

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (SJ) No.181 of 2016**

Arising Out of PS. Case No.-69 Year-2013 Thana- DESARI District- Vaishali

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Raushan Patel @ Baba son of Late Rajendra Patel, Resident of village-
Dharampur Ram Ray, P.S.- Desari (Chandpura Out Post), District- Vaishali
... .. Appellant/s

Versus

The State Of Bihar
... .. Respondent/s

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Appearance :

For the Appellant/s	:	Mr.Subhash Patel, Adv.
For the informant	:	Mr. Krishna Kant Singh, Adv.
		Mr. Anil Kumar Sinha, Adv.
For the State	:	Mr.S.A. Ahmad, APP

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

Date : 08-08-2019

1. Appellant, Raushan Patel @ Baba has been found guilty for an offence punishable under Section 376 of the IPC and sentenced to undergo R.I. for ten years as well as to pay fine appertaining to Rs.25,000/- in default thereof to undergo S.I. for six months, 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.25,000/- in default thereof to undergo S.I. for six months additionally, with a further direction that the sentences will run concurrently vide judgment of conviction dated 10.02.2016 and order of sentence dated 11.02.2016 passed by Additional Sessions



Judge, Ist-cum-Special Judge, POCSO Act, Vaishali at Hajipur
in Sessions Trial No.466/2013.

2. Before proceeding ahead, it is apparent from the lower court record that at an initial stage charge under Section 376 IPC was only framed, witnesses began to examined and during course thereof, it has been traced out that victim happens to be a seven year old girl whereupon, the concerned P.O. observed applicability of POCSO Act on account thereof, the record has been sent to the Special Court where charges have been framed and in the aforesaid background, the evidence so recorded at an earlier occasion as is evident from the order dated 16.01.2015, the same have been nullified, consequent thereupon, the trial has been allowed to sail up to this stage by way of denovo trial.

3. Suresh Thakur (PW.1) gave his fardbeyan at his house on 06.04.2013 at about 10:15 PM disclosing therein that on the same day at about 07:30 PM his grand daughter (name withheld, PW.2) aged about seven years daughter of Mahesh Thakur served the food and then disclosed that Dadajee please take food I am just coming after participating



in 'Asthjam' and then, proceeded ahead. When she did not return even after half an hour, caused anxiety and was to search during midst thereof, she came bewilderingly crying and fell down over chowki kept at Darwaja. He immediately rushed near her and inquired, what has happened over which, she answered please kill her as, she does not want to live. Again he inquired whereupon, she disclosed that Raushan Patel @ Baba allured her on the pretext of giving 'Singhara' whereupon, she accompanied. During course of returning, Raushan Patel @ Baba lifted her behind the Bathan of K.B. Rai where, gagged her mouth, gave bite over cheek and then raped her. After conclusion of rape, he left. Then, she rushed therefrom. On hue and cry so many villagers assembled and then, they all have apprehended Raushan Patel @ Baba, Police Station has been informed wherefrom, police came before whom, the fardbeyan is being given as well as, the accused Raushan Patel @ Baba is also being produced. It has also been disclosed that the villagers have assaulted the Raushan Patel @ Baba.



4. After registration of Desari (Chandpura O.P.) P.S. Case No.69/2013, charge sheet has been submitted after completing investigation whereupon trial commenced and concluded in a manner, the subject matter of challenge under present appeal.

5. 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 also been pleaded that grand father of the victim as well as appellant/accused both are electrician and works together. Because of the fact that informant developed dishonest intention subsequently in order to digest the dues, having been persistently demanded by the accused got him implicated in this false and concocted case. However, nothing has been adduced in defence.

6. In order to substantiate its case prosecution has examined altogether eleven PWs who are PW.1-Suresh Thakur, PW.2-Runa Kumari, PW.3-Champa Devi, PW.4-Rekha Devi, PW.5-Putul Devi, PW.6-Vikash Kumar Sah, PW.7-Raj Kumar sah, PW.8-Awdhesh Kumar Sah, PW.9-Dr. Priyanka,



PW.10-Lalan Prasad Chaudhary, PW.11-Rameshwar Sharma.

The prosecution has also exhibited, Ext.1-Fardbeyan, Ext.2-Seizure List, Ext.3-Signature of FIR attesting witness, Ext.4-Injury report and Ext.5-another seizure list. As stated above nothing has been adduced on behalf of defence.

7. While challenging the finding recorded by the learned lower court, it has been submitted at the end of the learned counsel for the appellant that more or less, all the witnesses are kith and kin of the victim whereupon, their evidences are full of hostility towards the appellant on one reason or other and that being so, could not be relied upon. It has also been urged that there happens to be presence of inconsistency in the evidence of the Pws on each and every point. Also submitted that there happens to be improbability such as, the informant has stated that victim had come, he had seen the victim naked while victim has stated that she has gone to the place where Aastyam was going on met with his brother who put towel over her body and then she rushed therefrom to her house, not supported by any other witness nor the brother has been examined to corroborate the same.



Furthermore, the victim has not disclosed nor the PW.1 that her brother had accompanied her. Had there been such kind of occurrence then, in that circumstance, there was no occasion for brother to remain at 'Asthjam' even after seeing the condition of the victim.

8. Then, it has been submitted that from the seizure list, it is evident that whatever recovery happens to be, from the place of the informant while, from the evidence of the informant as well as his wife, it is evident that recovery happens to be from the place of occurrence. In likewise manner, when the evidence on the material point is taken together, it is evident that they all are inconsistent to each other. It has also been argued that appellant has not been examined by the doctor as required under Section 53A of the Act, which the I.O. has also admitted. Also submitted that no incriminating material has been found by the I.O. during course of inspection of P.O. The objective finding of the I.O., did not support the alleged P.O. the cumulative effect did not justify the finding, hence is fit to be set aside.



9. On the other hand, the learned APP while supporting the finding recorded by the learned lower court has submitted that from the evidence of the victim, it is crystal clear that irrespective of having been confronted with persistent cross-examination, she substantiated the factum of rape and in likewise manner, the doctor PW.9 corroborated the same followed by the evidence of the I.O. PW.11 and consequent thereupon, the judgment impugned attracts no interference.

10. Before coming to the merit of the case, it is to be noted down that whenever there happens to be trial under POCSO Act, some sort of legal provision has to be taken into consideration against the interest of the accused and those are Section 29 as well as 30. Under Section 29 of the POCSO Act, the court has to presume the allegation unless and until it is being rebutted at the end of the accused, while under Section 20 of the Act, though similar facet is there but with an exception that firstly court has to perceive presence of prima-facie case that means to say whenever the question of mental capability arose, same sort of material has to be



present on record. After all, these two sections speak about reverse burden.

11. That being so, if the accused has not taken care of in rebutting the allegation then, in that circumstance, the court is under obligation to presume the same. Rebuttal may be in different form, even by way of cross-examination. That being so, one has to see whether the defence has succeeded in discharging its obligation by rebutting the presumption so prescribed under Section 29 of the Act and for that purpose, the evidence of the victim, PW.2 appears to be of paramount consideration.

12. Before examining PW.2, the court had tested the mental capability of the victim and then, formed an opinion in her favour whereupon, allowed the examination. From the record, it is evident that lower court had not taken precaution so laid down under the Act, but that could have prejudiced the interest of the prosecution and not of the accused/appellant. She has stated that the occurrence is about two months less than two years. She had gone to see 'Asthyam' after offering food to her grandfather where, Raushan Patel @ Baba came



and allured her that he is going to purchase 'Singhara' for her. She declined whereupon, he carry after coaxing her. After purchasing 'Singhara', he carried her towards a field where undressed her and then, torn the frock and thrust it in her mouth. Then thereafter, he committed rape. Blood had oozen out. She began to cry. He pressed her mouth and then, released her as, she might have died because she became unconscious. After regaining sense, she rushed therefrom to the place where 'Asthyam' was going on. She disclosed to her brother Babloo. Her brother put towel over her body, took her to house where, she disclosed the incident to her grandfather. Thereafter, her grandfather had gone to the house of Raushan Patel @ Baba in order to assault him. At that very time, Raushan Patel @ Baba who was in vest hidden behind a trunk in his house, taken out and then was assaulted. Police came and then took her as well as Raushan Patel @ Baba. Raushan Patel @ Baba said to her grandfather that now she is dead, got her postmortem conducted. She was taken to doctor where not only she was examined rather treated also. She was interrogated by the police and during course thereof detailed



the occurrence. She has identified the accused. Then disclosed that on the date of occurrence she had worn green frock and white pant. During cross-examination at para-2 she has stated that frock and pant has been taken away by the police from the field. Blood spot were over those apparels. In para-3, she has stated that the plot where she was raped is at some distance from the place where 'Asthyam' was going on. She had gone to the place of 'Asthyam' naked. She has further stated that on the date of occurrence she had gone for the first time though, had visited the place at an earlier occasion. At the place of 'Asthyam' only her brother as of her family was present. After coming from the place of 'Asthyam', she again became unconscious. She had sustained hurt over both leg, ankle, knee. She had also sustained hurt over her mouth. There was sign of hurt over her whole body. After disclosing the event, she became senseless. She regained sense at hospital. At para-4 she has stated that two houses lies in the vicinity of the place of occurrence but, she is not remembering the names of the house owner. They have not come at the place of occurrence. There was trail of blood from the P.O. to



the Yagya Asthal. Blood had also fallen over ground at the place of occurrence. In para-5 she has stated that Yagya Asthal was near to her house and at some distance therefrom, she was raped. In para-6 she has stated that while she was at her house police arrived. She was treated at village also by one doctor, namely, Pramod Gupta who had administered injection as well as medicine. She remained at Hajipur Sadar Hospital for one day. In para-7 there happens to be contradiction wherein she has stated that she had disclosed to the police that Raushan Patel @ Baba took her away for giving Singhara and then, after tearing her apparels gagged her mouth but is not corroborated by the I.O., PW.11 committed rape. Then denied suggestion that as the money of the accused was dues whereupon, his grandfather got this false case instituted.

13. PW.9 is the doctor who had, examined the victim on 06.04.2013 at Sadar Hospital Hajipur and found the following:-

(1) On general examination- Echymosis present over both cheek about 1 ½" diam.



(2) Multiple abrasions over both upper and lower limbs (about 8"-9" long and 8 in number.

(3) Echymosis present over both lips.

On Internal examination-(i) Vulva-inflammed

(ii) Labia minora-inflammed

(iii) Hymen torned with bleeding

(iv) Vagina introitus admits one finger.

(v) Penineal tear present.

(vi) Anus intact.

Age of injury-More than 5-6 hrs (red in colour)

Opinion-All the above findings coincides with sexual assault (Rape)

During cross-examination, as is evident, the defence has tried to take benefit over some sort of controversy in scribing the name of the victim, which she clarified. However, apart from the evidence of PW.2, the I.O. PW.11 has properly established her identity, hence the controversy over proper identification no more remains. Moreover, it is apparent that the doctor has not been cross-examined over her finding.

14. PW.10 is the part I.O. who has simply submitted charge sheet and so, his evidence is irrelevant. PW.11 is the main I.O. who has stated that on 06.04.2013 he



was ASI posted at Chandpur. After registration of the case, he was entrusted with the investigation. During course thereof, came to the village seized blood stain cloth and for that, prepared seizure list in presence of Suresh and Raj Kumar Sah (exhibited). Arrested accused Raushan Patel @ Baba. Recorded further statement of the informant, recorded statement of the witnesses, inspected the place of occurrence. As, he was transferred, on account thereof, he handed over charge. During cross-examination he has stated that after receiving information from the villagers he left the Thana after entering the Sanha. He has further stated that P.O. was shown by the informant. During course of inspection of P.O. he had not found any incriminating article which could have substantiated commission of the occurrence, there. He had not got the victim examined under Section 164 Cr.P.C. He had not sent the seized cloth for chemical examination. He had arrested the accused in front of house of the informant. He had not got the accused medically examined.

15. Rest witnesses, as it appears, are corroborative in nature as they came to know from the victim.



PW.1, is the informant who has stated that on 06-04-2013 at about 7-7.30 PM, he was at his Darwaja. Her grand daughter (victim) aged about 7-7 ½ years served him food and then disclosed that she is just after participating in 'Asthyam'. He finished his meal. As it was late, caused anxiety. Till then, his grand daughter came running in perplexed manner, being naked and fell down over his bed and then disclosed that grandfather, she does not want to remain alive so, kill her. On query, she disclosed that Raushan Patel @ Baba after alluring her committed rape and during course thereof, also bite her cheek. He had seen the same. He had seen the injury over her body. Blood was oozing from her genital. Then, he with the help of villagers informed the police during midst thereof, Raushan Patel @ Baba was apprehended with the assistance of the police. Who was only in vest hidden behind the trunk at his house. Police had recorded his fardbeyan at his house in presence of Raj Kumar Sah (exhibited). Police had also recovered frock from the place of occurrence and for that, seizure list was prepared in his presence as well as in presence of Raj Kumar Sah(exhibited). Police took away his grand



daughter to Hajipur along with accused and they both were examined there. Identified the accused. During cross-examination at para-5 he has stated that he came to know about the occurrence from his grand daughter. She had disclosed at his *Darwaja*. At that very time, he was alone. When his grand daughter came, she was naked. There was biting sign over her cheek. Blood was there. Blood was coming out from her genital. Blood had spread over her leg. While she was standing at the *Darwaja*, some drops had fallen but, police had not seen the same as, just after coming to *Darwaja*, Police had gone to inspect place of occurrence. He is not remembering whether blood had fallen over chowki or not. As soon as she became unconscious, he raised alarm whereupon other family members came. She regained sense at the hospital. She was carried to hospital by police jeep. They got the victim on the following day. In para-6 he has stated that house of accused lies at a distance of 50 yards from his house intervened by 4-5 houses. After arrival of his grand daughter there was uproar whereupon some people arrived. But, by that time they proceeded to hospital. In para-7 he has stated that



P.O. lies 50-60 yard from the house. Police had gone to inspect place of occurrence. P.O. land belongs to Umesh Rai. It happens to be a chak of 20 bigha. Some portion is barrel while in some portion 'Rahar' as well as 'Janera' plants were. He along with other co-villagers have accompanied the Darogajee to the place of occurrence. P.O. was towards southern side of the plot. They reached at the place after seeing the blood stain there. Police had not seized the blood stain soil. Only frock and vest was seized by the police. 'Samosa' was also there. Seizure list was prepared at the spot itself. Then has denied the suggestion that accused happens to be the electrician and was working along with him and as he has digested money on account thereof, got this case filed against the accused with false and frivolous allegation.

16. PW.3 is the grand mother of the victim. During her examination-in-chief she has reiterated the version. During cross-examination at para-3 she has stated that her grand daughter had disclosed regarding the occurrence. Then has stated that they have not gone to the place of occurrence before arrival of the police. P.O. lies 10-20 lagga from her



house. In para-4 she has stated that even during presence of Darogajee her grand daughter intermittently gone unconsciousness /regained sense. During intervening period, she has disclosed regarding the occurrence to the Darogajee police along with other family members, carried the victim to hospital. In para-5 she has stated that Darogajee along with villagers have gone to the place of occurrence. She had also accompanied. Frock and vest of the victim was there. Blood was present over the ground but she is unable to disclose the dimension. She cannot say whether there was trail of blood on the road or not. Blood was not seized by the police, while cloth were seized. In para-6 she has stated that the place where 'Asthyam' was going on lies ten steps away from her house. There happens to be a temple. Her grand daughter had gone alone as it was near her house. In para-8 she has stated that house of accused Raushan Patel lies after 2-3 houses appertaining to Ramnandan, Shankar Patel and Rameshwar who are not witness of this case. In para-9 she has stated that Raushan Patel @ Baba was caught hold by the villagers at that very time. He was in 'Janghiya'. She is not knowing whether



police had gone to the house of Raushan Patel @ Baba or not. She had not tried to see the Baba as, she was engaged in her grand daughter. Then has denied the suggestion that no occurrence as alleged had taken place with the victim.

17. PW.4, is the cousin grand mother of the victim. During examination-in-chief she has reiterated the prosecution story. During cross-examination at para-2 she has stated that she came to know about the occurrence from her grand daughter. At that very time, so many villagers have assembled at her house. Her grand daughter remained conscious for sometime and then, became unconscious. She continued the same for two days and during midst thereof, she was at Sadar hospital, Hajipur. In para-3 she has stated that when she was brought by her brother she was naked. There was blood over her body. In para-4 she has stated that she has not gone to place of occurrence. It has also been disclosed by her that villagers have caught hold Baba and then, he was handed over to the police. He was assaulted by fist and slap at the time of apprehension, Raushan Patel was in Janghiya only



having soil over the body. Then has stated that in this case villagers are also witness.

18. PW.5 is the mother of the victim. During examination-in-chief she has reiterated the prosecution version. During cross-examination she has admitted that the persons namely, Shankar Mahto, Vijay Mahto, Shayamnandan whose house lie in the vicinity are not witness of this case. It has further been disclosed by her that the house of the accused is after 4-5 houses from her house. Accused was caught hold by the villagers. She had not seen any injury over his person. At that very time Raushan Patel was only in Janghiya. Then has disclosed that the place where Astyam was going happens to be in front of his house. In para-3 she has stated that she came to know about the occurrence from her daughter. At para-4 she has stated that when her daughter came to house she had seen injury over her cheek as well as over whole body. There was biting sign over her cheek. In para-5 she has stated that at that very time her daughter was semiconscious. She regained full sense at the hospital. At para-6 she stated that when she came, her daughter was



naked. She had not gone to the place of occurrence. None of her family members had gone to the place of occurrence as, darkness had fallen. They have gone on the next day. The police along with witness had gone to the place of occurrence even then she had not gone there. Police had seized Singhara, torn frock, pant. Those seized articles were taken away by the police. Then there happens to be contradiction but, those has got no relevancy as the same has not brought up through PW.11.

19. PW.6 is the Vikash Kumar, who, on the alleged date and time of occurrence was at the place of Astyam where, brother of the victim was also present. He has seen the victim in naked condition who came near her brother. Her brother accompanied to her house. He had also gone there. Victim had disclosed regarding the occurrence. Then thereafter, he narrated the whole incidence as disclosed by the victim. He had also seen injury over the person of the victim. Blood was coming out. Then thereafter, they have gone in search of Baba, apprehended from his house and then was handed over to the police. At the time when he was



apprehended, he was in Janghiya. Police had also taken away the victim for the treatment as well. During cross-examination at para-2 there happens to be contradiction but those have got no relevancy in the eye of law because of the fact that PW.11 has not been confronted on that very score. In para-3 he has stated that he had not seen whether there was trail mark or not but he had seen blood over chowki. In para-4 he has stated that before arrival of the police villagers have apprehended Raushan Patel @ Baba. At the time when police came, victim was in semi conscious state. They have not seen mark of violence or injury over the person of Raushan. He had further stated that on the alleged date of occurrence police had not gone to place rather had gone two days thereafter. He had gone along with police to the place of occurrence but he is unable to disclose the boundary. Then has denied the suggestion.

20. PW.7 has stated that on the alleged date and time of occurrence large number of persons have assembled at the house of Raushan Patel. Later on he came to know that grand daughter of Suresh Thakur has been raped and Raushan



Baba has been named as rapist. He was taken to police station and then to jail. Identified has signature over fardbeyan. During cross-examination he has stated that at an earlier occasion while he was cross-examined had stated that he does not know about the occurrence. PW.8 is the formal.

21. From the evidence available on the record, it is crystal clear that PW.2, victim, a minor stood the test. Other witnesses are corroborative in nature as, they have seen the victim having injuries over her person, presence of blood, bleeding coming out from genital of the victim. In likewise manner, from the evidence of PW.1, the I.O., recovery of blood stain cloth from the place of occurrence on the date of occurrence itself is found duly substantiated corroborated by the informant. It is also evident from the evidence of PW.2 that she has not been tested over the factum of occurrence.

22. In ***Gian Chand & others v. State of Haryana*** reported in ***2013(4) PLJR 7 (SC)*** it has been held:-

“11. The effect of not cross-examining a witness on a particular fact/circumstance has been dealt with and explained by this Court in ***Laxmibai (Dead) Thr. L.Rs. & Anr. v. Bhagwanthuva (Dead) Thr. L.Rs. & Ors., AIR***



2013 SC 1204 observing as under:

“31. Furthermore, there cannot be any dispute with respect to the settled legal proposition, that if a party wishes to raise any doubt as regards the correctness of the statement of a witness, the said witness must be given an opportunity to explain his statement by drawing his attention to that part of it, which has been objected to by the other party, as being untrue. Without this, it is not possible to impeach his credibility. Such a law has been advanced in view of the statutory provisions enshrined in Section 138 of the Evidence Act, 1872, which enable the opposite party to cross-examine a witness as regards information tendered in evidence by him during his initial examination in chief, and the scope of this provision stands enlarged by Section 146 of the Evidence Act, which permits a witness to be questioned, inter-alia, in order to test his veracity. Thereafter, the unchallenged part of his evidence is to be relied upon, for the reason that it is impossible for the witness to explain or elaborate upon any doubts as regards the same, in the absence of questions put to him with respect to the circumstances which indicate that the version of events provided by him, is not fit to be believed, and the witness himself, is unworthy of credit. Thus, if a party intends to impeach a witness, he must provide adequate opportunity to the witness in the witness box, to give a full and proper explanation. The same is essential to ensure fair play and fairness in dealing with witnesses.”
(Emphasis supplied)”

23. In spite of the fact that the brother of the victim has not been examined but for that, there happens to be no cross-examination identifying his status to be major or



minor inconsonance with the fact that during course of cross-examination of PW.1 to PW.4 and PW.5 his presence has not been procured. Even in worst case, non-examination is not going to affect the credibility of PW.2 and in likewise manner, there happens to be no denial at the end of the appellant that he was not apprehended by the villagers from his house, and at moment he was in Janghiya having soil over his body. Furthermore, though, there happens to be some sort of differences in the name of victim coming out from the evidence of PW.9, which could be considered as a slip of pen having speaking mistake, moreover identity of PW.2 is found properly fixed. The witnesses have stated that appellant was also taken away by the police along with victim to the hospital, the I.O. PW.4 also deposed on that very score, but there happens to be no cross-examination on that very factual aspect whereupon non-examination of doctor, who had examined the appellant will not cause dent to the prosecution. It is needless to say, that the evidence of victim has got primacy, and having minute consideration thereof coupled with



evidence of PW.9, the doctor, the occurrence is found duly proved.

24. After giving anxious consideration to the facts and circumstances of the case, it is crystal clear that defence could not be able to rebut the allegation in accordance with Section 29 of the POCSO Act on the other hand, the prosecution case is found duly substantiated. Consequent thereupon, this 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.)

Prakash Narayan

AFR/NAFR	AFR
CAV DATE	NA
Uploading Date	16.08.2019
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