

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (SJ) No.100 of 2016

Arising Out of PS. Case No.-77 Year-2014 Thana- SONO District- Jamui

Md. Daud @ Daud Mian, Son of Mudin Mian, resident of Village-
Chauradhari, P.O. Aghara, P.S. Sono, District Jamui.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

Appearance :

For the Appellant/s	:	Mr. Umesh Prasad, Adv. Mr. Mirtunjay Kumar, Adv.
For the State	:	Mr. S.A. Ahmad, APP
For the informant	:	Mr. Rajesh Kumar Sinha, Adv.

CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI
ORAL JUDGMENT

Date : 06-08-2019

1. Appellant, Md. Daud @ Daud Mian has been found guilty for an offence punishable under Section 366A of the IPC and sentenced to undergo R.I. for ten years as well as to pay fine appertaining to Rs.20,000/- in default thereof, to undergo S.I. for six months additionally, under Section 8 of the POCSO Act and sentenced to undergo R.I. for five years, under Section 12 of the POCSO Act and sentenced to undergo R.I. for three years with a further direction to run the sentences concurrently vide judgment of conviction and order of sentence dated 21.01.2016 passed by Additional Sessions Judge, Ist -cum- Special Judge, POCSO in connection with Sessions Trial No.228/2014.

2. Kartik Barnwal, PW.3 filed written report on 10.05.2014 divulging the fact that his daughter (name withheld,



PW.1) aged about 15 years who happens to be student of Class-IX of Pariyojana High School, Sono in usual way has gone to school on 09-05-2014 but, did not return. He waited her till evening but, as she has not returned so, he contacted his well-wishers, friends, relatives but could not traced her out. During course thereof, he came to know that his daughter has been kidnapped by Daud Mian with the help of his brother, companion, relative along with unknown persons because of the fact that his daughter has complained so many times with regard to indecent activity of the Daud Mian. It has also been disclosed that about a year ago Daud Mian with the help of his associate had tried to kidnap her but, due to timely intervention of his mother she was rescued. It has also been disclosed that about a week ago Daud came to his shop and projected himself profligately whereupon, his nehighbour Anil Yadav had assaulted him and then, releaed him giving a warning.

3. After registration of Sono P.S. Case No.77/2014, investigation commenced and during course thereof, victim was traced out, her statement under Section 164 Cr.P.C. was recorded, she was medically examined, one of the accused, namely, Md. Daud (appellant) was arrested and so, keeping the investigation pending against remaining for want of apprehension charge sheet has been submitted against Md. Daud @ Daud Mian, facilitating



the trial, meeting with the ultimate result, subject matter of instant appeal.

4. Defence case as is evident from mode of cross-examination as well as statement recorded under Section 313 Cr.P.C is that of complete denial. Furthermore, it has also been pleaded that informant Kartik Barnwal had borrowed Rs.90,000/- from the appellant and for that, executed an undertaking. As he failed to pay the borrowed amount within stipulated period whereupon, there was persisted demand. However, as it appears that the informant has developed dishonest intention to digest the money whereupon this false case has been instituted so that appellant should give up demand. To substantiate the same, adduced oral as well as documentary evidence.

5. In order to substantiate its case, altogether seven Pws have been examined on behalf of prosecution who are PW.1-The victim, PW.2-Anil Yadav, PW.3-Kartik Burnwal, PW.4-Dr. Kabita Singh, PW.5-Dr. Amit Ranjan, PW.6-Vijay Kumar Chaudhary, PW.7-Sunita Devi. Side-by-side prosecution has also exhibited, Ext.1-Signature of victim over statement under Section 164 Cr.P.C., Ext.2-Written report, Ext.3-Medical Report, Ext.4-Medical Report relating to age of the victim, Ext.5 Series-X-ray plate, Ext.6-Formal FIR and Ext.7-Seizure list. In likewise



manner, one formal witness Ramniti Yadav has been examined on behalf of defence who exhibited an undertaking allegedly executed by the informant as Ext.A.

6. Assailing the judgment of conviction and sentence, it has been submitted at the end of the appellant that the prosecution story as advanced is found full of contradiction, unreliability and so, appears to be worthless whereupon, is non-sensical. In order to substantiate the same, it has been submitted that none is an eyewitness to occurrence. Though, PW.2 has tried to claim to be an eyewitness to occurrence but, after going through his evidence inconsonance with his conduct, it is apparent that he is set up witness. PW.3 is the father/informant while PW.7 is the mother. Having parallel scrutiny of evidence of these two witnesses, it is apparent that they have spoken lie. Now coming to remaining witnesses, it is evident that PW.5 is the doctor who had examined the victim in order to ascertain her age PW.4 is the doctor who had not substantiated the factum of rape on the other hand, found the victim accustomed to coitus and PW.6 is the I.O. from whose evidence, it is apparent that the story of kidnapping is found exposed if taken together with the evidence of PW.1.

7. Apart from this, it has also been submitted that from stage to stage, the prosecution has changed its path and that



happens to be reason behind presence of material exaggeration in the evidence of the victim right from the stage of her statement under Section 164 Cr.P.C. to the evidence having been given by her before the court and on that very score, her attention has been drawn up duly substantiated by the I.O. PW.6.

8. It has also been submitted that the story so propounded against the appellant could not be relied upon as, it is said that the victim was kidnapped in the morning of 09.05.2014 while she was in a way to school. On the other hand, appellant Md. Daud @ Daud Mian was arrested on 10.05.2014 at about 05:55 PM from his house. Victim (PW.1), if the evidence of PW.6 is considered, has been found on 12.05.2014 and so, the presence of appellant could not be in a way as suggested by the PW.1. That being so, the evidence of the prosecution is found full of infirmity and consequent thereupon, the finding of the learned lower court is found cryptic, erroneous whereupon, is fit to be set aside.

9. In an alternative, it has also been submitted that victim happens to be major as per finding of the doctor, PW.5. In the aforesaid background, considering her conduct, appears to be consenting party which is also found duly substantiated from subsequent conduct as, the prosecution party did not care with regard to presence of co-accused Ajay who since initial stage, is



evading in spite of the fact that he too has been found actively involved during commission of the alleged crime. Presence of material development in the evidence of PW.1 in order to drag the appellant is a circumstance going adverse to the prosecution and in the aforesaid background did not justify the finding whereupon, the judgment impugned is fit to be set aside.

10. On the other hand, the learned APP while supporting the finding recorded by the learned lower court has submitted that it is not the rule of the criminal jurisprudence that in case part of evidence of a witness is found unbelievable then, in that circumstance, whole evidence would be rejected as, falsus in uno falsus in omnibus is not applicable. Following such principle, the learned lower court meticulously examined the evidence of the witnesses and during course thereof, did not find the appellant to be guilty of an offence punishable under Section 376 of the IPC nor under Section 4 of the POCSO Act rather he has been found guilty for an offence punishable under Section 366A of the IPC because of the fact that from the initial version which has not been challenged at the end of the appellant, he associated with main accused Ajay in kidnapping of a minor, PW.1 in order to have illicit relationship with the PW.1 and so, conviction of appellant under Section 366A is concerned, same is maintainable.



Furthermore, it has also been submitted that so far conviction and sentence under Section 8 as well as 12 of POCSO Act is concerned the same is not at all substantiated from the evidence available on the record, rather, the evidence available on the record did justify applicability of Section 16 of the Act being an abater and for that, even having absence of charge, conviction could be recorded Section 221(2) of the Cr.P.C. so submitted that the judgment impugned could be modified in terms thereof.

11. PW.4 is the doctor who had examined the victim on 12.05.2014 at about 01:50 PM found the following:

Marks of identification:-

- 1) Til on left temple
- 2) Til on anterior aspect of left forearm.

Findings on physical examination of victim:-

- 1) No external injury, or any signs of resistance offered by victim found on victim's lips, cheeks, mammal, genitals or any other part of body.
- 2) Axillary hair present, breasts well developed.
- 3) No apparent abnormality or tenderness on per abdominal examination.
- 4) Pelvie examination-Pubic hair present. Per vaginal examination. Bleeding absent. Vagina admitted two fingers loose. Uterus antieverted, mobil, os closed, foriness clear.

Investigation on.

- (i) Urine for pregnancy test was negative.
- (ii) Laboratory Report of vaginal swab smear examination suggest absent of spermatozoa either dead



or alive and absence of red blood cells. But there few epithelial cells.

(iii) Ultra sonography of abdomen and pelvis suggest normal appearing liver, gallbladder spleen pancreas, kidneys, uterus and ovaries.

All reports were attached.

Age of victim will be determined by board of doctors.

Impression-Above findings suggest that victim might have had sexual intercourse, but there is no sign of forceful coitus.

During cross-examination save and except para-5 others are found non-relevant on the issue. In para-5, she has stated that she has not found any sign of forceful coitus.

12. PW.5 is the another doctor who was member of the board which examined the victim for ascertainment of the age and after proper examination, she has been found to be in between 14 to 16 years. During cross-examination, as is evident nothing substantial has been elicited from his mouth. Though, he was not cross-examined on the score but the fact remains that the radiological finding varies plus minus two years.

13. PW.1 is the victim. Before her examination, the note having scribed by the learned lower court, when her cross-examination resumed on 06.05.2015 is to be taken note of. The relevant provisions of POCSO Act are to be quoted later on, deals with procedure and power of special court under Chapter-VIII,



Section 33(3) as well as (4) thereof, speak that there would be frequent break during course of examination of child and in likewise manner, child friendly atmosphere has to be created till examination of the child. The second aspect is identification of special court as court of Session and further, the procedure so prescribed for conduction of sessions trial has been allowed to govern the trial under POCSO Act. Then in that circumstance, there was no occasion for the learned lower court to scribe the same including the plea having at the end of the learned defence counsel admitting the examination-in-chief of the victim. Once chief has been admitted then there was no scope for cross-examination.

14. Furthermore, as per section 2(d), the child has been defined as means any person below the age of 18 years. With regard to methodology to be used to resolve the controversy with regard to proper identity of a person to be child, the procedure so prescribed for conduction of an inquiry under the Juvenile Justice(Care and Protection of Children) Act is to be followed in accordance with Section 34 of the Act. That means to say, whenever an identity of a person as child is to be acknowledged the same should be adopting the procedure so prescribed under J.J. Act, more particularly, in accordance of Section 94. Apart from



this, the Hon'ble Apex Court has also in **Jarnail Singh Vs. State of Haryana** reported in **2013 Cr.L.J. 3976** as well as **State of Madhya Pradesh vs. Anoop Singh** reported in **(2015) 7 SCC 773** has observed that whenever the age of victim comes under dispute, the same has to be ascertained under the guise of procedure so prescribed under the Juvenile Justice (Care and Protection of Children) Act. From the evidence available on the record PW.1, the victim, it is evident that she has not been suggested to be a major nor PW.3, informant, PW.7, the mother, have been tested with regard to status of the victim to be major. That being so, as there was no challenge at the end of the appellant with regard to status of the victim to be minor, hence she is held to be minor. Consent if any though not suggested, would be of no use much less when prosecution is under POCSO Act.

15. As, POCSO Act is found applicable, on account thereof, the legal proposition so made applicable has also to be seen, and those are Section 29 as well as Section 30. Both has got independent identity but more or less command same arena, putting obligation on the court to presume the facts in issue. So far Section 29 is concerned, there happens to be no clutch on the other hand, the obligation is on the accused to rebut the presumption, while Section 30 permits only after having some sort



of prima-facie evidence to infer commission of an occurrence, though is also rebuttable. Now, the evidence has to be seen in the background of settled principle of law.

16. PW.1 has narrated that while she was coming to her school on 09.05.2014 at about 06:00 AM along with her friend Shikha and Rinki, they arrived at chowk at about 07:30 AM. During course thereof, she leg behind while her friends proceeded ahead. Ajay Kumar and Daud were present at chowk. They kept cloth over her face as a result of which she felt dizziness and then, got her over motorcycle. During course thereof, they have also tied her hand and put goggle over her eyes. Then they sped away the motorcycle to Chakai where the Khalasi of a bus was shouting Giridih-Giridih. They got her boarded in a bus and during course thereof, they administered some medicine as a result of which, she became senseless. Medicine was administered by Daud. After regaining sense she found herself at Bolero where they committed rape one by one. Then thereafter, they left her at the place of Hari who was residing along with her family members. Daud and Ajay also remained there and at that very place also, they committed rape. They have also taken away the mobile in order to blur any opportunity to inform her parents. After having case instituted by her father, police came into action as a result of which, Ajay



released her. Then thereafter, she came at Bokaro Bus Stand where she found herself in hapless condition and began to weep. During course thereof, one boy namely, Tannu inquired whereupon, she disclosed her miseries. Then, he dialed to Sono police station. Police came and searched her out. Ajay and Daud both have threatened to commit murder in case matter is reported against them. Hari allowed her to stay. Police brought her to Sono from Bokaro. Daud had damaged the Sim of her mobile. Police after taking her from Bokaro produced before the Magistrate where she had given her statement (exhibited), identified the accused in dock. During cross-examination at para-13 she has stated that she became apprehensive after seeing Ajay and Daud at chowk. She had seen them just 2-4 step ahead. She tried to slip therefrom. When they both tried to apprehend her, she raised alarm, but, none came. Thereafter, they gagged her mouth through handkerchief. At that very moment also she protested, raised alarm none came. The handkerchief was white coloured. She had opened her mouth whereupon, handkerchief was thrust inside. At that very moment she had protested. In para-14 she has stated that her hands were tied after sitting over motorcycle. At para-16 she has stated that goggle was put over her eye. She wriggled during course of sitting over motorcycle. In para-17 she has stated that the medicine was



given outside hotel at chakai. At that very moment also she had raised alarm. People from hotel and that of surrounding came whom she had disclosed that she has been kidnapped but, they have not taken any action. The accused persons took her away. When they boarded in bus, her hands have been untied goggle was removed. She was dragged in side the bus. She is unable to disclose the time. Then at para-18 there happens to be admission at her end with regard to her previous statement recorded under Section 164 Cr.P.C. that she had disclosed in the statement under Section 164 Cr.P.C. that Daud returned back leaving her in company of Ajay over the bus. She has further stated that she sat in bus however, she had stated that before the Magistrate that in Bolero they committed rape one by one and on that very score, there happens to be contradiction. In para-20 there happens to be cross-examination relating to rape having been committed at Bolero and in likewise manner, there happens to be cross-examination under para-21, 22. In para-24 there happens to be admission at her end that Daud was apprehended in the evening hour on 10.05.2014. She came at Sono police station in the morning of 12. Then she denied the suggestion that as her father is inclined to digest the borrowed amount appertaining to



Rs.90,000/- and for that she has been projected and then, this false case has been registered.

17. PW.2 is the Anil Yadav who during examination-in-chief has stated that on the alleged date and time of occurrence while he was going to procure residential certificate of his daughter and as soon as reached near Sono Bus Stand, he found Daud Mian taking away the victim over bike along with others. Then thereafter, he gone to block and then, to his relative. He returned back on 10.05.2014. He had not seen anything more. He has further stated that about a week ago Daud had misbehaved over which he had assaulted him. During cross-examination he has stated that Sono traker stand is the busy place. He raised alarm at that very moment. Again volunteered that she herself was raising alarm whereupon people assembled till then, Daud managed to take her away. In para-5 he has stated that he had not disclosed to any body save and except Raju Barnwal whose house is near the house of Kartik Barnwal. In para-6 he has stated that he had not informed the police. In para-7 he has stated that on 09.05.2014 he was at village-Tilbariya wherefrom he returned on 10.05.2014. At para-9 and 10 there happens to be contradiction. Then he denied the suggestion that they have planned this story in



order to digest money which father of victim had borrowed from the accused.

18. PW.3 is the informant. During examination-in-chief he has reiterated his earlier version. Exhibited the written report. Furthermore, it has also been disclosed at his end that after institution of the case police has recovered the victim and then, the victim was released in his favour on an undertaking. During cross-examination at para-3 he has disclosed distance in between Sono and Aghara his house, to be ten kilometer. In para-4 he has stated neither he nor his family members accompanied the victim during course of to and fro to the school. It was a morning school. victim used to return back at 11:30 AM. When she had not returned up till 11:30 then he had gone to search at Sono, inquired about but failed to trace out. In para-5, he has stated that after coming to know on 10-05-2014 regarding her kidnapping by Daud he rushed to police station and then, instituted the case. In para-6 he has stated that at an earlier occasion he had not instituted a case nor Sanha was given. In para-8 he has stated that accused Daud was apprehended on 10.05.2014 while victim was traced out on 12.5.2014. In para-9 he has admitted that he had not mentioned in the written report that in order to preserve prestige of family he had not instituted case at an earlier occasion. Then he has denied



the suggestion that in order to grab the money which he borrowed from the accused, this case has been planted.

19. PW.7 is the wife of PW.3, mother of PW.1. During her examination-in-chief, she has stated that on the alleged date and time of occurrence, her daughter had gone to school but, did not return whereupon, they gone in search of her but, in vein. In the evening hour, friend of her daughter came and disclosed that Daud Mian after administering medicine took her away. At that very time her mouth was gagged. Her daughter was taken to Chakai, then to Bokaro by the Daud as disclosed by Anil Yadav. Her husband had instituted a case on 10th. Her daughter had informed at police station from Bokaro whereupon, her daughter was brought to Sono police station and then was produced before the court where her statement was recorded. She was also medically examined. Daud had raped her. She has stated that about a week ago Daud Mian has threatened that in case deposing against him, she will be given a lesson. Identified the Daud Mian in court and disclosed that he had ruin the life of the victim. During cross-examination, at para-5 she has stated that during course of going to school her daughter stayed to take breakfast at Sono chowk as disclosed by her friend. She also disclosed that she (victim) had not returned. She also said that where she (victim)



had gone, unable to say. She could not be able to examine them (her friends). Victim was recovered on third day. Daud was apprehended a day after the occurrence. Her husband had given name of Ajay also. In para-6 there happens to be cross-examination with regard to Ajay. In para-7 she has stated that they have not taken step over threatening given by Daud. Then she denied the suggestion.

20. PW.6 is the I.O. He has stated that on 10.05.2014, he was S.I. at Sono police station. On the said day he took up investigation of Sono P.S. Case No.77/2014. He recorded further statement of the informant. He also recorded statement of independent witness. Inspected the place of occurrence and detailed the same. He had also examined independent witnesses Manoj Barnwal, Shikha Kumari, Rinki Kumari @ Guriya, Sunita Devi and inquired about the victim. Then he had gone to village Chauradhani and conducted raid at the house of the accused. Apprehended Daud Mian. On search, a mobile phone was found from his possession and for that seizure list was prepared. Returned back to the police station, recorded defence of the accused wherein he confessed guilt and also disclosed that for the last one year, he was in love with the victim and was, ready to marry. On 11.05.2014 accused was forwarded to judicial custody.



On 12.05.2014 at about 03:45 AM, S.I. Kaushal Kumar along with armed constable and Lady SPO brought the victim at police station. It was disclosed by the Officer-in-charge that they have brought the victim from Bokaro. On 12.5.2014 victim was produced before the Magistrate where she was examined under Section 164 Cr.P.C. and then, she was medically examined. Received supervision report. Then exhibited the formal FIR, endorsement over written report. Then after completing investigation submitted charge sheet against Daud Mian keeping investigation pending against others. Also exhibited the seizure list. In para-9 he has admitted that the investigation against the co-accused is still pending. In para-10 he has stated that the P.O. is house of the informant. He has further stated that he has not recorded statement of the person whose house lies in the boundary of the house of the informant. He has further stated that he apprehended Daud on 10.05.2014. In para-11 he has stated that Officer-in-charge of the Sonu P.S. has disclosed that victim has been brought from Bokaro. She was brought on 12.05.2014 at about 03:45 AM. He has further stated that armed police personnel along with Officer-in-charge, lady constable have gone to Bolero for recovery of the victim. He has further stated that he had not taken statement of the victim. In para-13 he has stated that he had



not gone to Bokaro. He had not inspected Sono tracker stand. He had not taken statement of any of shopkeeper of Sono. In para-14 he has stated that he had not gone to school in order to ascertain whether victim was a student there or not. He had not inquired on the alleged date victim had travelled by which vehicle. Then he denied the suggestion that neither victim was a student of that school nor she had gone to Sono chowk. In para-15 he has stated that parents of the victim had not accompanied them to Katchari. After examination of the victim, under Section 164 Cr.P.C. she was handed over to them. In para-16 he has stated that he had not directed the informant to furnish certificate relating to age of the victim. In para-18 there happens to be cross-examination with regard to Anil Yadav. Then has denied the suggestion that in collusion with prosecution party, he has maneuvered the thing.

21. As stated above, victim has not been cross-examined nor suggested over her status to be major. Though from her evidence there happens to be some sort of exposé with regard to her inclination but, being her status to be minor (child) that evaporates. Furthermore, it is also evident that while confronting her previous statement under para-18 wherein she has admitted that during course of her statement under Section 164 Cr.p.C. she had stated that accused Daud returned back after getting her



boarded in bus along with Ajay and that part of evidence, has not been challenged. That being so, that part of evidence is found admitted at the end of the appellant. That being so, the involvement of appellant happens to be with regard to kidnapping of the victim in order to have illicit relationship with the Ajay that means to say the ingredients of Section 366A is found duly substantiated.

22. So far conviction under Section 8 as well as Section 12 of the POCSO Act is concerned, the same is not at all applicable because of the fact that Section 8 is a penal section relating to sexual assault which has been defined under Section 7 of the Act and that is with regard to touching of the body of the victim with sexual intent and the same is lacking and in likewise manner, Section 12 is the penal section of Section 11 which defines the sexual harassment and again, so far alleged date of occurrence is concerned, there happens to be no allegation at the end of the victim justifying any of the ingredient so incorporated therein and so, would not be but, indulgence of Ajay in sexual activity comes within the purview of Section 3 and as, the appellant has facilitated presence of victim therefore, found as an abater and in the aforesaid background, Section 16 will be applicable and for that, is liable to be punished in accordance with



Section 17 of the Act. It is needless to say that Section 221 (2) of the Cr.P.C. did permit the court to inflict the sentence in case evidence is found on the record, even in absence of proper charge thereunder. Consequent thereupon, maintaining the conviction and sentence relating to Section 366A IPC, appellant is found guilty for an offence punishable under Section 17 of the POCSO Act and sentenced to undergo R.I. for five years with a further direction to run the sentences concurrently. In the background of aforesaid finding, the instant appeal is found devoid of merit whereupon is dismissed. Appellant will remain under custody till saturation of the sentence.

(Aditya Kumar Trivedi, J.)

Prakash Narayan

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