

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (SJ) No.657 of 2016**

Arising Out of PS. Case No.-17 Year-2014 Thana- MALAYPUR District- Jamui

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Dina Das @ Dinesh Das son of late Khairau Das, resident of Village-
Debachak, P.S Malaypur, District- Jamui.

... .. Appellant/s

Versus

The State Of Bihar

... .. Respondent/s

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Appearance :

For the Appellant/s : Mr.Baban Roy, Amicus Curiae
For the Respondent/s : Mr. Abhay Kumar, APP

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**CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI
ORAL JUDGMENT**

16-11-2019

Learned Sri Prabhat Ranjan Singh, learned counsel for the appellant has submitted that he is unable to argue this appeal as the client has taken away file from him so, Sri Baban Roy, learned Advocate of this Court has been requested to assist the Court as Amicus Curiae.

2. Vide judgment of conviction and sentence dated 25.07.2016 passed by 1st Additional Sessions Judge-cum-Special Judge, POCSO Jamui in Sessions Trial No. 185/2014 leading to POCSO Case No. 03/2014 has found appellant, Dina Das @ Dinesh Das guilty for an offence punishable under Section 4 of the POCSO Act and sentenced to undergo RI for 10 years as well as to pay fine of Rs. 20,000/-, under section 8 of the POCSO Act and sentenced to undergo RI for 5 years as well as to pay fine of Rs. 5000/- and in default thereof, to undergo SI



for three months additionally, under both counts respectively, with a further direction to run the sentences concurrently.

3. From the judgment impugned, it is further evident that the learned lower court has observed that as the prosecution has succeeded in substantiating its case under Section 4, 8 of the POCSO Act and further, Section 376 of the IPC as well as Section 6, 10, 12 of the POCSO Act, are found duly engulfed therewith, on account thereof, no separate finding with regard thereto is required.

4. Kailashwa Devi gave her Fardbeyan on 11.05.2014 at about 9:00 PM at Sadar Hospital, Jamui where her daughter, victim, PW-6 (name withheld) aged about 9 years was admitted in an injured condition, disclosing therein that her daughter (victim) aged about nine years was instructed by her on 09.05.2014 at about 4:00 PM to bring potato from a shop whereupon, she had gone but could not return. At that very juncture, her neighbour, Radha Kumari aged about seven years came and disclosed that her daughter has fallen over hand-pipe at her Darwaza. When she came there, Radha again disclosed that her daughter has fallen over peg of she-goat. At that very time, her father, Dina Das was sitting at Darwaza. Anyhow, she carried her daughter to her place but, her daughter could not



regain sense. She was unable to speak anything. Her husband resides at Kolkata in order to earn livelihood. So, he was informed as condition of her daughter did not improve. At that very time, they were not knowing that she was raped. When her husband came from Kolkata, then they both took the victim to Jamui Sadar Hospital where she has been admitted and treated. After getting some consciousness, she on query, disclosed before her as well as in presence of her Nanad, Reshma Devi that Dina Das has committed rape upon her. Whereupon, they all came to know that she has been raped and, on account thereof, she became unconscious.

5. After registration of Malaypur PS Case No. 17/2014, investigation commenced and concluded by way of submission of charge-sheet, facilitating the trial meeting with ultimate result, subject matter of the instant appeal.

6. Defence case as is evident from the mode of cross-examination as well as statement recorded under Section 313 CrPC is that of complete denial of occurrence so alleged. It has further been pleaded that while the male family members of the victim had gone to Sasural of niece of the appellant at village-Kasmichak in a marriage, there was quarrel and during course thereof, the family members of the victim were manhandled by



the villagers and for that, they have shown the niece of the appellant responsible and, in the aforesaid background, only to teach a lesson, this false case has been instituted putting the victim, a kid at forefront who has got no sense of understanding. Oral evidence has also been adduced in support thereof.

7. Altogether ten PWs have been examined on behalf of prosecution in order to substantiate its case who are PW-1, Reshma Devi, PW-2, Dipak Das, PW-3, Phagu Das, PW-4, Kailashwa Devi, PW-5, Tarni Das, PW-6, victim, PW-7, Raj Anjani Kumar, PW-8, Dr. Kavita, PW-9, Dr. Rita Upadhyaya, PW-10, Dr. Amit Ranjan. Side by side has also exhibited Ext-1, Fardbeyan, Ext-2 Formal FIR, Ext-3, Medical reports issued by PWs-8 and 9, Ext-4, Medical report issued by PW-10, Two DWs, DW-1, Bulletan Yadav, DW-2, Jawahar have been examined on behalf of appellant.

8. Learned Amicus Curiae while assailing the judgment impugned has submitted that irrespective of the fact that prosecution case suffers from inherent lacuna, the learned lower court failed to perceive the same and that being so, the judgment impugned is non-sustainable. In order to justify the same, it has been submitted that although there happens to be some sort of slackness at the end of the appellant during course



of cross-examination but, it happens to be obligation on the part of the prosecution to substantiate its case beyond all reasonable doubt. Evidences if, are to be considered, analyzed under the garb of aforesaid basic principle of criminal jurisprudence, it is evident that the same did not satisfy the test. Informant had recorded her Fardbeyan on 11.05.2014 while the victim was admitted at Sadar Hospital, Jamui but, there happens to be no disclosure at the end of the informant on which date she got the victim admitted at Sadar Hospital, Jamui, more particularly, in the background of the fact that there also happens to be specific disclosure that victim was firstly examined by Dr. Manoj Kumar and at his instruction, the victim was admitted at Sadar Hospital, Jamui. The prosecution failed to adduce prescription issued by Dr. Manoj Kumar on account of examining the victim that too on which date and, in likewise manner, there should have been positive evidence on the record on which date, the victim was admitted at Sadar Hospital, Jamui. Had there been, then the finding having recorded by the doctor at Sadar Hospital, Jamui, could have proper appreciation on parallel scrutiny thereof.

9. Furthermore, it has also been submitted that none of the PWs including the informant, PW-4, has disclosed regarding stitching of private part of the victim that too at which



place and by whom but, the doctors PW-8 and 9 (members of the medical board) during course of examination of the victim had found injury over her private part and further, stitching thereof. So, there should have been fairness at the end of prosecution in placing the relevant prescription or, at least bed head ticket depicting stitching on private part of the victim. Withholding the same is indicative of the fact that prosecution purposely, intentionally, malafidely, retained the same, so that, in order to put safeguard against the allegation as, after exposure of the aforesaid activity there is every likelihood of prosecution case being dismissed.

10. It has also been submitted that there happens to be no disclosure in the Fardbeyan nor during course of evidence that the informant PW-4 had seen the blood over the pant, blood coming out from the vagina, blood having spread over the ground, trail of blood nor there happens to be any effort at her end over query having at her end to Radha whether she was present during course of fall of victim over the platform of hand-pipe, whether any peg was there/in surrounding, presence/absence of Jhola and the cash given by her. So, this happens to be another circumstance doubting over authenticity of prosecution.



11. It has further been submitted that the Investigating Officer should have spoken with regard to OD slip having sent by the Hospital Authority, injury report having issued at his end after visiting hospital. It is also evident that the fact that victim was already admitted at the time of recording of Fardbeyan, the Investigating Officer failed to procure any report relating to the victim dated 11.05.2014. The injury report relating to her examination is of dated 12.05.2014. The aforesaid contrary is another event raising question, moreover, reliability of the prosecution version as prosecution did not opt to challenge the finding of PWs-8 and 9 conjointly, over date of examination of the victim, i.e. 12.05.2014.

12. Learned Amicus Curiae has also submitted that after perusal of the evidence of the victim, PW-6, it is evident that she was intercepted by the appellant in a way to shop and so, there should have been positive evidence relating to Jhola as well as money, whether it was retained by the victim or fallen down in the room itself as, there happens to be no evidence with regard to violence having attributed against the victim, nor the victim spoke relating thereto. Furthermore, it has also been submitted that none is an eyewitness to occurrence. All have deposed on the disclosure made by the victim and, considering



the evidence of the victim, more particularly, when she had admitted that her family members have gone to the Barati of her co-villager to the place where niece of appellant was married, where during course of quarrel, her family members were assaulted and for that, they have suspected hands of niece of the appellant. So, it was more probable to get the appellant involved with such a heinous attribution in revengeful manner. So, after going through the evidence as well as other materials in its totality, prosecution case could be held to be out and out an example of a false implication, whereupon, appellant is entitled for acquittal after setting aside the judgment impugned.

13. Learned APP while supporting the finding recorded by the learned lower court has submitted that though, there happens to be some slackness at the end of the I.O. in collecting the evidence during course of investigation but, the same is not going to be hazardous to the prosecution because of the fact that defence had not challenged the injuries having over the person of the victim, having been admitted at Sadar Hospital Jamui. It has further been submitted that no cross-examination has been made on behalf of the appellant to other witnesses but, considering the immaturity of the victim confronted with the shrewdness at the end of the learned defence counsel who



succeeded in mobilizing her. Had there been genuine conduct, then in that event, at least, brother PW-2 and father PW-4 would have been duly cross-examined on that very score as they were the person who have participated during course of Barati. It has also been submitted that there happens to be no cross-examination over the factum of rape and so, could be perceived as admitted one.

14. PW-8 is the doctor who had examined the victim in order to ascertain her age on the basis of ossification test and on the basis thereof, he had estimated the age of the victim to be in between 9-11 years, although the Apex Court consistently held that there should not be estimation of age under ossification test, rather it should be by way of conduction of an inquiry in similar way as prescribed under J.J. Act. During cross-examination, nothing substantial is found which could discredit his findings. PWs-8 and 9 both, lady doctors were made members of the board in order to examine the victim. They have examined the victim on 12.05.2014. No evidence has been brought up at the end of the prosecution regarding the earlier part, that means to say, examination of victim by any of the medical officer before 12.05.2014 and, on which date the victim was admitted at Sadar Hospital Jamui, though at the time of



Fardbeyan, on 11.05.2014, victim was admitted at Sadar Hospital.

That after examining the victim, prosecution gave following findings:-

(1) No marks of recent injury on any part of the body except perineum. Ancillary hair not present. Breast not developed.

(2) On pelvic examination, pubic hair not present, stitch wound of perineum about 1/2" size present.

(3) Vagina admit one finger. No laceration and injury inside vagina.

(4) Vaginal swab sent to Sadar Hospital Jamui.

(5) Examination by Dr. Arun Kumar shows no spermatozoa, dead or alive found.

15. Because of the fact that status of all the remaining PWs are that of hearsay, on account thereof, first of all, evidence of victim is to be taken care of.

16. POCSO Act is a Special Act and so, procedure so laid down therein will guide the issues as provided under Section 4 of the CrPC. Accordingly, before coming to the evidence of the victim, PW-6, it looks appropriate to refer the relevant provision so prescribed for recording the evidence of the victim.



33. Procedure and powers of Special Court.-

1. A Special Court may take cognizance of any offence, without the accused being committed to it for trial, upon receiving a complaint of facts which constitute such offence, or upon a police report of such facts.

2. The Special Public Prosecutor, or as the case may be, the counsel appearing for the accused shall, while recording the examination-in-chief, cross-examination or re-examination of the child, communicate the questions to be put to the child to the Special Court which shall in turn put those questions to the child.

3. The Special Court may, if it considers necessary, permit frequent breaks for the child during the trial.

4. The Special Court shall create a child-friendly atmosphere by allowing a family member, a guardian, a friend or a relative, in whom the child has trust or confidence, to be present in the court.

5. The Special Court shall ensure that the child is not called repeatedly to testify in the court.

6. The Special Court shall not permit aggressive questioning or character assassination of the child and ensure that dignity of the child is maintained at all times during the trial.

7. The Special Court shall ensure that the identity of the child is not disclosed at any time during the course of investigation or trial:

Provided that for reasons to be recorded in writing, the Special Court may permit such disclosure, if in its opinion such disclosure is in the interest of the child.



Explanation.- For the purposes of this sub-section, the identity of the child shall include the identity of the child's family, school, relatives, neighbourhood or any other information by which the identity of the child may be revealed.

8. In appropriate cases, the Special Court may, in addition to the punishment, direct payment of such compensation as may be prescribed to the child for any physical or mental trauma caused to him or for immediate rehabilitation of such child.

9. Subject to the provisions of this Act, a Special Court shall, for the purpose of the trial of any offence under this Act, have all the powers of a Court of Session and shall try such offence as if it were a Court of Session, and as far as may be, in accordance with the procedure specified in the Code of Criminal Procedure, 1973 for trial before a Court of Session.

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35. Period for recording of evidence of child and disposal of case.-

1. The evidence of the child shall be recorded within a period of thirty days of the Special Court taking cognizance of the offence and reasons for delay, if any, shall be recorded by the Special Court.

2. The Special Court shall complete the trial, as far as possible, within a period of one year from the date of taking cognizance of the offence.

36. Child not to see accused at the time of testifying.-

1. The Special Court shall ensure that the child is not exposed in any way to the accused at the time of recording of the evidence, while at the same time ensuring that the accused is in a position to hear the statement of the child and communicate with his advocate.



2. For the purposes of sub-section (1), the Special Court may record the statement of a child through video conferencing or by utilising single visibility mirrors or curtains or any other device.

37. Trials to be conducted in camera.-

The Special Court shall try cases in camera and in the presence of the parents of the child or any other person in whom the child has trust or confidence:

Provided that where the Special Court is of the opinion that the child needs to be examined at a place other than the court, it shall proceed to issue a commission in accordance with the provisions of section 284 of the Code of Criminal Procedure, 1973.

38. ***

39. ***

40. Right of child to take assistance of legal practitioner.-

Subject to the proviso to section 301 of the Code of Criminal Procedure, 1973 the family or the guardian of the child shall be entitled to the assistance of a legal counsel of their choice for any offence under this Act:

Provided that if the family or the guardian of the child are unable to afford a legal counsel, the Legal Services Authority shall provide a lawyer to them.

41. ***

42. ***

42A. Act not in derogation of any other law.-

The provisions of this Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force and, in case of any inconsistency, the provisions of this Act shall have overriding effect on the provisions of any such law to the extent of the inconsistency.

17. The victim was examined on 05.10.2015 and



then thereafter, she was subjected to lengthy cross-examination which concluded on 18.10.2015 after consuming so many dates. From the deposition as well as from the relevant order-sheet, it is evident that there happens to be no presence of any of the family members, or guardian or a friend or relatives in whom, the victim had trust in order to at ease the charged atmosphere as well as by providing child friendly atmosphere. Furthermore, as is evident there happens to be prescription of barrier whereunder the prosecutor or the defence counsel are not at all to confront the victim rather, they have to place before the court and the P.O. after analyzing the same will place before the victim as per Section 32(2) of the Act which is also found completely soaked. So, the victim aged about 9 years was allowed to play in the hands of learned APP as well as learned defence counsel in an uncared manner thus, putting the victim under perilous, perplexed situation. Furthermore, as per Section 36 of the Act, the victim is not expected to see the culprit in dock directly and for that, illustration has been given thereunder but, from the deposition, it is evident that victim was allowed to direct confrontation with the accused in dock.

18. The presence of aforesaid provision has got a bearing as, by seeing the accused directly the victim on account



of her tender age and the trauma which she faced during course of commission of crime would shake her mentally as well as physically putting under nervousness. That being so, the learned lower court has completely violated the mandate of law.

19. In *Nipun Saxena and Ors. vs. Union of India (UOI) and Ors. (2019) 2 SCC 703*, the issued has been dealt with in detail. For better appreciation the same is quoted below:-

47. Any litigant who enters the court feels intimidated by the atmosphere of the court. Children and women, especially those who have been subjected to sexual assault are virtually overwhelmed by the atmosphere in the courts. They are scared. They are so nervous that they, sometimes, are not even able to describe the nature of the crime accurately. When they are cross-examined in a hostile and intimidatory manner then the nervousness increases and the truth does not come out.

48. It is, therefore, imperative that we should have courts which are child friendly. Section 33(4) POCSO enjoins on the Special Court to ensure that there is child friendly atmosphere in court. Section 36 lays down that the child should not see the Accused at the time of testifying. This is to ensure that the child does not get scared on seeing the alleged perpetrator of the crime. As noted above, trials are to be conducted in camera. Therefore, there is a need to have courts which are specially designed to be child friendly and meet the needs of child victims and the law.

20. In *Atma Ram & Anr v. State of Rajasthan* reported in *2019 SCC OnLine SC 523*, it has been held as



follows:-

“22. According to Section 366 when a Court of Sessions passes a sentence of death, the proceedings must be submitted to the High Court and the sentence of death is not to be executed unless it is confirmed by the High Court. Section 367 then proceeds to lay down the power of the High Court to direct further enquiry to be made or additional evidence to be taken. Section 368, thereafter, lays down the power of the High Court to confirm the sentence so imposed or annul the conviction. One of the powers which the High Court can exercise is one Under Section 368 (c) of the Code and that is to "acquit the Accused person". Pertinently, the power to acquit the person can be exercised by the High Court even without there being any substantive appeal on the part of the Accused challenging his conviction. To that extent the proceedings under Chapter XXVIII which deals with "submission of death sentences for confirmation" is a proceeding in continuation of the trial. These provisions thus entitle the High Court to direct further enquiry or to take additional evidence and the High Court may, in a given case, even acquit the Accused person. The scope of the chapter is wider. Chapter XXIX of the Code deals with "Appeals". Section 391 also entitles the Appellate Court to take further evidence or direct such further evidence to be taken. Section 386 then enumerates powers of the Appellate Court which inter alia includes the power to "reverse the finding and sentence and acquit or discharge the Accused, or order him to be re-tried by a Court of competent jurisdiction subordinate to such Appellate Court or committed for trial". The powers of Appellate Court are equally wide. The High Court in the present case was exercising



powers both under Chapters XXVIII and XXIX of the Code. If the power can go to the extent of ordering a complete re-trial, the exercise of power to a lesser extent namely ordering de novo examination of twelve witnesses with further directions as the High Court has imposed in the present matter, was certainly within the powers of the High Court. There is, thus, no infraction or jurisdictional error on the part of the High Court.

23. It is true that as consistently laid down by this Court, an order of retrial of a criminal case is not to be taken resort to easily and must be made in exceptional cases. For example, it was observed by this Court in *Pandit Ukha Kolhe v. State of Maharashtra* : (1964) 1 SCR 926, as under:

“15. An order for retrial of a criminal case is made in exceptional cases, and not unless the appellate Court is satisfied that the Court trying the proceeding had no jurisdiction to try it or that the trial was vitiated by serious illegalities or irregularities or on account of misconception of the nature of the proceedings and on that account in substance there had been no real trial or that the Prosecutor or an Accused was, for reasons over which he had no control, prevented from leading or tendering evidence material to the charge, and in the interests of justice the appellate Court deems it appropriate, having regard to the circumstances of the case, that the Accused should be put on his trial again. An order of re-trial wipes out from the record the earlier proceeding, and exposes the person Accused to another trial which affords the prosecutor an opportunity to rectify the infirmities disclosed in the earlier trial, and will not ordinarily be countenanced when it is made merely to enable the prosecutor to



lead evidence which he could but has not cared to lead either on account of insufficient appreciation of the nature of the case or for other reasons. Harries, C.J., in *Ramanlal Rathi v. The State* : AIR (1951) Cal. 305.

“If at the end of a criminal prosecution the evidence leaves the Court in doubt as to the guilt of the Accused the latter is entitled to a verdict of not guilty. A retrial may be ordered when the original trial has not been satisfactory for particular reasons, for example, if evidence had been wrongly rejected which should have been admitted, or admitted when it should have been rejected, or the Court had refused to hear certain witness who should have been heard. But retrial cannot be ordered on the ground that the prosecution did not produce the proper evidence and did not know how to prove their case.”

21. The same view has also been followed in *P. Ramesh v. State* as reported in **2019 SCC OnLine SC 929**.

22. Apart from this, after going through the deposition of PW-6, the victim, it is evident that she has fallen victim of callousness of the learned lower court, whereupon, on account thereof, she is required to be re-examined within the framework of law, as referred hereinabove. In *Dinubhai Boghabhai Solanki vs. State of Gujarat and Ors.* reported in **(2018) 11 SCC 129**, it has been held as follows:-

“35. There is a discernible paradigm shift in the criminal justice system in India which keeps in mind the interests of victims as well. Victim



oriented policies are introduced giving better role to the victims of crime in criminal trials. It has led to adopting two pronged strategy. On the one hand, law now recognises, with the insertion of necessary statutory provisions, expanding role of victim in the procedural justice. On the other hand, substantive justice is also done to these victims by putting an obligation on the State (and even the culprit of crime) by providing adequate compensation to the victims⁵. The result is that private parties are now able to assert "their claim for fair trial and, thus, an effective 'say' in criminal prosecution, not merely as a 'witness' but also as one impacted".

36. That apart, it is in the larger interest of the society that actual perpetrator of the crime gets convicted and is suitably punished. Those persons who have committed the crime, if allowed to go unpunished, this also leads to weakening of the criminal justice system and the society starts losing faith therein. Therefore, the first part of the celebrated dictum "ten criminals may go unpunished but one innocent should not be convicted" has not to be taken routinely. No doubt, latter part of the aforesaid phrase, i.e., "innocent person should not be convicted" remains still valid. However, that does not mean that in the process "ten persons may go unpunished" and law becomes a mute spectator to this scenario, showing its helplessness. In order to ensure that criminal justice system is vibrant and effective, perpetrators of the crime should not go unpunished and all efforts are to be made to plug the loopholes which may give rise to the aforesaid situation.

37. The position which emerges is that in a criminal trial, on the one hand there are certain fundamental presumptions in favour of the accused, which are aimed at ensuring that innocent persons are not convicted. And, on the other hand, it has also been realised that if the criminal justice system has to be effective, crime should not go unpunished and victims of crimes are also well looked after. After all, the basic aim



of any good legal system is to do justice, which is to ensure that injustice is also not meted out to any citizen. This calls for balancing the interests of Accused as well as victims, which in turn depends on fair trial. For achieving this fair trial which is the solemn function of the Court, role of witnesses assumes great significance. This fair trial is possible only when the witnesses are truthful as 'they are the eyes and ears' of the Court.

23. Consequent thereupon, the judgment impugned is set aside. The appeal is allowed. The matter is remitted back to the learned lower court to proceed afresh in light of observation having been so made hereinabove and will endeavour to conclude the trial as early as possible preferably within six months from receipt of lower court record.

24. Appellant is under custody, hence is directed to be produced before the learned lower court.

25. The first and last pages of the instant judgment be handed over to the learned Amicus Curiae for the needful.

(Aditya Kumar Trivedi, J)

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