

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (SJ) No.425 of 2016

Arising Out of PS. Case No.-87 Year-2014 Thana- RIGA District- Sitamarhi

1. Saudhin Nut @ Sahabuddin Nut, son of Rustam Nut.
2. Noor Mohammad, son of Azim Nut, both resident of Village- Ram Nagara, P.S.- Riga District- Sitamarhi.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

Appearance :

For the Appellant/s	:	Mr. Mahendra Thakur-Advocate Mr. Vijay Kumar-Advocate Mr. Sanjay Kumar-Advocate
For the Respondent/s	:	Mr. Sujit Kumar Singh-A.P.P.

CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI
ORAL JUDGMENT

14-08-2019

Appellant Saudhin Nut @ Sahabuddin Nut and

Noor Mohammad have been found guilty for an offence punishable under Section 366A of the I.P.C. and each one has been sentenced to undergo R.I. for seven years as well as to pay fine appertaining to Rs.20,000/- and in default thereof, to undergo R.I. for six months, additionally, under Section 376(2) (N) of the I.P.C. and sentenced to undergo R.I. for ten years as well as to pay fine appertaining to Rs.30,000/- and in default thereof, to undergo R.I. for six months, additionally, under Section 4 of the POCSO Act and sentenced to undergo R.I. for ten years as well as to pay fine appertaining to Rs.30,000/- and in default thereof, to undergo R.I. for six months, additionally,



with a further direction to run the sentences concurrently, with a further direction that the half of the fine amount, if deposited, will be paid to the victim vide judgment of conviction dated 18.03.2016 and order of sentence dated 21.03.2016 passed by the 1st Additional Sessions Judge-cum-Special Judge, POCSO Act, Sitamarhi in Trial No.15 of 2015 arising out of Riga P. S. Case No.87 of 2014.

2. On 27.05.2014, informant Ram Binay Sah filed written report having an averment that on 18.05.2014 his minor daughter (victim, PW-1, name withheld) aged about 11 years while has gone to meet nature's call at about 7.00 P.M., did not return even at late night caused anxiety to them, whereupon they began to search and during course thereof, they have also gone to the house of Saudhin Nut as he used to talk over his mobile, who was also found missing since the day of occurrence and then, the villagers have also disclosed that Noor Mohammad, son of Azim Nut had actively co-operated with him in getting his daughter kidnapped.

3. As is evident, after registration of Riga P. S. Case No.87 of 2014, investigation commenced and during midst thereof, after getting clue at the end of the Sonipat Police Station, the police party gone there and brought the victim



whose statement was recorded under Section 164 of the Cr.P.C. She was medically examined. After examination of other witnesses, investigation concluded by way of submission of chargesheet, facilitating the trial meeting with the ultimate result, subject matter of instant appeal.

4. Defence case, as is evident from cross-examination as well as statement recorded under Section 313 of the Cr.P.C. is that of complete denial. However, nothing has been adduced in defence.

5. In order to substantiate its case, prosecution has examined altogether six PWs, who are PW-1, the victim, PW-2, Samudri Devi, PW-3, Abhiram Sharma, PW-4, Dr. Anil Kumar Shrivastava, PW-5, Rakesh Sah and PW-6, Sri Rajendra Kumar Sinha. Side by side, has also exhibited, Exhibit-1, margin case registering note of the then O/c of Riga, Exhibit-2 series, signature of doctor, constituting medical Board for examination of the victim followed with medical report, Exhibit-3, statement of the victim under Section 164 of Cr.P.C. As stated above, nothing has been adduced on behalf of defence.

6. Learned counsel for the appellants while assailing the judgment of conviction and sentence has submitted that the learned lower Court in perfunctory manner recorded its



finding, whereupon happens to be non-sustainable in the eye of law. In order to justify the same, it has been urged at the end of the learned counsel for the appellant that informant has not been examined. Though one of the member of the medical board has been examined, but the lady doctor, who had examined the victim has not been examined. Because of the fact that with regard to external or internal examination of the victim, she was the exclusive authority and so, her non-examination happens to be adverse to the interest of the prosecution. Also urged that due to non-examination of informant, the defence has been deprived of an opportunity to cross-examine him on the point of delay. So, the cumulative effect bound to demolish the prosecution case. Furthermore, it has also been submitted that none is an eye witness to occurrence and so, save and except evidence of PW-1, evidence of none of others could be accepted as happens to be under the category of hearsay. It has also been submitted that evidence of victim could not be accepted in the background of the fact that during cross-examination, she has stated that she was not knowing Saudhin Nut since before the occurrence while from the initial version of the informant, it is evident that he used to talk over his mobile and was frequent visitor at his shop. When these two circumstances are parallelly compared, it



speaks a lot and in the aforesaid background, neither it could be said to be a case of kidnapping nor rape rather in worst case happens to be consensual and that is further exposed from the conduct of the victim, who did not try to take positive steps including by way of raising alarm, making protest, rather enjoyed the company and later on, on being apprehended, at the pressure of her parents, got the appellants implicated in order to protect herself. That being so, it is a fit case wherein the judgment impugned needs reversal.

7. On the other hand, learned Additional Public Prosecutor while supporting the finding recorded by the learned lower Court has submitted that appellants have got no leg to standby, because of the fact that they are deficient on two score. The first one is regarding identity of the victim, being minor aged about 12 years on the day of examination and so, consent if any, though not pleaded nor suggested has got no identity in the eye of law. And the other, from the evidence of victim, it is crystal clear that her presence at Sonipat, Ludhiana is not at all found under the controversy, because of the fact that victim was recovered there from. Though, there happens to be some sort of slackness at the end of the I.O., but those are not going to axe upon the interest of the prosecution. Thus, from the materials



having on the record, the finding so recorded by the learned lower Court is found fully justified.

8. From the evidence of PW-4, Dr. Anil Kumar Shrivastava, it is evident that for the examination of the victim, a Board was constituted consisting him as well as Dr. Rajni Sinha and Dr. S. Bharti, on an order of Civil Surgeon-cum-Chairman, Sadar Hospital, Sitamarhi. The board after examination, estimated the age of the victim to be 14 years, apart from the fact that during external as well as internal examination, hymen has been found old ruptured and in likewise manner, non-presence of dead or alive spermatozoa, but no injury over her person (external) has been found and so, the Board was of the opinion that it was difficult to say whether she was raped or not. The learned counsel for the appellants has tried to deal with the finding in favour of the appellants, but that is found disanimate on two score, the first one even accepting of variance of age 12 years, still the victim is below 18 years, and secondly her hymen is found old ruptured, and no effective cross-examination is found on that score. PW-1 has stated that while she was being used as a sex-doll, she protested, resisted and shouted attracting so many persons including the landlord, who informed the police. Police came, took her away along with



the accused including Sahabuddin Nut and then, she was kept at the place of Ward Commissioner. PW-3, after approaching the Ludhiana police got possession of PW-1 from the aforesaid Ward Commissioner. Though in exceptional circumstance, the Modi had found presence of alive spermatozoa even after 48 hours, but normal life span of spermatozoa is 24 hours and within 48 hours it became dead. Beyond 48 hours, there would not be presence of spermatozoa dead or alive in the vaginal swab and so, rightly not been traced out during course of medical examination.

9. Although, the Apex Court has deprecated mode of ascertainment of age by medical evidence as has held in *Jarnail Singh vs. State of Haryana reported in 2013 CRI.L.J. 3976* and in *State of Madhya Pradesh vs. Anoop Singh reported in (2015) 7 SCC 773*, and directed to be ascertained in accordance with procedure so prescribed under Juvenile Justice (Care & Protection of Children) Act, wherein medical examination is prescribed whether no other document is there. So far status of victim is concerned, she happens to be illiterate.

10. Identifying the status of the victim to be a child below the age of 18 years, and subjected to sexual assault, attracting application of POCSO Act, then in that circumstance,



two Sections are necessary to be taken note of and those are Section 29 as well as 30 of the POCSO Act. So far Section 29 is concerned, that happens to be under the banner of reverse burden as it provides legal presumption with regard to commission of an occurrence unless rebutted by the accused. Needless to say that nothing has been adduced at the end of the accused is rebuttal. For the present, giving an expansion to the word 'rebuttal', by way of cross-examination is also to be seen and for that, none other than the evidence of PW-1 is found relevant one as there happens to be specific disclosure that while she had gone to meet nature's call, she did not return and none had claimed to have seen the aforesaid incidence.

11. PW-1, during course of her examination-in-chief, has stated that while she was along with her mother and was present at her "Kachri-Mudhi" Shop, she has gone towards flank of a pitch road lying North to Raja Chowk to ease. At that very moment, Noor Mohammad remained on the motorcycle while Sahabuddin @ Saudhin Nut gagged her mouth, lifted her, got her in the middle and then, Noor Mohammad sped away. After having at lonely place, she was injected as a result of which, she became unconscious. When she regained sense, she found herself in a train having presence of Saudhin Nut, Noor



Mohammad, brother-in-law of Noor Mohammad namely Rahman and one more, whose teeth were projected outside (Datula) by her side. When she inquired, they have threatened in case of raising alarm, she will be eliminated. Even at Ludhiana Station, they continued in threatening her and then, they took her to six number gali where they used her as sex-doll indulging not themselves alone rather they also allowed their friends to indulge in sexual activity with her. At last, in order to save herself, she began to shout, whereupon landlord came, inquired over which, she narrated her owe, who informed the police. Police came and took her away along with Saudhin Nut, Noor Mohammad, Rahman and one another (Datula) to police station where she was interrogated and then, she was kept at the place of Ward Commissioner while the accused were kept under police custody. Then the Ludhiana Police informed the local police, whereupon local police came, took her custody and then, returned back, her statement under Section 164 of the Cr.P.C. was recorded, she was medically examined. Even during course of her statement, she had detailed the incident. She was allowed to go to her parents, identified the accused. During cross-examination at the end of Saudhin Nut at Para-8, she has stated that house of Saudhin lies at a distance of one Kosh from her



house. She had not seen house of Saudhin, never visited her house. She had not talked with her since before the occurrence. She was not identifying the Saudhin. She had heard names of accused from the mouth of her parents. After the occurrence, she properly identified the accused. In Para-9, she has stated that the Ludhiana police apprehended her after seven days. At that very place, she was not examined by the doctor. Four days after returning from Ludhiana, she was medically examined. In Para-11, she has stated that her parents had not gone along with police. She was taken along with Saudhin. She had got no idea with regard to rest others. Then has denied the suggestion that Saudhin Nut had not committed rape rather at the instance of her parents, she has falsely implicated him. At the end of Noor Mohammad at Para-15, she has shown the boundary of the place wherefrom she was kidnapped as East-West-Road. In Para-17, she has stated that grocery shop of Ramdeo Sah lies three laggi away from the P.O. She is unable to say with regard to other people. In Para-19, she has stated that while she was going to meet nature's call, she had not seen the accused getting down from the motorcycle. In Para-20, she stated that when Saudhin caught hold her, she tried to raise alarm, but by then, her mouth was gagged and then, she was lifted and taken away over



motorcycle. She is unable to disclose the exact time whereunder the whole event materialized. She is unable to disclose time of arrival at Sitamarhi, Muzaffarpur as she had fallen unconscious. She regained sense in train. Just after regaining sense, they arrived at Ludhiana. In the train, she wanted to raise alarm, whereupon she was threatened that in case of raising alarm, she will be eliminated and in likewise manner, they continued to threat her during course of travelling over tempo. In Para-25, she has further stated that all of them used to remain in the room. Three persons remained outside while three persons inside the room. In Para-26, she has stated that even after commission of rape, when she intended to go to wash-room, they followed her. In Para-28, she has stated that during course of statement under Section 164 Cr.P.C., she had not disclosed name of accused persons as she was mentally perturbed. Then she has disclosed the statements whatever been not disclosed by her during course of her statement under Section 164 Cr.P.C. Then, she denied the suggestion that she had gone along with her companion. Accused Noor Mohammad has not accompanied her. In Para-34, she has denied the suggestion that Saudhin was not arrested by the Ludhiana Police rather he was arrested at Sitamarhi Bus Stand.



12. PW-3 is the I.O., who during course of examination-in-chief, has stated that after registration of the case, investigation was entrusted to him. Inspected the place of occurrence, which happens to be Northern flank of a road lying at circle no.5. Witnesses have been examined. It has also been disclosed by him that he came to know that the victim along with accused Saudhin Nut is residing at Mohalla Golden Vihar, Ward No.1, Ludhiana and then, after getting permission, he along with other police personnel, lady constable proceeded to Ludhiana. They arrived on 28.05.2014, then they reached at Basti Thana on 30.05.2014 where they disclosed about their presence, whereupon the local police disclosed that the victim has been kept under surveillance of Ward Commissioner Ranjit Singh, whereupon they have gone to Ranjit Singh and took custody of the victim. Then thereafter, they returned back to the concerned police station. He had further stated that at Ludhiana itself, he came to know that accused persons have proceeded there from. Then thereafter, they returned back to Riga Police Station and then, the victim was produced before the Court for examination under Section 164 of the Cr.P.C., was also medically examined and then, she was handed over to her parents. In Para-12, he has further stated that one of the accused Sahabuddin Nut was



arrested by him on Bus Stand, Sitamarhi. Noor Mohammad had surrendered, identified. After completing investigation, submitted chargesheet. During cross-examination at Para-15, he has stated that he took control of the victim on 30.05.2014 at about 4.15 P.M. He had not recorded statement of the Ward Councilor, he had not recorded statement of the victim. Though, she had stated, but he had not recorded the same. He proceeded there from in the night of 30.05.2014. He came on the following day, on that day i.e. 01.06.2014, he arrested Saudhin Nut from Sitamarhi Bus Stand. On 02.06.2014, accused was forwarded to Judicial custody and that day itself, victim was examined under Section 164 Cr.P.C. as well as she was also medically examined.

13. PW-6 is the Magistrate, who had recorded statement of the victim under Section 164 Cr.P.C. It is needless to say that the purpose of 164 Cr.P.C. is only for corroboration or contradiction. It could not be treated as substantive evidence.

14. PW-2 is the mother while PW-5 is the brother-in-law of the victim. Admittedly, they are not the eye witness to the occurrence rather they have deposed on the basis of the information having given by the victim.

15. Now, coming to the propriety of the finding recorded by the learned lower Court. So far Section 366A of the



I.P.C. is concerned, it happens to be applicable in a case where kidnap of the victim is with an intention that she will be forced to illicit intercourse along with others. In the present case, the kidnapper himself indulged in sexual assault with the victim, whereupon Section 366A of the I.P.C. would not be applicable and to that extent, the finding of the learned lower Court is being resilient and is annulled, confirming the finding relating to other two Sections along with the sentences having inflicted. Therefore, appellants are in custody, which they will remain till saturation.

(Aditya Kumar Trivedi, J)

Vikash/-

AFR/NAFR	A.F.R.
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