

**IN THE HIGH COURT OF JUDICATURE AT PATNA  
CRIMINAL APPEAL (SJ) No.3516 of 2017**

Arising Out of PS. Case No.-78 Year-2015 Thana- MAHILA P.S. District- Nawada

Sanjay Mahto @ Munna Mahto Son of Ganga Mahto, Resident of Village-  
Mirchak, P.S.- Warisaliganj in the district of Nawada.

... .. Appellant/s

Versus

The State Of Bihar

... .. Respondent/s

**Appearance :**

|                      |   |                                                       |
|----------------------|---|-------------------------------------------------------|
| For the Appellant/s  | : | Mr. Bindhyachal Singh,<br>Mr. Deepak Kumar, Advocates |
| For the Respondent/s | : | Mr. Binod Bihari Singh, APP                           |

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

**06-05-2019**

Sole Appellant, Sanjay Mahto @ Munna Mahto has been found guilty for an offence punishable under Section 376(2) of the IPC and sentenced to undergo RI for ten years as well as to pay fine of Rs. 2 Lacs and in default thereof, to undergo RI for one year additionally. Under Section 4 of POCSO Act having no separate sentence against the same vide judgment of conviction dated 16.11.2017 and order of sentence dated 27.11.2017 passed by 1<sup>st</sup> Additional Sessions Judge-cum-Special Judge, Nawada in Special (POCSO) Case No. 37 of 2015 arising out of Mahila (Nawada) PS Case No. 78/2015.

2. PW 5, (name withheld) filed a written report on 22.12.2015 alleging *inter alia* that on 21.12.2015 at about 1600 hours, his co-villager, Sanjay Mahto @ Munna Mahto aged



about 35 years, who had ploughed her field by his tractor and as, he instructed her mother to pay the charge appertaining to Rs. 160/- and for that, her mother gave Rs. 200/- whereupon, Rs. 40/- was to be returned to her by Sanjay. Sanjay Mahto @ Munna Mahto after receiving the same, has instructed her to follow to his house on the pretext of having no change. Accordingly, she accompanied him to his house where she was caught hold by him, pulled inside the house and then on the point of fire arm threw her on the ground, untied her pant and then attempted to commit rape. She raised alarm but none came in her rescue. She struggled to avoid the rape and during course thereof, there was bleeding from her vagina. Anyhow, her mother got information to the effect that her daughter has been confined by the Sanjay Mahto @ Munna Mahto in his house, whereupon she began to shout. Hearing shouts of her mother, she was released but, with a warning that in case of information to the police, her whole family will be eliminated. Out of fear, she had not gone to Warsaliganj Police Station. Today, i.e. on 22.12.2015, the written report is being filed before Mahila Police Station.

3. On the basis of the aforesaid written report Mahila PS Case No. 78/2005 was registered followed with



investigation as well as submission of charge-sheet, facilitating the trial, meeting with the ultimate result, subject matter of the instant appeal.

4. 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. It has further been pleaded that on account of political rivalry prevailing the alleged victim, a minor has been made scapegoat through which, this false case has been introduced in order to malign the prestige, character, competency of the family of the appellant/accused in challenging the prosecution party and to substantiate the same, three DWs also have been examined on their behalf.

5. In order to substantiate its case, prosecution has examined altogether 9 PWs out of whom PW-1, Ajay Nonia, PW-2, Asha Devi, PW-3, Sunita Devi, mother of informant, PW-4, Shiv Shankar Prasad, father of informant, PW-5, informant herself, PW-6, Savitri Devi, PW-7, Sudama Devi @ Sudamiya Devi, PW-8, Dr. Kumari Ragini and PW-9, Premlata Rai as well as has also exhibited Ext-1, Signature of Sunita Devi on the written application presented at PS, Ext-2/1, Signature of Shiv Shankar Prasad on the written application, Ext-1/2, Signature of Sangita Devi on the written application, Ext-1/3, Signature of



Savitri Devi on the written application, Ext-1/4, Signature of Sudamiya Devi on the written application, Ext-2, Signature of informant on statement recorded under Section 164 CrPC, Ext-3, Signature of Dr. Kumari Ragini Sinha, Ext-4 is writing and signature of Premlata Rai I/C SHO, Mahila PS on Formal FIR, Ext-6 is Charge-sheet. In likewise manner, defence has also examined three DWs i.e., DW-1, Amit Kumar, DW-2, Brijnandan Raut, DW-3 Dilip Nonia.

6. While assailing the judgment of conviction and sentence, it has been submitted at the end of learned counsel for the appellant that the whole prosecution case stands like house of cards. In order to substantiate the same, it has been submitted that when the evidence of victim PW-5, her mother PW-3 and father PW-4 are properly compared, it has become an admission at their end that the prosecution party happens to be active members of 'MALE' group. It is also apparent that brother of appellant was Mukhiya at the relevant time. It is also admitted that the mother of the victim had contested unsuccessfully for the post of Ward Member. In the aforesaid background, presence of PWs-6 and 7 who happen to be member of AIPWA, is relevant and their presence is indicative of the fact that there happens to be political fragrance, which, the learned lower court



failed to perceive while recording the finding adverse to the appellant.

7. In order to expose the same, learned counsel for the appellant has submitted that first of all, the root of the prosecution case is to be seen. That means to say, whether there happens to be any kind of genuineness, authenticity in the prosecution version. During appreciation of the same, one has to consider whether the prosecution version is reliable, could be probable. Admittedly, both the parties are politically opponent to each other. There happens to be no evidence at the end of prosecution that there was only one tractor in the village belonging to the appellant. PW-9, I.O had not visited the place to trace out corroborative piece of evidence that field of the informant was ploughed. So, there was no evidence, that means to say, there was no occasion to demand/receive change/ having no occasion to visit the place of appellant by the alleged victim.

8. That happens to be reason behind at each and every steps, there happens to be inconsistency in the evidence of PWs , right from inception at the prosecution. In order to put stress over the same, it has been submitted that from the evidence of PW-4, father, it is apparent that actually, PW-5, PW-6 and PW-7 are the persons who sailed the prosecution in order



to ruin their opponent.

9. Now coming to the facts of the case, it has been urged that the evidence of PW-5, the victim is itself full of inconsistency, infirmity and that being so, became unreliable, unworthiness, uncreditworthy. To substantiate the same, referred two important incidents from the written report. The first one, that there happens to be specific disclosure in the written report that out of fear, the prosecution party had not dared to go to Warsaliganj PS. And the second aspect, she had not disclosed penetration though disclosed an attempt was made. Because of the fact that the place of occurrence happens to be inside the house of the appellant/accused, from the evidence of PW-5, it is evident that so many persons were inside the house, then in that event, was it possible for the appellant to have succeeded in his lecherous activity. Not only this, when her subsequent step taken during course of trial is seen, the same has got changed by way of allegation of rape. In the aforesaid background, when the evidence of I.O. PW-9 is seen, it is evident that she had investigated unfairly falling under collusiveness as none of the family members has been examined at the end of IO, PW-9. From the place of occurrence as detailed by the PW-9, it is evident that she had not gone inside the house. The most crucial



evidence on that very score would have been presence of victim with the IO who should have taken her to such place, room to be the place of occurrence.

10. Furthermore, it has also been submitted that when the evidence of PW-9, IO is taken together with that of PW-5, there happens to be some sort of inconsistency with regard to handing over the material exhibits though not corroborated before the I.O. nor produced in the court. Apart from this, also submitted that from the evidence of PW-9 in consonance with the evidence of PW-5, PW-6, PW-7, their presence at police station became doubtful, that means to say, presence of PW-6, PW-7 as an FIR attesting witnesses became doubtful, that means to say, preparation of written report became suspicious, that means to say, the cumulative effect did not inspire confidence over reliability of the prosecution version. It has also been urged that when the evidence of PW-5 is properly scrutinized, it is apparent that she has developed the story right from the inception. That means to say, in the written report, there happens to be complete absence of an allegation with regard to penetration which, during course of statement under Section 164 CrPC been developed whereunder she had stated that she was raped and during course of evidence, she reiterated



which is found completely gutted down by the medical evidence as finding of the doctor rules out the same.

11. It has further been submitted that if the prosecution case is accepted then only two witnesses happen to be right from the inception and those are the victim, PW-5 and her mother, PW-3. When the evidence of PW-3 and 5 is compared, it is found inconsistent to each other and this inconsistency has got bearing in the background of the fact that as there was no occurrence so there was inconsistency. The inconsistency is with regard to exposure of physical feature of the victim after so alleged incident and that being so, it has caused severe dent to the prosecution case. PW-4, father and PW-6, 7 are hearsay witnesses as appearance of PW-4 happens to be on the following day while PW-6 and 7, as per prosecution version, subsequently thereof. Moreover, in spite of oral submissions the learned counsel for the appellant also referred the case of *Hem Raj v. State of Haryana* reported in (2014) 2 SCC 395 and *Ram Lakhan Singh vs. State Government of Uttar Pradesh* reported in (2015) 16 SCC 715.

12. Learned APP while controverting the submissions raised on behalf of learned counsel for the appellant has submitted that enmity is a double edged sword. It



might be a cause for false implication. Side by side, it might be a motive for commission of an occurrence. Indian social culture does not patronize lodging of rape case as tool of vengeance as, rape is still considered to a stigma, much less, when the victim is an unmarried till her life. That means to say, one has to take risk not for a moment rather for the whole life to bear the pains of suffering not for herself rather of her family. Furthermore, it has been submitted that it happens to be reason behind that the evidence of victim has got primacy that too when she happens to be minor, virgin, without any corroboration unless, it is found soaked with some externally influenced.

13. Furthermore, it has also been submitted that medical evidence is in support of the prosecution as the finding is “hymen old ruptured”. The defence is that it was beyond 24 hours as it is always subject to prompt healing. Defence was knowing since before that if he intends to cross-examine the doctor on that very score, his weakness will be duly exposed and that was the reason behind that no time has been suggested at the end of the defence. The other evidence happens to be corroborative to the victim which was not at all required in law as the sole testimony of the prosecutrix inspires confidence, happens to be sufficient to support the judgment of conviction



and sentence. So, in sum and substance, the prosecution has succeeded in substantiating the case whereupon, this appeal lacks merit and is, fit to be dismissed.

14. Though at the end none, the irregularity having been committed by the learned lower court during conduction of trial has been pointed out, more particularly, once there happens to be charge under POCSO Act, as being Special Act, more particularly, dealing with the sexual abuse of the minor, certain mandatory provisions have been prescribed which are to be strictly adhered to while proceeding with the trial, once the legislature has prescribed the same that has to be followed . In the aforesaid background, first of all the relevant provisions should be seen and then, its repercussion. In order to testify the same, first of all Section 33 of the POCSO Act (in short 'the Act) is to be seen which prescribes the power and procedure of the Special Court. Subsection-2 of Section 33 of the Act prohibits direct confrontation with child/victim during course of examination-in-chief, cross-examination or re-examination, if any and, has been directed to be communicated through the court itself. Subsection-3 of the Act deals with the provision giving recess to the victim during course of evidence while Subsection 4 speaks that during course of examination of the



victim, the court should carry the child in a friendly atmosphere allowing presence of family members, guardians, relatives, friends in whose the child has got trust and confidence. Section 36 of the Act deals with the situation while the child is subject to examination/cross-examination/re-examination and during course thereof, it happens to be the mandate of law that child should not be exposed to the accused and for that, certain methodology has been prescribed by which such exposure should be avoided.

15. In order to find out whether the learned lower court had followed the mandate of law during course of recording of evidence of the PW-5, the victim who was examined on 02.03.2017, the order-sheet dated 02.03.2017 has been gone through and from perusal of the same, it is evident that none of the precautions so prescribed therein, has been followed. Apart from this, when the evidence of PW-5 is gone through, it is evident that the manner whereunder it has been ascribed, appears to be in utter violation of Subsection-2 and Section 33 of the Act. Furthermore, the deposition does not speak nor the order-sheet suggests that the victim PW-5 was prevented from direct exposure with the accused, contrary to it, the evidence suggest that she was subjected to direct



confrontation as is evident from para-3 of her deposition and so, whatsoever evidence happens to be, could not be ruled out being influenced by tenor, terror of the accused in consonance with the crime so alleged coupled with premature mind of the victim, PW-5, which has compelled the legislature to prescribe all kinds of protection so that, the victim should not be found completely eclipsed with the horrifying situation which she had faced during course of the occurrence and in likewise manner, neither the prosecutor nor the defence counsel were allowed to have direct conversation with the victim during course of examination/cross-examination/re-examination. Deposition also speaks that she was subjected to a lengthy cross-examination without any breakage and the same would have also given adverse impact over the immature mind of the victim. That happens to be the reason behind presence of ifs and buts, hither and thither.

16. It is further apparent that learned lower court before examination of the victim did not test her mental equilibrium. In sum and substance, there happens to be complete violation of the mandate of law adversely affecting the status of the victim in consonance with her evidence.

17. Accordingly, the judgment impugned is set



aside. Appeal is allowed.

18. However, the matter is remitted to the learned lower court with a direction to record the evidence of PW-5 afresh after following all the prescriptions so laid down under the law, will record the statement of the accused and then defence and then after hearing the arguments, will pass the judgment in accordance with law.

19. Appellant is under custody, will be produced before the learned lower court, accordingly.

20. As such, I.A. bearing no. 2894/2018 stands disposed of.

**(Aditya Kumar Trivedi, J)**

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| AFR/NAFR          | AFR        |
| CAV DATE          | N/A        |
| Uploading Date    | 10.05.2019 |
| Transmission Date | 10.05.2019 |

