

**IN THE HIGH COURT OF JUDICATURE AT PATNA  
CRIMINAL APPEAL (SJ) No.2349 of 2018**

Arising Out of PS. Case No.-268 Year-2013 Thana- THAKURGANJ District- Kishanganj

Md. Sunny @ Mardin @ Sanny, S/o Late Nizamuddin @ Emajuddin @ Hayajudin , R/o Vill.- Behbuldangi, P.S.- Thakurganj, District- Kishanganj.  
... .. Appellant/s

Versus

The State of Bihar  
... .. Respondent/s

**Appearance :**

|                      |   |                                                            |
|----------------------|---|------------------------------------------------------------|
| For the Appellant/s  | : | Mr. Ashok Kumar-Advocate<br>Mr. Ram Prawesh Kumar-Advocate |
| For the Respondent/s | : | Mr. Bipin Kumar-A.P.P.                                     |

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

**23-08-2019**

Appellant Md. Sunny @ Mardin @ Sanny has been found guilty for an offence punishable under Section 376 of the I.P.C., 363 of the I.P.C. and Section 4 of the POCSO Act, but under the garb of Section 42 of the POCSO Act, no sentence has been prescribed for Section 376 of the I.P.C. and so, has been sentenced to undergo R.I. for ten years as well as to pay fine appertaining to Rs.20,000/- and in default thereof, to undergo S.I. for one year, additionally, under Section 4 of the POCSO Act to undergo R.I. for five years as well as to pay fine appertaining to Rs.10,000/- and in default thereof, to undergo S.I. for six months, additionally, for an offence punishable under Section 363 of the I.P.C. vide judgment of conviction dated 04.05.2018 and order of sentence dated 09.05.2018 passed by the 1<sup>st</sup> Additional Sessions Judge-cum-Special Judge, POCSO



Act, Kishanganj in connection with Special Case No.3k of 2015, C.I.S. No.168 of 2014 with a further direction to run the sentences concurrently, with a further direction that the period having undergone during course of trial be set off in accordance with Section 428 of the Cr.P.C.

2. Birbal Sah (PW-4) filed written report on 22.12.2013, disclosing therein that his daughter (name withheld, PW-6) did not return from her school on 19.12.2013. She is aged about 14 years and is a student of Class-VII of Adarsh Madhya Vidhyalaya, Thakurganj. It has also been divulged that during course of search, he came to know that she has been kidnapped in midst of way to school by Md. Sunny @ Mardin @ Sanny, S/o Late Nizamuddin @ Emajuddin @ Hayajudin , R/o Vill.- Behbuldangi, P.S.- Thakurganj, District- Kishanganj with an intention to marry.

3. After registration of Thakurganj P. S. Case No.268 of 2013, investigation proceeded and during course thereof, victim was recovered from the house of the appellant along with him, her statement was recorded under Section 164 of the Cr.P.C. She was medically examined and then, after completing investigation, submitted charge-sheet, 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 of the Cr.P.C. is that of complete denial. Though, a feeble attempt of alibi has also been taken by way of suggesting to some of the witnesses that on the alleged date and time of occurrence, he was at Gangtok while some of the witnesses have been suggested that on account of dispute over wages as appellant was engaged under informant, appellant has been falsely implicated. However, nothing has been adduced in defence.

5. In order to substantiate its case, prosecution has examined altogether nine PWs, who are PW-1, Sanjit Kumar Mahto, PW-2, Ranjit Sah, PW-3, Tapan Viswas, PW-4, Birbal Sah, informant, PW-5, Chanda Devi, PW-6, victim, PW-7, Subhas Kumar Mandal, PW-8, Dr. Devendra Kumar and PW-9, Dr. Shabnam Yasmin. Side by side, has also been exhibited, Exhibit-1, signature of informant over written report, Exhibit-2, statement of the victim under Section 164 Cr.P.C., Exhibit-3, 3/1, medical report relating to ascertainment of age along with signature of Dr. Shabnam Yasmin, Exhibit-4, 4/1 relating to commission of rape along with signature of Dr. Shabnam



Yasmin. As stated above, nothing has been adduced on behalf of appellant.

6. While assailing the judgment of conviction and sentence, it has been submitted at the end of the appellant that whole case is misconceived. In order to buttress such plea, it has been submitted that neither the trial should be under Section 376 of the I.P.C. nor under the POCSO Act, because of the fact that medical evidence depicts age of the victim to be above 18 years of age a major one, when her conduct is taken together, she appears to be a consenting party. That being so, the judgment of conviction and sentence did not justify its prevalence.

7. It has also been submitted that none is an eye witness to occurrence. Save and except PW-6, others whatever they deposed, happen to be based upon the disclosure at the end of the PW-6. Because of the fact that PW-6 by her conduct shown herself to be a consenting party and being major, her consent is legally acceptable, acknowledgeable, whereupon, the evidence of remaining would have been considered in same light as a result of which, judgment impugned is fit to be set aside and the appeal be allowed.

8. On the other hand, the learned Additional Public Prosecutor controverted the submission and submitted



that after going through the evidence of the victim, it is apparent that during cross-examination itself, her status irrespective of medical evidence has been questioned whereupon, she has disclosed her date of birth to be 05.04.2001 and in the aforesaid background, she was minor on the alleged date of occurrence. That being so, consent or no consent has become immaterial. In the aforesaid background, it has also been submitted that POCSO Act would be applicable whereunder Section 29 prescribes presumption though rebuttable at the end of accused, which the appellant failed to discharge. Consequent thereupon, instant appeal happens to be meritless and is fit to be dismissed.

9. Ascertainment of age of the victim by way of medical examination which gives a variance of plus-minus two years has been subject to consideration by the Apex Court and repeatedly, it has been observed that it should not be done through medical examination rather an inquiry has to be conducted wherever a dispute arose over proper identification of the victim to be minor or major in accordance with the procedure so prescribed under the Juvenile Justice (Care & Protection of Children) Act as has been observed 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.***

10. Therefore, irrespective of the fact that Investigating Officer are not at all, on account of incompetency or lacking are prone to medical examination for ascertainment of age, which ought not to be, so far, present scenario is concerned, victim (PW-6) in Para-3 of her cross-examination has clearly stated her date of birth so ascribed in the school as 05.04.2001, which never been controverted and so, on the date of occurrence i.e. 19.12.2013, certainly she was minor, below the age of 18 years. In the aforesaid background, the evidence of PW-7, who was one of the member of the Board including that of PW-8 and one other Doctor that victim was major falling in between age of 16 to 18 years, is not at all found legally entertainable. Hence, the status of the victim is found minor.

11. Admittedly, none of the witnesses that means to say, PW-1, PW-2, PW-3, PW-4 and PW-5 are an eye witness to occurrence. They have deposed what the victim (PW-6) had disclosed to them. So, its she (PW-6), whose evidence has got primacy. During her examination-in-chief, she has stated that while she was in a way to school, she was stopped by the accused, who put a handkerchief over her face resultantly unconsciousness and having been lifted to some another



destination, which she found after regaining sense and then, on a point of knife, got her inside a bus, taken to some other place where she was raped in the night itself. Thereafter, she was taken to own house by the accused where police conducted raid and apprehended. Police took her to police station and then, to Court where her statement was recorded under Section 164 Cr.P.C. and then, she was medically examined. During course of cross-examination at Para-2, she has admitted that she was knowing the accused from the age of 5-6 years as he was working at her shop. She has further stated that she is unable to disclose the age of the victim. Then, she disclosed that she is unable to say the distance in between her house as well as house of the accused. At Para-3, she has further stated that distance in between her school and her house happens to be half kilometer. School is on the main road near Hanuman Temple. She was regularly attending the school, but sometimes in order to assist her father, she used to go to shop. In Para-5, she has stated that the distance from her house to school is coverable within 5-10 minutes. Other students also go through her house. Usually, all the students go to school conjointly. On the alleged date, other students were not present. They have already gone inside the school. She was alone near the gate of the school. None was



present at the hospital or near temple. Md. Sunny was at a distance of 3-4 hands from the temple. He was armed with knife, which he taken out from his pocket and then, shown her. She became very much afraid of as a result of which, she became nervous, did not raise alarm and by that time, he kept handkerchief over her face. As she became unconscious, so she was unable to disclose how he lifted her. In Para-6, she has stated that when she regained sense, she found herself at a lonely place by the side of the road. Then, she was taken over bus. She is unable to disclose name of the Bus, registration number of the bus. She is unable to say whether accused had paid fare or not. She was pushed from behind, during course of boarding. She was forcibly seated. She is unable to say how many persons were inside the bus. She is unable to say whether driver or conductor were present or not. She is unable to say how much time bus plied. She had not taken food. She had not located the place after getting down from the bus. It was night. She is unable to say name of the bus stand where they got down. Where she was taken by the accused, she was unable to say. They covered the distance within half an hour. Md. Sunny got her locked in a room for two nights consecutively. On the following day, police came. She was kept in a room, but she is



unable to say, whose house that was. She was not allowed to come forward. She was given meal. She was not allowed to go outside to ease. In Para-8, she has stated that she remained in one room. Police had apprehended on 23.12.2013 at about 10.00 A.M. In the night, she was allowed to stay with her parents, then again corrected, she remained at P.S. on 23.12.2013. On 24.12.2013, came to Court. Her statement was recorded at the instance of police, who again took her to police station and then, her parents came and took her to their residence. Police had not seized her cloth. In Para-9, she has stated that her hand had sustained injury. There was no injury over her back, stomach, again corrected, she is unable to say the injury over her back, then denied the suggestion that this false case has purposely been filed at the instance of her father on account of dispute over money.

12. PW-9 is the doctor, who was a member of the Board along with PW-8 along with one more and accordingly, examined the victim on 24.12.2013. On two points:-

*A) Over ascertainment of age,*

*B) Whether she was sexually exploited or not.*

*So far age is concerned, they have estimated her age in between 16 to 18 years and so far report relating to sexual assault is concerned,*



*she found hymen old ruptured, though had not found evidence of external or internal injury over her private part. On pathological examination of vaginal swab dead or alive spermatozoa was not found and so, she opined that there was no evidence of recent sexual intercourse.*

During cross-examination, she has stated at Para-5, the hymen can be ruptured due to physical or accidental.

13. PW-7 is the part I.O., who had submitted chargesheet and so, appears to be worthless.

14. POCSO Act is a new Act and it has been introduced by the Parliament in the background of increasing of atrocity over the minor below the age of 18 years in a form of sexual assault to lecherous activity and considering the status of the victim, two sections have been prescribed deflecting from normal rule of the Evidence Act over the burden which the prosecution carries by way of prescribing rule of presumption. Under this Act, the presumption has been prescribed in a manner totally alien to Evidence Act, as per ***Section 111A of the Evidence Act, Section 113A of the Evidence Act, Section 113B of the Evidence Act, Section 114 of the Evidence Act.*** After going through Section 29 of the POCSO Act, it is apparent that Court has to presume commission of an offence so alleged and



the obligation goes upon the accused to rebut the same. So, it happens to be based upon the theory the reverse burden. For better appreciation, **Section 29 of the POCSO Act** is quoted below:-

*“29. 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.”*

15. At the present juncture, Section 30 of the Act should not be ward off, as the same speaks about mode of presumption regarding mental culpability of an accused to commit an offence, if, the same is found prima facie proved by way of preponderance of probability.

16. In **Manju Devi vs. Onkarjit Singh Ahluwalia alias Omkarjeet Singh and others reported in (2017) 13 SCC 439**, it has been held:-

*“22. A victim of molestation and indignation is in the same position as an injured witness and her testimony should receive the same weight.....”*

17. From the evidence available on the record, it



is crystal clear that PW-6, a minor has succeeded in properly explaining the occurrence, by way of identifying the accused/ appellant to be her kidnapper and being captive subjected to rape and that part is found unrebutted at the end of the appellant. Consequent thereupon, the appeal lacks merit and is accordingly, dismissed. The appellant is under custody, which he will remain till its saturation.

**(Aditya Kumar Trivedi, J)**

Vikash/-

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