

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (SJ) No.895 of 2016

Arising Out of PS. Case No.-256 Year-2014 Thana- PIRPAINTI District- Bhagalpur

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Yogendra Prasad Ram @ Yogendra Ram Son of Late Grabu Ram resident of
Village - Simanpur, Police Station - Pirpainti, District - Bhagalpur.

... .. Appellant/s

Versus

The State Of Bihar.

..... .. Respondent/s

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Appearance :

For the Appellant/s : Mr. Radheshyam, advocate.

For the Respondent/s : Mr. Sujit Kumar Singh, A.P.P..

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CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI
ORAL JUDGMENT

Date : 26-09-2019

1. Heard learned counsel for the appellant as well
as learned Additional Public Prosecutor.

2. Appellant Yogendra Prasad Ram @ Yogendra Ram
has been found guilty, for an offence punishable under Section 4
of the POCSO Act (Protection of Children from Sexual
Offences Act) and sentenced to undergo rigorous imprisonment
for ten years as well as pay a fine appertaining to Rs.10,000/- in
default thereof, to undergo simple imprisonment for six months,
additionally, vide judgment of conviction dated 29.08.2016 and
order of sentence dated 02.09.2016 passed by 1st Additional
Sessions Judge-cum-Special Judge POCSO Act, Bhagalpur in
connection with Sessions Trial No. 872 of 2014 arising out of
Pirpainti P.S. Case No. 256 of 2014.

3. Sindhu Devi (P.W.3), filed a written report on
04.11.2014 disclosing therein that on the eve of Chhath, while
she was engaged in performing rituals and after performing



rituals when she return back from the Ghat to her house, her daughter became unwell. One of co-villager namely, Yogendra Prasad Ram happens to be sorcerer, and is used to treat was accordingly informed. At about 9.P.M. he came and then, on the pretext of exercising some occult practice, took away the victim (name withheld, P.W.1) behind the house and during course thereof, he directed that she has been victimized by the evil ghost, whereupon none would come till his exercise is over and during course thereof, after gagging her mouth he committed sin. Out of fear, the victim has not disclosed the aforesaid incident to any person. On 30.10.2014 when she returned back from Ghat, she found her daughter unable to get up. On query, she began to weep and said that she could not got up, urine is not being discharged and there happens to be burning sensation. Apart from this, she is also feeling severe pain and then, began to weep. On further interrogation she disclosed that the Ojha has directed her that in case of disclosure to anybody, she will die and then narrated the event. Thereafter, she has gone to the place of Yogendra Prasad Ram, who threatened to kill her. Again said, that he is going to provide treatment and then, took the victim for treatment. After having the victim treated, he returned back and then again threatened that in case of disclosure she will be eliminated. Out of fear, she kept silence but, seeing the



condition of the victim lastly, she considered appropriate to report the matter and accordingly, placed the written report.

4. After registration of Pirpanti P.S. Case No. 256 of 2014, investigation commenced and after concluding the same, charge-sheet has been submitted, facilitating the trial, meeting with the ultimate result, subject matter of instant appeal.

5. Defence case as is evident from mode for cross-examination as well as statement recorded under Section 313 Cr.P.C. is that of complete denial. It has further been pleaded that at an earlier occasion there was dispute in between the father of the victim along with the appellant/accused over a mobile phone and in the aforesaid background, the appellant has been falsely been implicated in this case. However, nothing has been adduced in this regard.

6. Altogether eight Pws has been examined on behalf of the prosecution who are P.W.1,victim, P.W.2,Sindhu Devi, P.W.3 Shobha Devi, P.W.4, Bhario Das, P.W.5, Premlata Devi, P.W.6, Rinku Kumar, P.W.7 Dr. Alpana Mitra and P.W.8, Mukhram Tiwari. Side by side as also exhibited, Ext-1 injury report, Ext.-2 formal F.I.R., and Ext-3 endorsement over the written report.

7. As stated above, nothing has been adduced on behalf of the defence.



8. While assailing the Judgment of conviction and sentence, the learned counsel for the appellant has submitted that the prosecution case suffers for inherent lacuna which has completely been ignored by the learned lower court and that being so, the Judgment impugned is unsustainable in the eye of law. In order to substantiate the same, it has been submitted that prosecution has changed the initial version and for that, no reason has been assigned. It has further been submitted that it is true that F.I.R. should not be encyclopedia of the occurrence, but in the facts and circumstances of the case, when the written report has been filed after four days of the occurrence and, informant being illiterate that means to say whatever been incorporated therein happens to be either her own thought or thought of others, having ample opportunity to weave the story and further, to implicate on account of personal grudge plays an important role which, irrespective of the fact that during course of cross-examination, the same has not been confronted to the informant even then, material whatever been incorporated in the written report has to be seen by the court in order to adjudge with regard to the reliability, truthfulness of the prosecution version. Then, it has been submitted that now coming to the facts of the case, irrespective of the fact that since examination of P.W.1 victim there happens to be substantial exaggeration in



the oral evidence which is not at all found supported by the medical evidence. Further, there happens to be specific plea at the end of the victim along with others that the victim was taken to hospital by the informant herself, brushing aside the initial narration whatever been under the written report that victim was taken away by the appellant/accused alone to the doctor and further, having three stitches also not corroborated by the doctor P.W.7. The doctor P.W.7 also ruled out the penetrative sexual assault as per definition so prescribed under Section 3 of the POCSO Act, and that being so, no offence under the POCSO Act, more particularly Section 4 of the POCSO Act is made out.

9. Apart from this it has also been submitted that considering the infirmities having in the evidence of P.W.1 to P.W.6, the whole prosecution version is found iridescent in the aforesaid facts and circumstances of the case, is found duly covered under the principle laid down by the Apex Court vide Judgment dated 21.08.2018 in Sham Singh vs. State of Haryana, Cr. Appeal No. 544 of 2014, and to substantiate the same, referred paragraph 22 of the Judgment which reads as follows;

“The Fact that at the residential house of the appellant, wherein all the inmates of the house including the mother, children, sister and wife of the accused were living, such a



brutal offence of rape could not have been executed without attracting the attention of anyone at that point of time, would make the prosecution version seriously improbable. We are of the view that the doubtful and suspicious nature of the evidence sought to be relied upon to substantiate the circumstances in this case themselves suffer from serious infirmities and lack of legal credibility to merit acceptance in the hands of the court of law. Having regard to the material on record, we find that there is every possibility of false implication of the accused in this matter to take revenge against the family of the accused because of the longstanding disputes inter se between the two families.”

10. The learned counsel for the appellant also submitted that the presumption as prescribed under Section 29 of the POCSO Act, is not at all legally, enter-tenably because of the fact that no corresponding amendment has been made under the Evidence Act and so, it happens to be violative of principles of natural justice.



11. On the other hand, the learned Additional A.P.P. while supporting the findings recorded by the learned lower court has submitted that after going through the materials available on the record, meticulously, the learned lower court has come to the finding of guilt against the appellant and that being so, it needs no interference.

12. P.W.7 is the doctor. She had examined the victim on 04.11.2014 and recorded following finding;

(i) There is no sign of physical and chemical injury on her body including private parts.

Came to me with Foley's catheter and urine-bag with 300 ml urine. She gave the history of sexual assault (Rape) on 29.10.2014. Her menses is not started.

Sent her to patho Department of J.L.N.M.C.H with two sealed vaginal swab for spermatozoa detection.

Sent to radio-logical dept. of J.L.N.M.C for X-ray of wrist, elbow and pelvis for age determination. M.I. Black till on (R) Elbow joint.

According to Memo No. 446 dated 05.11.2014 spermatozoa not found.

According to X-ray No. 293 dated 04.11.2014 age on the basis of Radio-logical ground is below fourteen years/less than fourteen year/< 14 years.



Opinion- According to above report there is no recent sexual intercourse and she is found below fourteen year (<14 years).

13. During cross-examination, in para 3 she had stated that has there being genital organ of the victim stitched then, in that circumstance, certainly the same would have been reported in her report.

14. Apart from the fact that victim was examined beyond 24 hours of the occurrence so there was no question of presence of dead or alive spermatozoa even then, as per report as well as deposition of the doctor, it is crystal clear that the finding has been recorded on the basis of superficial finding of her wise, she would have recorded the same after removal of catheter which have proper one.

15. P.W.-1 is the victim. She has stated that the occurrence is at the time of Chath (a festival). At that very time, she was suffering from headache. Yogendra Prasad Ram happens to be her grand father as well as he also happens to be sorcerer. He came at her home at 9.P.M.. Mother had instructed her to go to him whereupon Yogendra Prasad took her behind back of the house, near bamboo cluster and then gagged her mouth, lying her down, undressed her and then committed wrong as a result of which she felt severe pain at her genital. She became unwell.



Appellant had directed her that in case of disclosure to anybody, ghost will kill her. Out of fear she had not divulged the incident to anybody. But on the following day, she disclosed to her mother. She disclosed that after taking her to back of the house Yogendra Ram laid her down, undressed her and then committed wrong with her. Then her mother had gone to him where he also terrorized her mother. Then her mother took her to doctor at Barahat where she was examined. The doctor had stitched her genital. Thereafter her elder Mummy, mother and she came to police station. Her father used to reside at Gujarat in order to earn livelihood. She had narrated the incident to the police. Identified the accused. During cross-examination she has stated that on the fateful day she was suffering from headache. When accused came at that very time her mother was engaged in rituals of shrine (Chhatha Soop Sajana). Other family members were also engaged in that process. At that very time, her mother had not talked with the accused. In para 11 she has stated that on account lying her down over the ground she sustained hurt but the same was not shown to the doctor. In para 12 she has stated that she had gone to doctor about four days after the occurrence. Then, thereafter, she had not gone there. In para 13 she has stated that her mother had directed her to speak in chronological manner with regard to incident before the



police. In para 14 she had stated that first of all she has disclosed regarding occurrence to her mother. In para 15 she stated that her mother had gone to place of accused to enquire why such occurrence has been committed. In para 16 she has stated that her pant was not torn during course of occurrence but there was blood spot over the same. That pant had already been thrown by her mother. In para 17 she has stated that she had not gone to the police along with pant. Then she denied the suggestion that no such kind of occurrence had ever taken place. She denied the suggestion that she had not sustained any kind of hurt. She denied the suggestion that there was no stitch over her genital. She denied the suggestion that out of village politics she has deposed falsely against the accused.

16. P.W.3 is the mother of the victim as well as informant. She has deposed that she happens to be informant stated that this case has been instituted against Yogendra Ram. The occurrence took place on first day of Chath. It was about eight months ago, she along with her Gotani Pramila Devi were Chathi (who performs Chath a local festival) victim (name withheld) aged about 10 years return from Ghat along with them and then disclosed that she is suffering from headache. She directed her to call Yogendra as he is used to casting out by means of incantation. She had gone to Yogendra to call him but



he had not come at that very moment. Yogendra came at about 9.00 P.M.. She directed the victim that after having hand of Yogendra over her head, she will be cured, and then, she along with her Gotani and other family members engaged in performing Chath rituals. Yogendra, then took the victim towards back of the house, at bamboo cluster where he gagged her mouth and then he committed rape and then, threatened her that in case of disclosure, she will have to face dire consequences. On the following day, victim was unable to move. She had also seen blood spot over her cloths, she had also seen blood spot over her private part. Then the victim disclosed that Yogendra has committed wrong with her at bamboo cluster after gagging her mouth and also threatened her that ghost will be eliminated her in case of disclosure, she took her to Barahat where doctor had seen her. Doctor had disclosed that her genital has got torn whereupon he stitched and then, they returned back. Two-three days thereafter considering the deteriorated condition of the victim she along with Pramila and the victim had gone to police station where furnished written report. Identified the accused. During cross-examination at para 11 she has disclosed that on the eve of Chath, children were present inside her house. In para 12 she has stated that after filing of case at the police station victim was taken to Mayaganj hospital where victim was



examined by the doctor. In para 13 she has stated that she had incorporated in the written report about the occurrence as disclosed by the victim. Case was instituted 3-4 days after the occurrence. In para 14 she has stated that before coming of her husband, case was already instituted. In para 15 she has stated that she is unable to say whether blood stained cloth was taken away by the police or not. In para 16 she has stated that she had seen the place of occurrence. The same was also seen by the police. In para 17 there happens to be suggestion that no such kind of occurrence had ever taken place. In para 18 she has stated that gadget which was inserted at Barahat was removed subsequently at the Mayaganj hospital. Then she denied the suggestion that out of village politics this case has been instituted.

17. P.W.-8 is the I.O. During course of examination in chief he has stated that after registration of F.I.R. investigation was entrusted to him. He had recorded further statement of the informant. He recorded statement of the victim. He recorded statement of other witnesses. Then inspected the place of occurrence which happens to be a Sahan land of thatched house of the informant. The boundary has been shown as east barren land of Kapil Das, west house of Kanchan Ram, north bamboo cluster of Laxman Thakur and south house of



informant. He arrested the accused, recorded his statement, received supervision note, received injury report and then submitted charge-sheet u/s 376 of the I.P.C and Section 4 of the POCSO Act. Then exhibited relevant documents. During cross-examination at para 2 he has stated that he has not visited the place of doctor where victim was earlier examined. In para 5 he has stated that he had not mentioned the time of inspection of the P.O.. He had not mentioned who had shown the place of occurrence. In para 6 he has stated that he had not prepared sketch map of the place of occurrence.

18. P.W.2 is the grand mother of the victim. She has disclosed that victim is aged about 10 years. Occurrence is of first day of Arag of Chath. Victim had suffered from headache, mother, aunt of victim were the Chathhi (who performs Chath). Mother of the victim anyhow got presence of Yogendra who came at about 9. P.M. and then took her behind the house on one pretext or other. Yogendra happens to be grand father in relation of the victim. Yogendra, after gagging her mouth, raped her which the victim disclosed on the following day as, Yogendra had, after commission of rape directed that in case of disclosure the ghost will kill her. She disclosed on the following day when she perceived severe pain during course of pee whereupon, her mother enquired and then she disclosed that in the previous



night Yogendra had committed rape after gagging her mouth. Mother of the victim took her to Barahat hospital. Police had taken her statement. Identified the accused. During cross-examination she has stated that she is unable to say where treatment of victim was carried out at Barahat. Her statement was recorded on the following day by the police. Victim had also disclosed regarding the occurrence. Then she stated that only three minutes time will be taken while coming from the house of the victim, when mother of the victim had disclosed at that very time she had not gone to Barahat rather the victim, mother of the victim and younger brother of the victim have gone to Barahat. She accompanied the victim and her mother and others to police station. Then she denied the suggestion that at the instance of Deep Narayan, father of the victim she has deposed falsely.

19. P.W.4 during examination-in-chief has stated that victim was raped by the Yogendra Ram on the first day of Chath which he came to know after four days of occurrence. Victim was treated. Identified the accused. During Cross-examination he has stated that he came to know about the occurrence after four days. Then has stated that the father of the victim has brought him to depose and for that, he has been paid expenses.

20. P.W.5 is the aunt of the victim. During her



examination-in-chief she has stated that occurrence is on the first day of the Chath. On that day, victim was suffering from headache whereupon her Mummy directed her to call Yogendra whereupon, victim had gone to the place of Yogendra to call him. He came at about 9.00 P.M. and then, on one pretext or other he succeeded in getting the victim behind her house where he after gagging her mouth, committed rape. She was also threatened that in case of disclosure ghost will come and committing murder. Out of fear, the victim did not speak in night but on the following day, her condition deteriorated and, was unable to move, suffering from severe pain whereupon she disclosed the incident, on query having been made by her mother, to the effect that after gagging her mouth, Yogendra committed rape and he also threatened that in case of disclosure the ghost will murder. Then mother of the victim gone to place of Yogendra to protest whereupon Yogendra came and took the victim along with mother to doctor. Identified the accused in dock. During cross-examination she has stated that whatever been disclosed at the present moment was also stated before the police during course of her statement. At para 6 happens to be contradiction which has got no relevancy as the same has not been placed before the I.O.. In para 7 she has also disclosed that she also resides in the same house. On the fateful day Yogendra



came to her house, she was also near Shoba and victim and was engaged in cooking Pakwan. At that very time, she was near furnace where victim was alone with her mother. Yogendra took the victim behind house for incantation. At para 8 she further stated that when victim went and she returned back she had not seen. At para 9 she has stated that she has deposed on the basis of disclosure given by the victim to her mother, on the next day of occurrence. In para 10 she has stated that she had not accompanied the victim to Mayaganj. Then she denied the suggestion that Yogendra had not raped the victim.

21. P.W.6, brother of the victim has stated that the occurrence is on the first day of Chath. On that very day, victim was suffering from headache, and so Yogendra who happens to be a sorcerer was requested to see, who came at 9.00 P.M. and then on one pretext or other took her behind the house where, after gagging her mouth, committed rape, and threatened that in case of disclosure she will be murdered by the ghost. On the following day, she was unable to move and, was suffering from severe pain at her genital and was even unable to pee, and was weeping over which mother enquired and then, she disclosed that Yogendra Ram after gagging her mouth, committed rape after lying her down and, also threatened that in case of disclosure ghost will commit murder. Then, thereafter, Mummy



had gone to the place of Yogendra and protested whereupon Yogendra disclosed that he will provide treatment but in case of disclosure she will be murdered. Thereafter, his Mummy taken the victim to Barahat for treatment. Identified the accused. During cross-examination, he has stated that on the alleged date of occurrence he was not present at the house rather he had gone to the Sasural of his sister namely Rajani Kumari. His statement was recorded on the fourth days of occurrence. He had returned from the house of the sister on third day. In para 6 he has stated that his Mummy had disclosed regarding the occurrence and on the basis thereof, he made statement before the police as well as before the Court also. At para 10 there happens to be contradiction but the same has not put to the I.O.. In para 11 he stated that he is unable to disclose where victim was treated. In para 12 he has stated that after registration of the case, victim was examined at Bhagalpur. This case has been instituted by his mother. Then has denied the suggestion that out of village politics this case has been instituted.

22. From perusal of the record it is evident that charge has been framed only under Section 4 of the POCSO Act. POCSO Act, has been introduced in the year 2012 when the legislature has found that Penal Provisions having incorporated under the Penal Code deficient one to tackle



menace of child abuse properly. The legislature also found that child being of tender age literate/illiterate was unable to narrate the incident in accordance with requirement of fulfillment of ingredients of an offence having in accordance with Evidence Act and further, completely deficient one to confront the legal icon so, apart from protecting the victim as is evident from Section 33 of the Act whereunder direct question irrespective of being at the end of the prosecution or the defence, has been forbidden in likewise manner Sections 29 and 30 has also been incorporated specially, as the provisions so prescribing under Evidence Act has been found intangible. The introduction of Section 29 is with regard to enabling the Court to form, presumption in favour of the prosecution with regard to commission of an offence and, the burden is upon the accused to controvert the same. This provision, as it stands will come within the ambit of reverse burden. For better appreciation, Section 29 is quoted below;

“Presumption as to certain

offences:- Where a person is prosecuted for committing or abetting or attempting to commit any offence under Sections 3, 5, 7, and Section 9 of this Act, the Special Court shall



presume, that such person has committed or abetted or attempted to commit the offence, as the case may be unless the contrary is proved.”

23. That being so, the Court is under obligation to perceive the prosecution case until and unless, it is not found duly rebutted at the end of accused. It is not that, the accused has to enter into defence rather even by way of cross-examination, the accused could discharge the burden. After all the Court has to see whether burden has been discharged in due course of law as per Section 29 of the Act. Learned counsel for the appellant, during course of submission has submitted that for the purpose of drawing of presumption sufficient material has to be placed before the Court, by the prosecution in order to trace out whether prosecution has succeeded in bringing its case beyond reasonable doubt. In continuance, it has also been submitted that whose tracing out mental culpability as required under Section 30 of the Act, there happens to be specific requirement with regard to presence of prima facie prosecution case which is found lacking so far Section 29 is concerned, but that does not mean the prosecution has completely been absolved to bring at least prima facie case, for drawing a presumption. As from the evidence on record, it is apparent that



prosecution has failed to discharge its duty perfectly, hence there would not be question of presumption to appellant.

24. It is true that prosecution is under obligation to substantiate its case as has been laid down U/s 107 of the Evidence Act. It is also to be seen in the background of Article 21 of the Constitution which speaks about infringement of fundamental rights in accordance with law. But legislature is found within its competence under Article 15 (3), 3a (e), (f), 45, 47 to prevent the interest of child hence, in order to prevent and protect the child (below 18 years) from any kind of exploitation, this special Act has been introduced having negative effect/ and further be considered under Section 4 & 5 of the Cr.P.C. the special Act has due recognition.

Under the garb of aforesaid legal adumbration the relevant provisions are gone through. It is evident that so far applicability of Section 30 is concerned the legislature has specifically laid down that unless there happens to be presence of prima facie case, no presumption would be available but so far Section 29 is concerned there happens to be no such rigour.

25. The learned Additional P.P. vehemently opposed the same by way of submitting that Section 29 Specifically relates with certain kind of offences including the present one, hence the submission argued on behalf of appellant is legally



not permissible.

26. Now coming to facts of the case, it is evident that none is an eye witness to occurrence. Victim is the sole witness of her miseries. She has elaborately detailed how on the pretext of incantation, she was taken behind the house, near bamboo cluster (supported by objective finding of the P.O.) where after gagging her mouth, forced to lie down, and then raped. During course of cross-examination, it is evident that she was not at all cross-examined over factum of rape. In likewise manner, neither on delay in institution of case, the victim nor the informant has been cross-examined.

27. In case reported in 2013 (4) page 7 (SC), it has been held that non-cross examination on particular point will be considered to be admission. For better consideration, the same is quoted below: Para 11 and 12;

“11. The effect of not cross-examining a witness on a particular fact/circumstance has been dealt with and explained by this Court in **Laxmibai (Dead) Thr. L.Rs. & Anr. Vs. Bhagwanthuva (Dead) Thr. L.Rs. & Ors.**, AIR 2013 SC 1204 observing as under:-



“31. Furthermore, there cannot be any dispute with respect to the settled legal proposition, that if a party wishes to raise any doubt as regards the correctness of the statement of a witness, the said witness must be given an opportunity to explain his statement by drawing his attention to that part of it, which has been objected to by the other party, as being untrue. Without this, it is not possible to impeach his credibility. Such a law has been advanced in view of the statutory provisions enshrined in Section 138 of the Evidence Act, 1872, which enable the opposite party to cross-examine a witness as regards information tendered in evidence by him during his initial examination-in-chief, and the scope of this provision stands enlarged by Section 146 of the Evidence Act, which permits a witness to be questioned, inter alia, in order to



test his veracity. Thereafter, the unchallenged part of his evidence is to be relied upon, for the reason that it is impossible for the witness to explain or elaborate upon any doubts as regards the same, in the absence of questions put to him with respect to the circumstances which indicate that the version of events provided by him, is not fit to be believed, and the witness himself, is unworthy of credit. Thus, if a party intends to impeach a witness, he must provide adequate opportunity to the witness in the witness box, to give a full and proper explanation. The same is essential to ensure fair play and fairness in dealing with witnesses.”(Emphasis supplied)

12. The defence did not put any question to the Investigating Officer in his cross-examination in respect of missing chits from the bags containing



the case property/contraband articles.
Thus, no grievance could be raised by
the appellants in this regard.”

28. In likewise manner in all cases, delay will not invariably axe upon prosecution case much less when it relates with rape case “ in State of H.P. Vs. Sanjay, reported in 2017 Cr.L.J 1443, the same has been elaborately dealt with. Much less, though suggested, but the defense could not be able to substantiate motive if any, for false implication. Even during course of statement, recorded under Section 313 Cr.P.C. the same is found completely stupefied.

29. Giving anxious consideration and the material available on record, in consonance with the legal aspect as discussed hereinabove, this appeal whereupon is dismissed.

30. Appellant is under custody, which he will remain till saturation of the period of sentence.

(Aditya Kumar Trivedi, J)

T.Kr./-Rahul/-

AFR/NAFR	NAFR
CAV DATE	NA
Uploading Date	24.10.2019
Transmission Date	24.10.2019

