to disrobe her, the learned trial Court held that the accused had used criminal force with the intention of outraging her modesty and accordingly convicted him under Section 354 of the I.P.C., treating the said offence as a lesser offence included in the charge under Section 376/511 I.P.C. and sentenced him accordingly. The relevant part of the aforesaid judgment is reproduced herein for ready reference:-

> *"12. The accused has also been charged U/s.376/511 of I.P.C. I have already discussed that the victim was not naked. There was no injury on her person. There is discrepancy relating to squeezing of breast between P.Ws.1, 2 & 3. The only evidence which is*

believable from the evidence and circumstances is that the accused tried to disrobe her but left when the victim became reluctant to agree with the action of the accused. The accused is aged 45 years and the victim is aged 17 years. The accused had the physical capacity to overpower her and to commit rape. But when he found the victim's reluctance for submitting herself towards the sexual urge of the accused, the accused left the place. So this may not be an attempt to commit rape on the victim. The accused had not mentally prepared to forcibly commit rape on the victim at that moment. So when the victim cried and shouted, he left the place. So Section 376/511 of I.P.C. is not established in evidence as there was no element to believe that the accused took some extreme steps to commit rape on the victim. But the action of the accused is squarely covered U/s.354 of I.P.C. The accused at the spur of moment made up his mind to sexually assault the victim and accordingly he caught hold of her with the intention to outrage her modesty. Since charge has been framed U/s.376/511 of I.P.C., a charge U/s.354 of I.P.C. which is an offence of lesser degree is covered within the charge of Section 376/511 of I.P.C. as per Section 222 and 221(2) Cr.P.C. Hence offence committed is included in offence charged.

13. So far charge U/s.506 of I.P.C. is concerned, the victim has stated that the accused left the place and while leaving the place threatened her to kill in case she disclosed the facts to others. But she does not say that the threat caused alarm in her mind and she was frightened because of the threat. Rather it is inferred from her evidence that soon after her mother arrived, she lodged F.I.R. on the same day. So threat did not have any impact on her mind. Accordingly, I am of the opinion that one of the vital ingredients of Section

506 I.P.C. being absent in evidence the charge cannot be held proved against the accused.

14. The accused has been charged U/s.4 & 18 of the POCSO Act. Section 4 of the POCSO Act deals with penetrative sexual assault. In the instant case there is no penetration. The allegation of attempt to commit rape fails, so attempt to commit penetrative sexual assault on the victim is not established as per my discussions made while considering the charge U/s.376/511 of I.P.C. So charge under Section 4 & 18 of POCSO Act fails.

15. In view of my discussions made above, I hold the accused not guilty for commission of the offence punishable U/s.452,376/511,506 of I.P.C. read with Sections 4 & 18 of the POCSO Act and acquit him therefrom as per the provision of Section 235(1) of the Cr.P.C."

Aggrieved by the findings extracted hereinabove which led to the conviction, the appellant has filed this appeal.

7. The principal question which arises for consideration in the present appeal is whether the conviction of the appellant under Section 354 IPC, on the evidence available on record and upon the findings recorded by the learned trial Court, calls for interference.

8. In the present case, the victim has consistently stated that the appellant entered the house, initially enquiring about the hammer, and thereafter caught hold of her and attempted to disrobe her. She further

stated that when she raised an alarm, the appellant left the house. The prompt lodging of the F.I.R. on the very day of occurrence and the recording of her statement under Section 164 Cr.P.C. constitute circumstances which lend assurance to the core of her version.

This Court, therefore, finds no sufficient ground to interfere with the finding of guilt recorded against the appellant under Section 354 IPC. The conviction under Section 354 IPC is accordingly affirmed.

9. The next question is the appropriate order on sentence. The occurrence is of 23.03.2018. The appellant was arrested on 26.03.2018 and was released on bail on 16.08.2018. After the judgment of the learned trial Court, he surrendered on 02.09.2026. The appellant has thus faced the criminal proceeding for a considerable period. The offence for which conviction has ultimately been recorded is under Section 354 IPC and not under the graver provisions of Sections 376/511 IPC or the POCSO Act with which he was originally charged.

10. Apt would be to place reliance upon the Judgement of the Hon'ble Supreme Court in ***Chellammal and Another v. State***

represented by the Inspector of Police[1] wherein the Apex Court has elaborately explained the scope, object and significance of the Probation of Offenders Act, 1958, while considering the question of extending the benefit of probation to a convict. The Hon'ble Supreme Court has underscored that the legislative intent behind the enactment of the Probation of Offenders Act is essentially reformative in nature, aiming to provide an opportunity to first-time or less serious offenders to reform themselves rather than subjecting them to incarceration. It has been emphasized that the provisions of the Act are intended to prevent the deleterious effects of imprisonment on individuals who can otherwise be rehabilitated as responsible members of society. The Court has further highlighted that Section 4 of the Probation of Offenders Act confers a wide discretion upon the courts to release an offender on probation in appropriate cases and that the said provision has a broader and more expansive ambit than Section 360 of the Code of Criminal Procedure, 1973.

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While discussing the interplay between the aforesaid provisions, the Hon'ble Supreme Court has also clarified that courts are duty-bound to consider the applicability of the Probation of Offenders Act in cases where the circumstances justify such consideration, and if the court decides not to extend the benefit of probation, it must record special reasons for such refusal. The relevant observations of the Hon'ble Supreme Court are reproduced hereunder:

> *"26. On consideration of the precedents and based on a comparative study of Section 360, Cr. PC and sub-section (1) of Section 4 of the Probation Act, what is revealed is that the latter is wider and expansive in its coverage than the former. Inter alia, while Section 360 permits release of an offender, more twenty-one years old, on probation when he is sentenced to imprisonment for less than seven years or fine, Section 4 of the Probation Act enables a court to exercise its discretion in any case where the offender is found to have committed an offence such that he is punishable with any sentence other than death or life imprisonment. Additionally, the non-obstante clause in sub-section gives overriding effect to sub-section (1) of Section 4 over any other law for the time being in force. Also, it is noteworthy that Section 361, Cr. PC itself, being a subsequent legislation, engrafts a provision that in any case where the court could have dealt with an accused under the provisions of the Probation Act but has not done so, it shall record in its judgment the special reasons therefor.*
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> *27. What logically follows from a conjoint reading of sub-section (1) of Section 4 of the Probation Act and Section 361, Cr. PC is that if Section 360, Cr. PC were not*

applicable in a particular case, there is no reason why Section 4 of the Probation Act would not be attracted.

28. Summing up the legal position, it can be said that while an offender cannot seek an order for grant of probation as a matter of right but having noticed the object that the statutory provisions seek to achieve by grant of probation and the several decisions of this Court on the point of applicability of Section 4 of the Probation Act, we hold that, unless applicability is excluded, in a case where the circumstances stated in subsection (1) of Section 4 of the Probation Act are attracted, the court has no discretion to omit from its consideration release of the offender on probation; on the contrary, a mandatory duty is cast upon the court to consider whether the case before it warrants releasing the offender upon fulfilment of the stated circumstances. The question of grant of probation could be decided either way. In the event, the court in its discretion decides to extend the benefit of probation, it may upon considering the report of the probation officer impose such conditions as deemed just and proper. However, if the answer be in the negative, it would only be just and proper for the court to record the reasons therefor."

11. In the present case, the appellant has ultimately been found guilty only under Section 354 IPC. The occurrence took place in the year 2018 and a substantial period has elapsed thereafter. The graver charges have not been established. The appellant remained on bail after 16.08.2018 and has now surrendered pursuant to the judgment. There is no material placed before this Court establishing any subsequent conviction of the appellant for a similar offence. Regard being had to the aforementioned proposition of law, the facts of the

present case, this Court is of the considered view that the case of the appellant deserves consideration under the beneficial provisions of the Probation of Offenders Act. This Court is inclined to extend to the appellant the benefit contemplated under Section 4 of the Probation of Offenders Act.

12. This Court also considers it appropriate to refer to Section 12 of the Probation of Offenders Act, 1958. The said provision provides that a person dealt with under Section 3 or Section 4 of the Act shall not suffer disqualification, if any, attaching to a conviction of an offence under any law. Accordingly, the appellant, having been dealt with under Section 4 of the Act, shall be entitled to the statutory protection contemplated under Section 12, subject to the terms and limitations contained in the statute. However, the direction of the learned trial Court for payment of Rs.2,00,000/- as compensation to the victim through the District Legal Services Authority, Puri, is maintained.

13. In light of these factors, while maintaining the conviction, it is appropriate to grant the appellant the benefit of probation under the

P.O. Act. This Court directs the appellant to be released under Section 4 of the Probation of Offenders Act for a period of six months on his executing bond of Rs.5,000/- (Rupees Five Thousand) within one month with one surety for the like amount to appear and receive the sentence when called upon during such period and in the meantime, the appellant shall keep peace and good behavior and he shall remain under the supervision of the concerned Probation Officer during the aforementioned period of six months.

14. Accordingly, the Criminal Appeal is partly allowed.

(S.S. Mishra)
Judge

The High Court of Orissa, Cuttack.
Dated the 31st day of October, 2026/ Subhashis Mohanty

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Signed by: SUBHASIS MOHANTY
Reason: Authentication
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