

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (SJ) No.117 of 2016**

Arising Out of PS. Case No.-100 Year-2014 Thana- KISHANGANJ District- Kishanganj

Sanjay Sah, Son of Ramjee Sah, resident of Village- Khagara Machhamara,
P.S. and District- Kishanganj.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

Appearance :

For the Appellant/s	:	Mr. Ranjan Kumar Jha-Advocate Mr. Radha Mohan Singh-Advocate Mr. Mirtunjay Kumar Mishra-Advocate
For the Respondent/s	:	Mr. S.A. Ahmad-A.P.P.

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

07-08-2019

Appellant Sanjay Sah, vide judgment of conviction dated 29.01.2016 and order of sentence dated 01.02.2016 passed by the 1st Additional Sessions Judge-cum-Special Judge, POCSO, Kishanganj in connection with Special Case No.05 of 2014 arising out of Kishanganj P. S. Case No.100 of 2014, has been found guilty for an offence punishable under Section 376(i)/ 511 of the I.P.C. and sentenced to undergo R.I. for seven years as well as to pay fine appertaining to Rs.5,000/- and in default thereof, to undergo S.I. for three months, under Section 8 of POCSO Act and sentenced to undergo R.I. for five years as well as to pay fine appertaining to Rs.5,000/- and in default thereof, to undergo S.I. for three months, additionally, with a direction that the sentence will run 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., challenged the same under present appeal.

2. Chanchal Tiwari (PW-5) recorded F.I.R. on 19.02.2014 at about 6.00 P.M. disclosing therein that he happens to be a hawker. He used to go in round usually at about 10.30 A.M. and return back at evening hour. Today, he proceeded from his house at about 10.30 A.M. At about 5.00 P.M. when he returned back, he found all the family members indulged in weeping, whereupon he inquired from his wife Tara Tiwari the reason, who disclosed that at about 1.00 P.M. when she searched out, their daughter (name withheld PW-4) aged about four years for meal, the kids of the neighbour had disclosed that his neighbour Sanjay Sah aged about 30 years has taken her away. Tara Devi gone to the place of Sanjay Sah where she found the victim lying naked over bed of Sanjay Sah. Then thereafter, Tara Devi took the victim to her house. On query, victim disclosed that Sanjay uncle after undressing her, was engaged in fingering after spitting over her private part, during course thereof, he also became naked. After getting this information, he along with his wife have gone to the place of Sanjay Sah, who seeing them, fled away from his house. So, it has been alleged by the



informant that Sanjay Sah has attempted to commit rape with his daughter and during course thereof, caused hurt over her genital.

3. After registration of Kishanganj P. S. Case No.100 of 2014, investigation taken up and after concluding the same, chargesheet has been submitted, followed with 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. It has further been pleaded that on account of land dispute, this false case has been instituted and to substantiate the same, oral evidence has been adduced.

5. Altogether nine PWs have been examined on behalf of prosecution, who are PW-1, Pinky Devi, PW-2, Yogendra Tiwari, PW-3, Tara Tiwari, PW-4, the victim, PW-5, Chanchal Tiwari, PW-6, Kiran Bala, I.O., PW-7, Dr. Md. Manzar Alam, PW-8, Dr. Urmila Kumari and PW-9, Jitendra Kumar. Side by side, has also exhibited, Exhibit-1 series, signature of informant, signature of O/c, Exhibit-2 series, signature of the doctor over medical report relating to



determination of eye, Exhibit-3, the medical report issued by PW-8, Dr. Urmila Kumari. Three DWs have also been examined namely, DW-1, Md. Faruque, DW-2, Ajay Kumar Sah and DW-3, Sudami Devi. However, no document has been made an exhibit of the record.

6. Manifold argument has been made on behalf of appellant while assailing the judgment impugned. The first and foremost is that after perusal of the judgment impugned, it is evident that the learned lower Court had acted in mechanical manner and that happens to be reason behind presence of inconsistency relating to framing of charge as is evident from Para-1 and Para-30 of the judgment impugned. There also happens to be mechanical approach during course of consideration of the evidence having adduced on behalf of respective parties.

7. In its continuation, it has also been submitted that learned lower Court had failed to perceive that PW-1, an independent witness did not oblige the prosecution, whereupon she has been declared hostile. The rest witnesses PW-2, PW-3, PW-4, PW-5 are the own family members. That means to say, irrespective of the fact that from the evidence of PW-6, I.O., it is evident that houses of so many persons lies in the vicinity of the



informant, no one came forward to support and corroborate the incident. Accordingly, the evidence of interested partisan witnesses has to be seen with cautious eye, more particularly, when defence has adduced three DWs to substantiate the land dispute prevailing amongst the parties, which probablizes motive of false implication putting forward a minor by her guardian. That being so, the evidences of the interested partisan witnesses whose status could not be as a natural witness ought not to have relied upon by the learned lower Court.

8. Then, it has been submitted that victim was an infant and remained under custody of her parents vulnerable to tutoring and on that very score, ample material have been over the record. That being so, the learned lower Court should have properly examined the probability before acceptance of the evidence of the so alleged victim, which happens to be judicial approach. Absence of such formality is indicative of the fact that the learned lower Court acted contrary to settled principle of law.

9. Furthermore, it has also been submitted that there happens to be utter violation of mandatory provisions of law so envisaged under POCSO Act, whereupon the trial became illegal. As a result of which, the finding so arrived at by



the learned lower Court did not find favour and so, is fit to be set aside.

10. On the other hand, learned Additional Public Prosecutor while confronting the submission having made on behalf of appellant has submitted that though there happens to be some sort of slackness at the end of the learned lower Court, but those are superficial and did not go to the root of the finding. Consequent thereupon, it could be perceived as mere irregularity nor illegality. Then, it has been submitted that from the finding recorded by the learned lower Court, it is evident that the learned lower Court has done meticulous examination of the materials available on the record, whereupon the judgment impugned did not attract interference.

11. After going through the POCSO Act, it is evident that Chapter-VIII deals with procedure and powers of Special Court and recording of evidence and the same begins with Section 33 to 38. After going through the same, it is evident that all the protections whatever been provided thereunder is only for the protection of interest of a victim, a child so that she/ he could not find herself/ himself nervous with the Court's atmosphere and in likewise manner, seeing the tormentor of the crime, the victim should not find influenced by



recollecting the horrifying condition which he or she has faced during commission of the crime allegedly attracting his/ her mental condition due to premature mental condition. Therefore, if the Court failed to follow any of the procedure, it would cause grievances to the victim and not to the accused and that is the reason behind that appellant failed to place how the appellant's interest is found prejudiced.

12. Seeing the condition, status of the victim to be a child, the legislature, during course of implementation of the special law took notice thereof, and in the aforesaid background introduced two Sections, ***Section 29 as well as Section 30 of the POCSO Act***. For better appreciation, both these Sections are 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.”

30. Presumption of culpable mental state-(1) In any prosecution for any offence under this Act which requires a culpable mental state on the part of the accused, the Special Court shall presume the



existence of such mental state, but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.

(2) For the purposes of this section, a fact is said to be proved only when the Special Court believes it to exist beyond reasonable doubt and not merely when its existence is established by a preponderance of probability.”

13. By introduction of Section 29 of the Act, it is evident that a rigor is on the accused to rebut the presumption which the Court has to form whenever there happens to be an application of POCSO Act by way of legal fiction. In likewise manner, during course of tracing out the mental culpability of an accused, the mode of consideration as been in comparison to the burden which, as per Criminal Jurisprudence, the prosecution carries to prove beyond reasonable doubt, in the score of preponderance of probability and then, the accused has to rebut the same by way of cogent, reliable evidence. In the aforesaid background, first of all, the evidence rebuttal is to be seen having so adduced at the end of the appellant.

14. Three DWs, DW-1, Md. Faruque, a Ward Commissioner of Ward No.33, DW-2, Ajay Kumar Sah, a Ward



Commissioner of Ward No.32 and DW-3, Sudami Devi, the wife of the appellant have been examined, who deposed on the score that land dispute amongst the parties is prevailing since before and for that, a Panchayati was convened wherein some sort of resolution was, but informant Chanchal Tiwari did not accept the same and in the aforesaid background, this case has been instituted. It is evident from their evidences that there happens to be no identity of the land. When land is not there, wherefrom dispute arose. Furthermore, it is evident that all the witnesses have stated that the house of both the parties lies contiguous to each other, found dawdled after having the evidence of I.O., who has found the boundary of the house of the appellant as East-road, West-house of Birbal Sah, North-portion land of Hari Dhobi and South-portion land of Raju. So, the contention of defence that land dispute is the reason behind to institute this false case, by way of rebuttal, is found duly parched.

15. Moreover, the evidence is to be seen in order to find out whether prosecution is suffering from ad-ynamia and on that very score, PW-2 and PW-5 could be identified as a hearsay witness and for the present, their evidences are kept a bey. PW-3 is the mother, PW-4 is the victim, who are source of the evidence of PW-2 as well as PW-5. PW-3, mother has stated that



on the alleged date and time of occurrence, she was at her house. Her husband and father-in-law have gone in their working and so, they were not present at the house. At about 1.00 P.M., she gone in search of her daughter (victim) for feeding and during course thereof, the other children have disclosed that Sanjay uncle taken her away to his house. She had gone to the house of Sanjay Sah, called his name, whereupon Sanjay came out from his house. She had gone inside, she saw the victim lying over bed in naked condition, was sweating and nervous. On query, she disclosed that Sanjay uncle after spitting over her genital, inserted his finger and then, after undressing himself, committed sin. She had not seen sign of hurt either at front side or back side nor seen the blood oozing out from the genital. Again corrected, blood was coming out from her genital. Then, she lifted her daughter to home followed by Sanjay Sah. She inquired from Sanjay, why he has done so, whereupon he disclosed that it was mere a fun. He will not do again in future. Then her daughter fallen asleep. She informed her husband. Her husband came and then, she disclosed. Then thereafter, this case has been instituted by him. Police had recorded her statement. Identified the accused. During cross-examination at Para-2, she has stated that the house of accused lies at a distance of 100-200



feet away from her house. In West of her home, there happens to be barren land. House of Jahid Ansari lies North to her house. In South, there happens to be barren land. Jahid Ansari is not a witness of this case. None other than the family members are the witness of this case. In Para-3, she has stated that she has deposed on the basis of information given by her daughter as well as seeing her condition. In Para-4, she has stated that she has got no dispute with the accused. She has got no land dispute with the accused. Pinky Devi (PW-1) is the sister of Bhabhi of the accused and is virtually, occupying the same with the accused. In Para-5, she has stated that husband, father-in-law and victim are the witness. In Para-6, she has stated that they have gone to police station on the date of occurrence itself. In Para-7, she has stated that she had not seen whether there was blood spot over the bed sheet or not.

16. PW-4 is the victim. Before her examination, the Court had tested her mental level and then, found fit for the purpose of deposing. She, before deposing over the fact in issue, disclosed her daily activity. Then said that one day while she was playing, Sanjay uncle came and took her away to his house on the pretext of chocolate. He had not given chocolate. He lied her down over bed and undressed her. Uncle also undressed



himself and then, spate over her genital part and then, began to finger. She had not shouted. She had not wept. At that very moment, her mother came seeing whom, uncle fled away from the house. Aforesaid house belonged to Sanjay. She narrated the event to her mother whatever been committed by Sanjay. Police also inquired from her. Identified the accused. During cross-examination at Para-2, she has stated that her father has instituted this case. She has come along with father as well as grandfather. She has deposed out of her freewill. She has not deposed on the tutoring of her parents. She once has come to Court at an earliest. She is unable to disclose the day, date and month of the occurrence. Younger sister of Chaini namely Khesi was there at the place where she was playing. Then, she has stated that there happens to be one room and then, another room and then, courtyard in the house of Sanjay uncle. Then has stated that when uncle inserted his finger inside her genital, blood had not came out. There was no sign of hurt at that very place. When Mummy came in search of her and taken her back, she had raised alarm, but none came. She has further stated that she had gone to the house of Sanjay uncle so many times prior to the occurrence.

17. Now, coming to the evidence of PW-5, father, it



is crystal clear that as he was not present at the house during course thereof, so his evidence is based upon whatever been at the end of the mother as well as victim. Furthermore, he has reaffirmed his status as an informant. In cross-examination at Para-2, he has stated that house of Sahid Ansari lies by the side of his house. House of Pinky Devi lies in front of his house. House of none lies in the boundary of his house. Birbal's house lies by the side of Pinky's house and then, the house of Sanjay Sah lies. Then at Para-4, he has stated that he had not seen sign of hurt over body of his daughter. He came to police station along with the victim as well as his wife. He had recorded F.I.R. before the police. He has not remembering whether during course thereof, he had recorded that on account of an attempt to commit rape, her private part sustained injury. In Para-5, he has stated that he had gone along with the victim for medical examination. Yesterday, while evidence of victim was being recorded in Court, he was present as a guardian. PW-2 is the grandfather of the victim, who also substantiated the prosecution version, but as hearsay.

18. PW-8 is the lady doctor, who had found secondly sexual character developed while examining the victim. No external injury was found over her person. After



inspection of the private part of the victim, she found hymen intact. Vaginal swab was taken out and sent to pathological examination. No spermatozoa dead or alive was found and so, she opined as there is no sign of recent sexual intercourse. She has further explained that in case of fingering over a child aged about 4-5 years, she will face the pain. Rupture of hymen will depend upon elasticity of the vagina. Then has exhibited medical report issued by her. During cross-examination, she has stated that she has examined the victim and had not found injury over external or internal.

19. PW-7 is the doctor, who was a member of the Medical Board, who after examining the victim estimated her age in between 4-6 years average five years. Nothing is there in cross-examination.

20. PW-6 is the I.O., who has stated that after registration of the case, investigation was entrusted to her. Then thereafter, she had gone to place of occurrence, which happens to be the house of the accused. Then detailed the same. She had not found any incriminating material at the P.O., recorded further statement of the informant, witnesses Tara Devi, Yogendra Tiwari, Pinky Devi as well as victim. Took the victim for medical examination, procured the same, received



supervision note. Arrested the accused. Then thereafter, after completing investigation, submitted chargesheet under Section 354 A,B,C of the I.P.C. and Section 7/8 of the POCSO Act. During cross-examination at Para-2, she has admitted that she had not mentioned the time of examination of the witnesses. She has further stated that she had not examined Birbal Sah, Hari Dhobi, Raju. She has further stated at Para-3 that she had not seized any kind of incriminating article from the P.O. She had not seized the apparel of the victim. She has further stated that Laxmi Devi is not the family member of Chanchal Tiwari. Rest happens to be the family members. In Para-4, she has stated that at the fag end of F.I.R., there happens to be disclosure that there was an attempt of rape and during course thereof, private part of the victim became injured. She has further stated that being female, she had not tried to see the private part of the victim.

21. Section 118 of the Evidence Act suggests that all the persons are competent to depose unless and until, otherwise disqualified, as enumerated therein. No such disqualification has been traced out either by the Court or by the defence counsel while ruthlessly cross-examining the victim. It is needless to say that the evidence of victim needs no corroboration, if the same is found trustworthy. Simply, the



victim happens to be a minor, may be prone to tutoring would not be a legal ground to discard her testimony, more particularly in the background of the fact that the defence has failed to substantiate the reason, motive for false implication, which even after examining three DWs failed to substantiate. Apart from this, the evidence of PW-4 in consonance with the evidence of PW-3, the mother, if taken together is found duly interlinked, which the appellant/ accused could not be able to dismantle. So far medical evidence is concerned, from the evidence of doctor (PW-8), it is evident that explanation is there under Para-2 of the evidence and on that score, defence could not be able to satisfy. More particularly, over on which date accused was arrested and whether, subjected to medical examination as required under Section 53A of the Cr.P.C.

22. From the evidence available on the record, the finding of the learned lower Court with regard to identification of the appellant to be guilty under Section 376/511 of the I.P.C. as well as Section 8 of the POCSO Act is not at all found matching with, more particularly, after going through the definition so laid down under Section 375 of the I.P.C. as well as under Section 3 of the POCSO Act and so, would have been properly charged under Section 376 of the I.P.C. as well as



under Section 4 of the POCSO Act. Instead thereof, from the record as it appears accused/ appellant has been charged under Section 376/ 511 of the I.P.C. and Section 8 of the POCSO Act. At the present occasion, though under Section 386 of the Cr.P.C. does provide power to the appellate Court to transform after noticing the appellant, but considering the period of the detention as well as it will give another round of litigation, hence did not find favour and so, maintaining the conviction and sentence for the offences as recorded by the lower Court. The appeal is found devoid of merit and is accordingly, dismissed. Appellant is under custody which he will remain till saturation of the period of sentence.

(Aditya Kumar Trivedi, J)

Vikash/-

AFR/NAFR	A.F.R.
CAV DATE	N.A.
Uploading Date	16.08.2019
Transmission Date	16.08.2019

