

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (SJ) No.249 of 2016**

Arising Out of PS. Case No.-19 Year-2013 Thana- VALMIKINAGAR District- West
Champaran

Imteyaz Ali, Son of Late Iltaf Ali @ Altaf Ali, Resident of Village- Harihansh,
Police Station- Hussainganj, District- Siwan.

... .. Appellant

Versus

The State Of Bihar

... .. Respondent

Appearance :

For the Appellant/s : Mr. Milind Kumar Mishra, Adv.
For the Respondent/s : Mr. Binod Bihari Singh, A.P.P.

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

Date : 05-09-2019

Appellant, Imteyaz Ali, has been found guilty for an offence punishable under section 376(2)(B) of the I.P.C. and sentenced to undergo R.I. for ten years as well as to pay fine appertaining to Rs. 1 lac and in default thereof, to undergo R.I. for one year, additionally, under section 6 of the POCSO Act and sentenced to undergo R.I. for ten years as well as to pay fine appertaining to Rs. 1 lac and in default thereof, to undergo R.I. for one year, additionally, under section 3(1)(xii) of the SC and ST (P.O.A.) Act and sentenced to undergo R.I. for three years as well as to pay fine of Rs.10,000/- and in default thereof, to undergo R.I. for two months vide judgment of conviction dated 10.2.2016 and order of sentence dated 11.2.2016 passed by the 1st Addl. Sessions Judge cum Special Judge, POCSO, West Champaran, Bettiah in



connection with S.Tr.No. 261/2014 arising out of Balmikinagar P.S.Case No. 19/2013. All the sentences have been directed to run concurrently.

The instant prosecution has originated on a Fard Beyan of Putariya Devi (P.W.1) recorded at concerned police station on 12.4.2013 at 9 A.M. having an allegation that in the preceding night at about 8 P.M. she alongwith her husband Manharan Mushahar (P.W.6) and the victim (name withheld) P.W.2, aged about 7 years has gone to the house of the appellant Imteyaz Ali, a Forest guard having his house at Darwabari itself (near about Forest Office) in order to cook on a request. After cooking, they were about to return but, at that very moment having handing over a note of Rs.10/- Imteyaz Ali requested to bring vegetable for the next day. She alongwith her husband proceeded leaving behind the victim who was sleeping. After returning with the vegetable, she found her daughter wriggling. Her panty was removed. She was weeping. She disclosed that after removing her panty Sipahi Jee overridden upon her and committed sin. She was suffering severe pain, whereupon, she began to cry. She enquired from Sipahi Jee Imteyaz Ali what you have done but, he remained silent. Then thereafter she disclosed the event to her neighbours whereupon, large number of persons assembled there, who caught hold of the



Sipahi Jee Imteyaz Ali. Imteyaz Ali is a Forest Guard and for the last two years he was residing here. Because of the fact that they could not succeed in getting connection with the police, on account thereof, they remained with Imteyaz Ali whole night. In the morning, she alongwith the victim, Imteyaz accompanied by the villagers have come up at the police station in order to lodge a case.

After registration of Balmikinagar P.S. Case No. 19/2013, investigation commenced and after concluding the same, charge sheet has been submitted, whereupon, trial commenced and concluded in the manner, subject matter of the instant appeal.

Defence as is evident from the mode of cross-examination as well as statement recorded under section 313 Cr.P.C. is that of complete denial. It has further been pleaded that the grant father of the victim, namely, Teemal Mushahar (P.W.4) is also a Forest Guard and known to each other. The aforesaid Teemal Mushahar had borrowed full money from him and, on the score of repayment there was dispute. In order to digest the money got this case filed with false and frivolous allegation. In order to substantiate the same attested copy of attendance register has been made an exhibit.



In order to substantiate its case, the prosecution has examined altogether 9 P.Ws., who are P.W.1 Putaria Devi, P.W.2 victim herself, P.W.3 Sarswati Devi, P.W.4 Teemal Mushahar, P.W.5 Mamal Mushahar, P.W.6 Manharan Mushahar, P.W.7 Tulasi Mushahar, P.W.8 Munna Kumar and P.W.9 Dr. Akanksha. Prosecution has also adduced Fard Beyan Ext.1, Formal F.I.R. Ext.2, Seizure list Ext.3 series, charge sheet Ext.4 and the medical report Ext.5. As stated above, attested copy of attendance register adduced on behalf of the appellant in defence as Ext. A.

While assailing the judgment impugned (of conviction and sentence), it has been submitted at the end of learned counsel for the appellant that the whole prosecution case happens to be farce and the same has been instituted only to digest the money which the prosecution party had borrowed at an earlier occasion in the background of the fact that the grand father of the victim was employed as a Forest Guard alongwith the appellant. In order to buttress such plea it has been submitted that all the witnesses so examined are own kith and kin. That means to say, they all happens to be interested witness. In the aforesaid background, when their evidences are minutely gone through, it is apparent that they had not stuck over a single point. More over, admittedly



none are an eye witness to the occurrence. So, the case rests upon the evidence of the victim, P.W.2.

It has further been submitted that in order to properly appreciate the evidence of P.W.2, first of all evidence of the doctor P.W.9 has to be considered. The victim was examined on 12.4.2013 itself. On 12.4.2013 the doctor had not found the recent sign of sexual intercourse and further, though had found the hymen ruptured vagina found but that was not recent one. There happens to be absence of dead or alive spermatozoa on account thereof, any form of penetration is found completely ruled out. That being so, the medical evidence did not justify the allegation. That means to say, the prosecution case is found deficient one with regard to mandatory requirement of definition of rape so prescribed under Section 375 of the I.P.C. hence, no conviction could survive with regard thereto.

It has also been submitted that though, during the course of cross-examination P.W.2 had not been specifically cross-examined over the factum of rape, but surrounding circumstances as exposed by the witnesses more particularly the parents P.W.1 as well as P.W.6 make the allegation non-sustainable and in likewise manner, the judgment of conviction and sentence. So, submitted



that it is a fit case wherein the judgment impugned is to be reverted.

On the other hand, learned Addl. P.P. while supporting the finding recorded by the learned lower court has submitted that from the evidence of the victim there happens to be double exposer of the occurrence and non-cross examination at the end of the appellant nor the factum of occurrence is another circumstance to support coupled with the medical evidence i.e. the tearing of vaginal wall as well as rupture of hymen. That means to say, penetration is found duly substantiated whereupon, the judgment of conviction and sentence is to be affirmed.

Because of the fact that there happens to be no controversy with regard to status of the victim to be a child and so proceeded under the POCSO Act. Considering the status of the victim to be minor, certainly would have lesser I/Q, would not be able to face the puzzle post before whether by the defence counsel, seeing the accused will again put her/him under trauma of the occurrence, should not be allowed to be cross- examined in the different manner, that being so, apart from different protective provisions, two sections have purposely been introduced and those are Section 29 and 30. Section 29 deals with legal presumption and, on plain reading of the same, it is evident that it has got some



sort of independent identity than mode of presumption, so prescribed under the Evidence Act. After going through Section 29, it is evident that the Court has to presume unless and until it happens to be properly rebutted at the end of the accused. Therefore, one has also to see whether the accused has succeeded in rebutting the presumption while proceeding under POCSO Act. Further more, Section 30 deals with regard to mental culpability of an accused during the course of commission of an occurrence and for that, there happens to be requirement at the end of the prosecution to prove a prima facie case, with regard to commission of an offence that means to say under section 29 the prosecution is not under obligation to substantiate prima facie, save and except bringing on record the allegation for drawing a sentence in accordance with section 30, prosecution is under obligation to substantiate prima facie case.

That means to say, whenever there happens to be prosecution under the POCSO Act, the acceptability of the evidences is to be considered, filtered up, appreciated under the garb of mandate so prescribed under sections 29 and 30 of the POCSO Act. So far status of child as witness is concerned, Section 118 of the Evidence Act did not prescribe any kind of deformity. However, considering the tender age, by judicial verdict, a caution



has been prescribed while relying upon the evidence of child witness. From the deposition of P.W.2 it is evident that before her examination, she has been tested by the learned lower court and then observing that she was mentally capable to give answer of the questions. She was allowed to depose as, there always happens to be an opportunity of being tutored. In **State of U.P. v. Krishna Master & ors.**, reported in (2010)12 SCC 324, it has been held:

“36. ... This Court fails to understand as to on what principle and on which experience in real life, the High Court made a sweeping observation that it is inconceivable that a child of Madan Lal’s understanding would be able to recapitulate facts in his memory witnessed by him long ago. There is no principle of law known to this Court that it is inconceivable that a child of tender age would not be able to recapitulate facts in his memory witnessed by him long ago. This witness has claimed on oath before the Court that he had seen five members of his family being ruthlessly killed by the respondents by firing gunshots. When a child of tender age witnesses gruesome murder of his father, mother, brothers, etc. he is not likely to forget the incident for his whole life and would certainly recapitulate facts in his memory when asked about the same at any point of time, notwithstanding the gap of about ten years between the incident and recording of his evidence.



37. This Court is of the firm opinion that it would be doing injustice to a child witness possessing a sharp memory to say that it is inconceivable for him to recapitulate facts in his memory witnessed by him long ago. A child of tender age is always receptive to abnormal events which take place in his life and would never forget those events for the rest of his life. The child would be able to recapitulate correctly and exactly when asked about the same in future. Therefore, the specious ground on which the reliable testimony of P.W.2 Madan Lal came to be disbelieved can hardly be affirmed by this Court.”

She during course of her examination-in-chief has stated that on the alleged date and time of occurrence she was at the house of Imteyaz. She had gone there alongwith her mother. Her mother had gone to cook. After cooking, Imteyaz had given Rs.10/- to her father for bringing vegetable whereupon, her parents (father and mother) gone to purchase vegetable. Thereafter, Imteyaz undressed her and then committed sin with her, as a result of which, blood oozen out. On account of sin committed by Imteyaz, blood came out. She began to shaker, parents came and seeing her condition. enquired, whereupon she disclosed that Imteyaz has committed sin with her. Thereafter, her parents called the villagers who came, caught hold of Imteyaz. Identified the accused. Then thereafter, Imteyaz was taken to the police station



alongwith one of her parents. During course of cross-examination, she has stated at para 2 that her mother was not a cook. She used to do menial work, basically related to agriculture. She denied the suggestion that her mother was a cook. In para 2 she has stated that her parents alongwith her villagers have not quarrelled with Imteyaz since before the occurrence. Even before the occurrence there was no dispute. In para 3 she has stated that after the occurrence, her parents (father and mother) have gone to village and then, people came. Villagers had assaulted Imteyaz after the occurrence. When they have gone to assault Imteyaz she had also accompanied. While her father and villagers were in search of Imteyaz, he had come to her house where he was apprehended. He was assaulted there and then thereafter, he was taken to the police station. Her father, mother alongwith villagers have gone to the police station. As directed, her mummy had given her statement, Her mummy had given statement on her own and not at the instance of the villagers. In para 4 she has stated that near about the house of Imteyaz, house of none else lies. Then she had shown distance in between her house as well as the house of Imteyaz. Then she has stated that her mummy has disclosed that they have come to court for evidence. Mummy, Papa alongwith some villagers have also come. The villagers have disclosed that you



have to depose before an officer. In para 5 she has denied the suggestion that at the instance of the villagers, she has been tutored, whereupon she has deposed like so. She has also denied the suggestion that no such occurrence had ever taken place rather there was quarrel in between her grand father, villagers with Imteyaz whereupon, at their instance, this false case has been instituted and as tutored by them, she has deposed falsely.

P.W.9 is the doctor, who had examined the victim on 12.4.2013 while she was Medical Officer at M.J.K.Hospital, Bettiah and she had found small tear present on the vaginal wall having size less than 05 M.M. No fresh bleeding present. Hyman ruptured, No pubic and auxiliary hair present, breast not developed. After vaginal swab examination (Pathological examination) no spermatozoa dead or alive was seen. R.B.C. not seen. W.B.C. present 1-2/ H.P.F. Epithelial cells present. She was referred to Radiology Department for ascertainment of her age and there happens to be details on that very score and lastly it has been opined at the end of P.W.9 that no sign of recent sexual assault is present and injury might have been caused due to hard and blunt substance or sexual intercourse. The age of the victim has been estimated in between 10-12 years.



During cross-examination at para 3 she has stated that rapture of hymen was possible by several other means than sexual intercourse.

P.W.8 is the I.O. He has during course of his examination-in-chief, after exhibiting all the relevant documents, has deposed that after registration of Balmikinagar P.S.Case No. 19/2013, investigation was entrusted to him. He had seized the panty of the victim, underwear, pant of the accused and for that separate seizure list were prepared (exhibited). During course of inspection of the P.O. he had seized the torn sari over which, the victim allegedly slept during the course of which occurrence took place and for that, another seizure list was prepared. Inspected the place of occurrence which happens to be the house of the accused and in the half portion of the house, happens to be the office. Then has disclosed that nothing incriminating has been found. Recorded statement of the witnesses. Then thereafter, sent the seized articles to FSL for examination. Got the victim examined by the doctor. Then thereafter, as he was to go for training on account thereof, he handed over the charge to the Officer In-charge. The Officer In-charge, after concluding investigation, submitted charge sheet. During cross-examination at para 11 he has stated that he had arrested the accused and forwarded him to custody. The villagers



had brought the accused and then, after registration of the case accused was apprehend. The accused was brought up on the following date of occurrence. In para 13 he has stated that during course of visiting/ inspecting the place of occurrence that means to say house of the accused he had seized Sari (Yellow and red colour) over which the victim had slept. In para 14 he has stated that panty which was seized by him belonging to the victim was blood stained as well as spot was also over it and for that, he had prepared seizure list already exhibited. Then at para 17 he has stated that on his direction, the accused had handed over his pant, Janghiya, and for that seizure list was prepared. He had handed over another cloth to the accused for wearing. In para 19 he has stated that Dharmraj Mahto happens to be one of the seizure list witness whose statement has not been recorded. In para 21 he has stated that the persons namely Banshi Mahto, Sunil Mahto, Krishna Mohan Mahto and Chulhai Mahto have not been examined as, they have not come to make statement. In para 22 he has stated that save and except the victim none is an eye witness. In para 26 he has stated that he had not received the FSL report during course of investigation. In para 27 he has stated that he had not brought the victim for her statement under section 164 Cr.P.C. In para 30 he has stated that he had not recorded the statement of



the accused in defence as he declined to say anything. Then denied suggestion that his investigation happens to be wholly unworthy.

P.W.1 and P.W.6 are the parents who had seen the victim under agony while they returned back after purchasing vegetable on the direction of the appellant. They have also been substantiated with regard to commission of rape by the appellant as disclosed by the victim on query made by them. From cross-examination of P.W.1, it is evident that she was not at all cross-examined specifically on that very score save and except at para 5 that when she came at the Dera of Imteyaz after vegetable, her daughter had disclosed the event whereupon, she raised alarm, she gone inside the village and then villagers have assembled, and then they apprehended Imteyaz. They have also assaulted Imteyaz, whole night he was kept under watch and then on the following day, he was produced at the police station and that happens to be also narration of P.W.6. The other witnesses that means to say P.W.3, P.W.4, P.W.5 and P.W.7 are corroborative in nature and substantiated the same. Even during cross-examination they stood the test, and that happens to be reason behind absence of contradiction save and except natural one on the basis of individual perception.



After going through the evidence as discussed hereinabove, it is abundantly clear that not only P.W.2 the victim has been left out to be cross-examined specifically over the factum of rape rather, the I.O. has not been cross examined in what manner Imteyaz was produced by the villagers carrying the victims her parents, physical condition of the victim, the subsequent steps having at his end.

From the record, it transpires that appellant of the arrest was not examined by the doctor in accordance with Section 53A Cr.P.C. It is further evident that FSL report has not yet been recorded. Could it be considered an infirmity in the prosecution case. Certainly not, as there has been an additional ice portable as undue thrust would be other evidence of the victim. If the evidence of the victim inspires confidence, then, in that event the same did not perceive corroboration. Further more, appellant failed to substantiate prejudice, if any, caused to him.

Further more, it is also evident from the conduct of the appellant that he failed to properly discharge the onus to rebut the allegation having him in accordance with Section 29 of the POCSO Act. The only thing which, after going through the record in consonance with the finding so recorded by the learned lower court is not found supported, is justification of the conviction and



sentence under the SC and ST (POA) Act. There happens to be no allegation that being a member of the Scheduled Tribe, the aforesaid offence was committed. That being so, as per principle laid down by the Apex Court in **Khuman Singh v. State of M.P.**, Cr.A.No. 283/2019 arising out of SLP(Cr.)No. 6647/2018, the same would not survive.

As such, the finding recorded by the learned lower court with regard to conviction and sentence under the SC & ST (P.O.A.) Act is found unsustainable in the eye of law, whereupon the same is set aside, confirming the conviction and sentence recorded by the learned lower court relating to remaining offences and in likewise manner the sentence. The appellant is in custody which he will remain till saturation of the period of sentence.

(Aditya Kumar Trivedi, J)

Surendra/-

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