

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (SJ) No.1601 of 2017**

Arising Out of PS. Case No.-24 Year-2014 Thana- TEGHRHA District- Begusarai

Rajiv Kumar Son of Sri Ram Pujun Singh, resident of Village- Madhurapur,
Bichla Tola, Police Station- Teghra in the district of Begusarai.

... .. Appellant/s

Versus

The State Of Bihar

... .. Respondent/s

Appearance :

For the Appellant/s	:	Mr. Akhileshwar Prasad Singh, Sr. Advocate Mr. Bimal Kumar No.2, Advocate Mr. Madhukar Anand, Advocate
For the Respondent/s	:	Mr.Sujit Kumar Singh

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

Date : 16-11-2019

Appellant, Rajiv Kumar, has been found guilty for an offence punishable under Section 366 of the IPC as well as under Section 376 of the IPC, ³/₄ POCSO Act and has been sentenced to undergo rigorous imprisonment for eight years as well as to pay fine appertaining to Rs.2,000/-, in default thereof, to undergo simple imprisonment for three months additionally under each head separately independently by Judgment of Conviction dated 13.04.2017 and order of sentence dated 17.04.2017 passed by First Additional Sessions Judge-cum-Special Judge, Begusarai in connection with POCSO Case No.44 of 2015 arising out of Teghra P.S. Case No.24 of 2014, with a further direction to run the sentences concurrently, with a further direction that period already undergone



during course of trial will be set off in accordance with Section 428 Cr.P.C.

Chand Singh (since deceased) filed written statement on 29.01.2014 putting an allegation therein that on 27.01.2014 at about 9.00 P.M., his daughter, (name withheld P.W.9) aged about 11 years has come out from the house to meet nature's call but did not return. They have gone in search of her and during course thereof, he came to know that Rajeev Kumar has kidnapped her and has made her captive at the place of his Fua and further, indulged in illicit relation with her. His co-villagers, Roshan Singh, has been informed by the co-villager of Fua of Rajeev and disclosed that his co-villager, Rajeev Kumar has brought a girl and has confined her in the house of his Fua. After getting such information, he along with some co-villagers gone to village Achuara where they met with local Mukhiya who informed the police and at the instance of local Mukhiya, his daughter has been taken out from the house of Fufa of Rajeev and, has been handed over to him while, O/c of local police station has taken custody of the Rajeev. Because of the fact that he came at his house in late night of 28.01.2014 on account thereof, some delay has been caused in filing the written report. Therefore, it has been prayed that proper legal action be taken against Rajeev.



After registration of the Teghra P.S. Case No.24 of 2014, investigation commenced and concluded by way of submission of chargesheet against the appellant / accused along with Vijay Singh (fufa) who absconded during course of trial whereupon separated facilitating the trial meeting with the results subject matter of instant appeal.

Defence case, as is evident from the mode of cross-examination as well as statement recorded under Section 313 of Cr.P.C. is that of complete denial. However, nothing has been adduced in defence.

Altogether ten P.W.s has been examined on behalf of prosecution in order to substantiate its case who are, P.W.-1 Meera Devi, P.W.-2 Pappu Singh, P.W.-3 Shiv Kumar, P.W.4 Rashiyajn Singh, P.W.5 Dr. Shashi Prabha, P.W.6 Dr. Ajay Kumar, P.W.-7 Dr. Ram Pravesh Prasad, P.W.8, Mr. Ajay Krishna Ojha, P.W.9 the victim and P.W.10 Gaurav Anand. Side by side, prosecution has also exhibited- exhibit 1 series, medical report, exhibit-2 statement recorded under Section 164 Cr.P.C. As stated above, nothing has been adduced on behalf of defence.

It has been submitted at the end of learned counsel for the appellant that the judgment impugned is unsustainable in the eye of law because of the fact that finding so recorded thereunder



is not at all substantiated from the materials available on the record. To justify such plea, it has been submitted that none is eye witness to the occurrence. None of the material witness has claimed that he had seen the appellant during course of kidnapping the victim or, taking her away. That being so, their statement on that very score happens to be heresay and the manner suggest inadmissible in the eye of law.

Now, coming to the evidence of the victim, it has been submitted that though she had alleged during course of her examination-in-chief with regard to her kidnapping by one Rajeev Singh, who took her to the place of her Fua wherefrom she was recovered but, she failed to identify the appellant / accused in dock and that being so, there happens to be deficiency at the end of the prosecution on account of proper identification of the appellant to be the culprit.

Apart from this, it has also been submitted that P.W.-6 and P.W.-7, though examined the victim have not substantiated the case of rape rather, from their evidence, it is apparent that they have simply stated with regard to attempt but the same could not be attributed against the appellant on account of non-identification of the appellant as a culprit by the victim. So, after proper analysis of the evidences having been on the record, it is crystal clear that



this case happens to be virtually of no confidence whereupon, the appellant should be exonerated by way of allowing the appeal. Learned counsel for the appellant referred Judgment passed by the Apex Court in Narra Peddi Raju Vs. State of A.P. (Now Telangana)- Cr.A. No.1553 of 2019, Diary No.28533 of 2019 in order to buttress the plea.

Learned Additional P.P. while refuting the submission has submitted that when the victim has come up for evidence, she disclosed her age as 14 years but the most surprising feature as is evident she was married. Now, her married life is to be preserved and that happens to be reason behind that irrespective of the fact that prosecution has failed to declare her hostile as the victim declined to identify the accused, but during course of evidence, she has specifically said that whatever been done by the Rajeev on her, she had elaborately detailed the same before the appellant during course of her statement. Furthermore, her approach suggest that she was very much conscious to preserve her marital life and that happens to be reason behind that appellant who happens to be her co-villager and identified by her mother P.W.-1 along with other witnesses, did not find favour at her end. This was but natural as her father had died. There happens to be no evidence on the record that other responsible family members is in the family to



look after her as well as her mother and so, the subsequent event is resultant of aforesaid incident which should also be taken into consideration during course of appreciation of the evidence.

From the materials available on record, it is apparent that informant is dead. It is further evident that P.W.1, P.W.2, P.W.3, have deposed on the score that after having been disappearance of the victim, they made hectic search and during course thereof, the co-villager of Fua of Rajeev Kumar informed Raushan Singh regarding presence of Rajeev with a girl whom he has concealed in the house of his Fua whereupon they all have gone met with local Mukhiya who informed the local police and then thereafter victim was recovered from the house of Fua or Rajeev as well as Rajeev Kumar, then also handed over to the informant while appellant was taken away by the local police. It is further evident that they have not seen the appellant taking away the victim in the night, some of the witness stick over the same. P.W.4 is the Raushan Singh who has stated that the occurrence is dated 27.01.2014 at about 11.00 P.M. Daughter of Chand Singh (named withheld) came out from her house in order to meet nature's call and during course thereof, Rajeev Singh kidnapped her. Rajeev Singh took her to village Achuara at the place of his Fua. Rajeev Kumar committed rape on the victim at the house of



his Fua. Thereafter, Chand Singh informed the police. Rajeev and victim was recovered from the house of his Fua and Rajeev from there she was sent to Teghra police station and then victim was produced before the Magistrate for statement as well as for medical examination, she was sent to hospital, accused was sent to Court.

Informant Chand Singh had made his further statement in his presence. Chand Singh is dead. Identified the accused. During cross-examination at para 8, he has stated that Rajeev Singh happens to be his brother. He has further stated that the house of accused lies south to the Bhagwati Sthan. In para 9, he has stated the victim was in village Achuara. Vijay Singh, the owner of the house was also made accused. The nanihal of Vijay Singh lies at village Madhurapur. At para 10, he has stated that he met with the victim in village Achuara. He along with whole family member of the victim had gone along with local Mukhiya and at that place itself, victim had disclosed with regard to the occurrence. Then thereafter, Mukhiya Ji informed the police. Police came and then handed over both of them to the police. In para 11, he has stated that he does not reside in the Diyra of Madhurapur rather he resides in the village. Informant, Chand Singh, resides in the Diyra with his family. At the time of



occurrence, he was also residing at the Diyara. Diyara happens to be at a distance of 15 kilometer from his village. Then has stated that he had not seen the occurrence. Then he was suggested no such kind of occurrence had ever taken place.

P.W.-1 is the mother. She has stated that her husband Chand Singh (since deceased) had instituted this case. Her statement was also recorded by the police. Occurrence is about two years ago. At that very time, her daughter (victim) aged about 11 years had gone to meet nature's call. Rajeev Kumar kidnapped her. When her daughter did not return then they all began to search and during cross thereof, they came to know that Rajeev Kumar has kept her daughter at the place of his Fua where he has committed rape on her. Police had arrested Rajeev Kumar. Her daughter was also recovered from that place. She was examined under Section 164 Cr.P.C. She was also medically examined. Identified the accused. During cross-examination, she has stated that the victim is her daughter. Victim was recovered from Achuara village. Later on, she was handed over to her. She is not knowing whether the Mamhar of Vijay Singh lies in Madhurapur. She is unable to say how many days victim remained at village Achuara. She had not seen kidnapping of the victim. She had not seen any kind of incidence having been taken place with her. She



has got no personal knowledge with regard thereto. She has further stated that Rajeev Kumar happens to be her neighbour. His house lies by the side of her house. They also reside at Diyra conjoins to each other. Then she stated that on an information given by the villagers, this case has been instituted. She has further stated that her statement was not recorded by the police. She has further stated that this case has been instituted by her husband who had detailed with regard to the occurrence to her before his death.

P.W.-2 has stated that he knew about the occurrence. His statement was recorded by the police. In the night of 27.01.2014, victim came out from her house in order to meet nature's call and during course thereof, Rajeev Kumar kidnapped her. During course of search, they came to know that Rajeev Kumar has kept victim at the place of his Fua at village Achuara where they have gone. Police recovered there from. Identified accused. During cross-examination at para-5, he has stated that his house lies half kilo meter away from the house of accused. Rajeev is his co-villager and so, he is known to him. In para -6, he has stated that victim is his cousin sister. His house and the house of victim lies by the side of each other. Though, they are separate in mess and business. In para 8, he has stated that he had not seen



the victim going to meet nature's call and in likewise manner having been kidnapped by the accused. But he came to know about the occurrence subsequently.

P.W.-3 has stated that he knew about the occurrence. His statement was recorded by the police. The occurrence is of the year 2014. It was in night of 27.01.2014. At that very time, Rajeev Kumar kidnapped her (victim) and took her to village Achuara, where he kept at the house of her Fua wherefrom she was recovered by the police. Identified the accused. During cross-examination in para-6, he has stated that Rajeev is co-villager and so he knew him. In para-7, he has stated that his house lies at a distance of one kosh. Victim is his sister. Victim had gone to meet nature's call alone. It was foggy night. When the people disclosed then he came to know about the occurrence. He had not seen the accused taking away the victim.

P.W.-9 is the victim. Her deposition is in the format of question and answer. After going through the same, it is evident that she has deposed with regard to the occurrence having been committed about three years ago. At that very time, it was night. She came out from her house to meet nature's call whereupon, she was kidnapped by Rajeev. Rajeev kept her at the place of his Fua at village Achura. He had kept there. She stated that kidnap was



done by the Rajeev. She has further stated that police had recovered her as well as Rajeev from the place of Fua and then she was handed over to her parents and from there, she was taken to Court where her statement was recorded before the Magistrate. She has narrated the incidence whatsoever she has faced during course thereof. Then thereafter, she was medically examined and then, when the face of the accused was shown to her in a mirror, she failed to identify. During cross-examination, it is evident that nothing substantial has been at the end of the appellant save and except that she came to Court along with her parents, whatever they had instructed, she has deposed that she had not stated according to free will. But she denied the suggestion that no occurrence had taken place with her.

P.W.-8, the I.O. He during his examination-in-chief has stated that after registration of Teghara P.S. Case No.24 of 2014, he was entrusted with the investigation. During course of investigation, he had recorded further statement of the informant, Chand Singh and then there happens to be details thereof does not admissible as did not fall within any of category so laid down under Section 32 of the Evidence Act, recorded statement of the witnesses, inspected the place of occurrence which happens to be the house of the informant which he detailed with specific



boundary. Then, as per the direction of the superior official, he got the accused Rajeev Kumar remanded in this case who was under custody in connection with Barh P.S. Case No.26 of 2014. He received medical report of the victim. Then after completing investigation submitted charge-sheet against the accused. During course of cross-examination, at para 15 and 16, there happens to be cross-examination with regard to demography of the village. Then, he stated that he had not talked with the people of Diyara as, they were not available at their place. Then, had denied the suggestion that investigation happens to be tainted are.

P.W.6 and P.W.7 are doctors who were member of the Medical Board for examination of victim and during course thereof, they simply estimated the age of the victim about in between 10-12 years. During cross-examination, they have stated that estimation of age has been on the basis of radio logical examination, counting of the teeth, space, having left over the gums.

P.W.-5 is the Doctor, Shashi Prabha who had examined the victim on 29.01.2014 and on which date, her finding suggest that she had not found any kind of injury over the person of the victim save and except, there was readiness at the both side of libia majora. However, hymen was intact and so, in the opinion of the



doctor, it was attempt to rape. Furthermore, from her evidence, it is evident that original medical report was not before her rather she deposed on the basis of the photostat copy of the original having properly identified by her appears to be on account of misconception, the original copy is there on the record and is marked as Ext.1/2.

From the evidence of the doctor, it is evident that victim was examined at 29.01.2014 and on that day, readiness was found over libia majora, though there happens to be absence of suggestion at the end of prosecution, cross-examination at the end of accused, as well, but as per Modi Medical Jurisprudence, mere hymen being intact would not ruled out factum of rape, and readiness at liria major, which was persisting after two days of occurrence, did speak otherwise, Modi also speak about incidence of penetration. The factum has not being cross-examined on the factum of rape, recovery from the house of Fua of appellant Rajeev, Rajeev have not been taken by the local police into custody and for that Barh P.S. Case No.24 of 2014 was registered, and therefrom he was remanded in this case. The other witness have also not been properly cross-examined the witnesses, then they claimed identification being co-villager and P.W.-4 being emphatic on that very score, not even been adequately suggested.



Furthermore, it is also evident from the record that during course of recording of deposition of P.W.8, I.O., there happens to be some sort of slackness at the end of the prosecution, as all the relevant documents that means to say formal FIR, endorsement over the written report, injury report having been issued by the police have not been made an exhibit and for that, no explanation is on the record. Furthermore, it is also evident that while the victim, P.W.9, deflected from her earlier statement recorded under Section 164 Cr.P.C. Statement under Section 164 Cr.P.C., she was not at all declared hostile to that extent nor her attention has been drawn towards the same in her deposition, she had stated that whatever she faced, she had narrated before the Magistrate during course of her statement. That means to say, the prosecution has sailed with the trial in casual manner.

From the record, it is manifest that charges have been framed under POCSO Act also. It is needless to say that POCSO Act is a Special Act. In accordance with Section 4 of the Criminal Procedure Code, whenever there happens to be special procedure prescribed under Special Act then, in that circumstance, the procedure so prescribed under Special Act will override the Cr.P.C. Section 29 of the POCSO Act is with regard to presumption. Section 29 provides that the Court will have to presume



commission of an occurrence unless and until it is rebutted by the accused. That means to say, it deals with reverse burden. That means to say, it is the accused over whom the burden lies to contradict that no such kind of occurrence had taken place. From the evidence, as has been discussed hereinabove, it is apparent that the accused / appellant at his own has not taken any effort to rebut the presumption in terms of Section 29. That being so, the defence is found deficient.

Learned counsel for the appellant also referred the Judgment passed by the Apex Court delivered on 14.10.2019 in **Narra Peddi Raju Vs. State of A.P. and Ors.** passed in **Cr. Appeal No.1553 of 2019**. From the facts of the aforesaid case, it is evident that same is not applicable in the facts and circumstances of the instant case because of the fact that the date of occurrence happens to be of the year 2000 on which date POCSO Act was not introduced and all the witnesses did not support the prosecution case.

Be that as it may, when the judgment impugned has been gone through, it is evident from para 23 that learned lower Court has based its finding on a statement recorded under Section 164 Cr.P.C. which could not fulfill the purpose as statement under Section 164 Cr.P.C. is only for contradiction or corroboration.



It is further evident from the judgment impugned that the learned lower Court while challenging the material, failed to perceive presence of Section 29, the perception, the burden cast upon the accused to rebut, steps taken at the end of accused and its legal repercussion over fate of the trial. That being so, it is found and held that the instant Appeal sans merit.

Being the victim minor, Section 366 of the IPC would not be applicable rather it would be Section 366 A of the IPC but because of the fact that Rajeev Kumar himself kidnapped the girl in order to satisfy his cardinal desires, therefore, Section 366 A of the IPC is not at all found admissible as, the kidnapping should be by an accused knowing full well that the victim will be seduced to forcibly indulge with an illicit relation with the other. However, in the facts and circumstances of the case, Section 363 of the IPC would be there. That being so, the finding so recorded by the learned lower Court relating thereto is modified to 363.

Now, coming to Section 376 of the IPC, it is evident that learned lower Court should have dealt with the matter in accordance with Section 4 of the POCSO Act with a parallel scrutiny of sentence to be properly inflicted in consonance with Section 42 of the POCSO Act.



However, in the facts and circumstances of the case, the sentence so inflicted by the lower Court relate thereto are retained subject to modification.

The appellant is sentenced to undergo rigorous imprisonment for three years for an offence punishable under Section 363 of the IPC. All the sentences are directed to run concurrently. The period having been undergone will be set off in accordance with Section 428 of the Cr.P.C. Appellant will remain under custody till saturation of the period of sentence.

In terms thereof, instant Appeal is dismissed.

(Aditya Kumar Trivedi, J)

sanjeev/-

AFR/NAFR	NAFR
CAV DATE	NA
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