

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (SJ) No.2268 of 2017**

Arising Out of PS. Case No.-10 Year-2016 Thana- MAHILA PS District- Gopalganj

Krishna Singh, Son of Late Ram Prasad Singh, Resident of Village- Bangra
Tola Dewaria, P.S.- Thawe, District- Gopalganj.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

Appearance :

For the Appellant/s	:	Mr. Ram Kishore Singh-Advocate Mr. Rajnish Kumar Choubey-Advocate Mr. Satyapal Singh-Advocate
For the Respondent/s	:	Mr. Bipin Kumar-A.P.P.

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

10-07-2019

Accused Krishna Singh has been found guilty for an offence punishable under Section 376(2) of the I.P.C. and sentenced to undergo R.I. for ten years as well as to pay fine appertaining to Rs.20,000/- and in default thereof, to undergo S.I. for one year, also found guilty under Section 3/4 of the POCSO Act, 5/6, 9/10 of the POCSO Act, though no independent sentence has been inflicted therefor under the guise of Section 42 of the POCSO Act vide judgment of conviction dated 15.05.2017 and order of sentence dated 18.05.2017 passed by the 1st Additional Sessions Judge-cum-Special Judge, POCSO, Gopalganj in connection with Trial (POCSO) No.03 of 2016 arising out of Gopalganj Mahila P. S. Case No.10 of 2016.

2. PW-1, Johra Khatoon gave her fard-bayan on



06.03.2016 at about 11.00 P.M. at Sadar Hospital, Gopalganj where her daughter (victim name withheld) aged about 3 ½ years was undergoing treatment, divulging the fact that on the same day at about 4.00 P.M., she (victim) has gone to meet nature's call at her orchard, wherefrom she returned back weeping, she made query. The victim disclosed that the person, who frequently visits named as Krishna Singh, undressed her and then, inserted his fusari in her vagina and committed 'Ganda Kam'. Krishna Singh is her co-villager, who is aged about 50 years. The victim further disclosed her that Krishna Singh allured her on the pretext of giving Bel and then, done the same. She rushed to Gopalganj Hospital carrying the victim where victim is being treated.

3. After registration of Gopalganj Mahila P. S. Case No.10 of 2016, investigation commenced and concluding the same, chargesheet was submitted, whereupon trial commenced and concluded in a manner, 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 also been pleaded that due to local politics, accused has been implicated. However,



nothing has been adduced in defence.

5. The learned counsel for the appellant has submitted that the factum of occurrence is also in dispute coupled with proper identification of an accused. Further elaborating the issue, it has been submitted that there happens to be specific disclosure at the end of the prosecution party that the victim had gone to orchard for the first time on the date of occurrence itself alone, is not at all acceptable in the background of the fact that the age of the victim at the time of occurrence has been shown as 3 ½ years and it was not feasible for her to cover a distance of half kilometer that too, alone more particularly when she was not accustomed to go and when there happens to be field after field having standing wheat crop. That means to say, passing over ridge having the plots lying having standing wheat crop to its full length as the occurrence happens to be in the month of March, would not have allowed the victim to go to orchard covering half kilometer that too, for meeting nature's call, which could have just by the side of the house as there was large area available adjacent to the house.

6. In the aforesaid background, the story so propounded by the prosecution could not be accepted, and in likewise manner, claim of PW-3 to be an eye witness to



occurrence. Apart from this, moreover in which the so alleged victim had deposed before the Court, is indicative of the fact that she has been properly tortured and so, her evidence is found unreliable. Not only this, when her testimony is taken together with the evidence of I.O., also the parallel scrutiny did not justify the allegation.

7. From the medical evidence, as deposed by PW-6, the Dr. Mithilesh Sharan, some sort of injury was found over vagina. But that could be on account of rubbing against the standing ripen wheat crop, which the victim, on account of tender age, sustained over delicate part of body, otherwise had there been penetration by penis of a full grown man could not have caused the superficial injury and so, the prosecution of the case is found soaked with falsehood.

8. Then, it has been submitted that PW-1, PW-3 have not divulged that they were living separately in two independent houses at some distance. That being so, the mother-in-law and daughter-in-law (PW-3 as well as PW-1) will be treated to be occupant of the same house. PW-1 had not shown presence of PW-3 and in likewise manner, evidence of PW-3. When the evidence of PW-3 is minutely gone through, it is evident that manner whereunder she projected herself claiming



to be an eye witness to occurrence is a circumstance, which speaks a lot and in the aforesaid background, when the evidence in its entirety is taken into consideration, the evidence as laid is found unbelievable, more particularly in the background of the fact that I.O. has not found the orchard to be the place of occurrence rather it happens to be a wheat field and further, the I.O. also failed to disclose the distance in between. That being so, the judgment impugned did not justify its prevalence.

9. On the other hand, learned Additional Public Prosecutor while refuting the submission having at the end of the appellant has submitted that whatever been argued at the end of the appellant is not at all convinceable, conceivable in the background of the fact that as per Section 29 of the POCSO Act, the presumption is there though rebuttable and from the conduct of the appellant, it is evident that no effort has been taken at his end to refute the same even by way of cross-examination. Furthermore, it has also been submitted that when evidence of the victim (PW-4) is gone through, it is evident that she was not at all cross-examined over the factum of occurrence, so that part remained intact. Consequent thereupon, the judgment of conviction and sentence recorded by the learned lower Court is fit to be confirmed.



10. POCSO Act is a special Act and special procedure including that of Cr.P.C. in limited way has been prescribed with regard to conduction of trial as provided under Section 31 of the Act. The procedure so prescribed under special Act is duly recognized in accordance with Sub-section 2 of Section 4 of the Cr.P.C. That being so, the niceties of the Act are to be highlighted, and are enumerated below:-

A) As per Section 31(2) of the Act, there happens to be prohibition either at the end of the prosecutor or at the end of the defence counsel to confront the victim, a child directly rather the statute speaks that firstly the question has to be put to the P.O., who shall put those questions to the child.

B) Sub-section-3 allows the frequently breaks during course of examination/ cross-examination.

C) As per Sub-section-4, there should be prevalence of child friendly atmosphere at least, by way of allowing presence of guardian/ family members/ friend or relative.

D) Apart from this, as per Section 35 of the Act, the evidence of victim/ child should be recorded within 30 days of the date of cognizance by the Special Court and the delay, if any, has to be explained.

E) In likewise manner, Section 36 prescribes that at the time of evidence of the victim/ child, there should not be any opportunity of confrontation with the accused while



accused has an opportunity to hear the evidence having been deposed at the end of the victim and for that, necessary precautions in terms of Sub-section-2 should be taken up.

11. It is evident from the record that cognizance has been taken on 27.05.2016 while the examination of PW-4, victim has been recorded on 18.08.2016. Furthermore, from Para-3 of her deposition, it is evident that at the time of recording of evidence, the mandate of Section 36 of the Act has been violated as, the victim has deposed “*Krishnaji has come today, who is standing and is being identified by her*” and this is indicative of the fact that there was direct confrontation in between the victim as well as appellant/ accused during course of conduction of trial. In that situation, adverse impact over a girl aged about four years could not be ruled out. It is further evident that from the order sheet that on the day of examination of victim, there happens to be complete absence of her family members that means to say, there was no child friendly atmosphere, so there was utter violation of Sub-section-4 of Section 33.

12. In order to search out whether non-compliance of aforesaid provisions have caused adverse impact upon the victim, it is evident from the deposition that learned lower Court



had failed to test the mental equilibrium of the victim, who was aged about four years at the time of deposition coupled with the fact that she was able to understand the meaning, impact of oath, was administered oath. But, on that very score, there is no grievance at the end of appellant, nor the prosecutor.

13. In the aforesaid background, now, the evidences are to be seen. PW-1, PW-2 are not an eye witness to occurrence. What they deposed, happens to be on the basis of information given by the victim (PW-4), who at the time of occurrence was aged about approximately three and half years. PW-1 is the mother while PW-2 is step-uncle. PW-1 had stated that the victim, who had gone to meet nature's call, returned back weeping, whereupon was inquired and during course thereof, she disclosed that the accused has inserted his genital in her private part as a result of which, blood oozen out from it. She suffered severe pain on that very score. She had also inspected the private part of the victim, whereupon she found oozing of blood. Then thereafter, she along with Sagiran Khatoon and Mustafa took the victim to Sadar Hospital Gopalganj where police came, recorded her fard-bayan. Identified the accused. At an earlier occasion, she was not at all cross-examined and so, was discharged. Then thereafter, as is



evident, vide order dated 22.09.2016, PW-1 was recalled, on 17.10.2016, a compromise petition was filed and then, on 19.10.2016, she was cross-examined wherein at Para-6, she had disclosed that the victim is a kid having no sense of understanding. At Para-7, she had disclosed that on the alleged date of occurrence, her mother-in-law accompanied the victim from somewhere else and then, she had disclosed, over which the victim had put her nod. None other than Sagiran Khatoon (mother-in-law) had disclosed about the occurrence. In Para-8, she had stated that she had not seen any occurrence. Whatever been disclosed by her mother-in-law, that happens to be the basis for institution of the case.

14. PW-2 had stated that on the alleged date and time of occurrence, he was at his house. Victim is her co-villager. He came to know that Krishnaji had committed sin with her, whereupon he had gone to the place of victim and inquired from the mother of the victim, who disclosed that while victim had gone to orchard for meeting nature's call, she returned back weeping and then, disclosed that on the pretext of giving Bel, accused Krishnaji took her to a field where committed rape. He had seen the victim, who was weeping out of grief. He had also seen blood oozing out from her private



part. Then thereafter, he along with mother, grandmother of the victim brought her to Sadar Hospital Gopalganj where she was treated. Police had recorded his statement. Identified the accused. During cross-examination at Para-7, he had shown inter se relationship amongst the informant as well as he himself. In Para-9, he had stated that he was informed by the wife of Md. Ali (mother of victim) over phone. Then, he came and inquired about the incidence, over which the mother of the victim had narrated the whole event. In Para-10, he had further stated that he also inquired from the victim. He had further stated that she used to go to field for meeting nature's call right from the age of three. He had further stated that the orchard lies about half kilometer from the house. At Para-11, he had stated that he has got no knowledge whether any person had seen the occurrence or not. He had gone to P.O., which was shown by the victim and her mother and thereafter, they all came to hospital. Then had denied the suggestion that this case has falsely been filed.

15. PW-3 is the grandmother, who had disclosed that on the alleged date and time of occurrence, she was at her house. Victim, her grand-daughter aged about four years, gone towards orchard. She heard sound of weeping, whereupon gone



there and had seen Krishnaji running towards Arhar field. When she went near the victim, she had found blood oozing out from her private part. She was raped by Krishnaji. She inquired from her grand daughter, who disclosed that Krishnaji had committed sin with her. She had further claimed to have seen the same. Thereafter, she along with mother of victim (PW-1) and Mustafa (PW-2) brought the victim to Gopalganj Hospital where she was treated. Police came and in her presence statement of PW-1 was recorded. She had also put her thumb impression over the same. Identified the accused. During cross-examination at Para-6, she had stated that at the time of occurrence, only she along with mother of the victim was present at the house. None had disclosed regarding the occurrence. On the other hand, she claimed that she had seen the occurrence on her own. She had disclosed to her daughter-in-law that she had seen the occurrence. Her daughter-in-law had not accompanied her to the place of occurrence. The daughter-in-law has brought the victim to Gopalganj hospital. Her daughter-in-law had registered the case. She was also there. She is unaware with the fact that she had not been shown as an eye witness to occurrence. At Para-7, she had disclosed that the orchard lies at a distance of half kilometer from house. The victim had gone to the orchard. She



had not gone to place at an earlier occasion. On the date of occurrence, she had gone there. At Para-9, she had stated that victim was examined by the police. She was also taken before the Magistrate. In Para-11, she had stated that when she reached, she had seen the victim lying and was weeping in such manner that she might die. At that very time, she was wearing frock and pant. Panty was torn. On query, the victim had disclosed that Krishna Singh had brought to that place. Then had denied the suggestion that she had not made statement before the police that she had gone to call the victim at the field and she had seen the occurrence.

16. PW-4 is the victim. She had stated that Krishna Singh threw her on the ground and then, inserted his penis into her vagina. This act Krishna Singh had done at orchard where she had gone to ease herself. It was evening time. After returning to her house, she had disclosed the event to her mother. Then her mother took her to hospital where she was treated. Then had stated that all these things, she had disclosed to Darogaji. Then Darogaji took her to Court where she had made statement before the Officer regarding the occurrence. Identified the accused, who was standing in a dock. During cross-examination at Para-4, she had stated that she is unable to



disclose the names of neighbours of Krishna Singh. The house of Krishna Singh lies near about her house. She is unable to disclose the names of the family members of Krishna Singh. In Para-6, she had stated that on the alleged date and time of occurrence, for the first time, she had gone there, she used to visit that place along with her parents. Fulwari lies at some distance. At that very time, none was present. At Para-8, she had disclosed that she had made statement before the police that Krishna Singh took her away. She had not disclosed before the police that she had gone to ease herself. This part has been disclosed by her mother. She identified the Darogaji, who was a male. He took her to Court. Whatever been disclosed by her mother, she had narrated the same. In Para-9, she had stated that her maternal uncle Saddam was along with Darogaji on the day, she was brought to Court. Then had denied the suggestion that no occurrence had been committed against her.

17. PW-5 is the Magistrate, who had recorded statement of the victim under Section 164 Cr.P.C. He had elaborated the steps whatever been at his end before, during course, after recording of the statement of the victim under Section 164 Cr.P.C. Furthermore, he had also stated that the aforesaid statement was recorded in presence of her mother and



the whole process was video graphed. During cross-examination, nothing substantial has been brought.

18. PW-6 is the doctor, who had examined the victim on 06.03.2016 and found the following:-

“Findings:-Height-3 feet 1 inch, Teeth-Upper Jaw-09 and Lower Jaw-08.

No external injury.

P/V findings-redness of both lateral vaginal wall.

Tran introitus. Linour semi lunar 0.5 cm approximately). Blood stain star near introitus.

Swab taken and sent for pathological examination.

Investigation-Plain X-Ray of wrist joint and hand advised.

Opinion-(i) There is evidence of sexual assault.

(ii) Abrasion on both lateral both vaginal wall near introitus.

(iii) Report will be given after X-ray report. After receiving X-ray report-X-ray finding by lateral wrist, hand-four carpal bones appeared age-3 to 4 years.

During cross-examination, she had stated that she had not found injury over upper part of the vagina.

She had further stated that insertion of any substance inside her vagina would cause such kind of injury. She had further stated that presence of spermatozoa is not a condition precedent in order to



substantiate the factum of rape.”

19. PW-7 is Dr. Sanjiv Kumar, who had examined the accused Krishna Singh on 07.03.2016, after forming a medical board at the instance of Deputy Superintendent and found the accused to be fit to perform the sex. During cross-examination, he had admitted that he had not examined whether he had indulged in sexual activity or not.

20. PW-8 is the I.O., during course of her examination-in-chief, she had stated that after recording statement of Johra Khatoon, case was registered and then, she took up investigation (exhibited all the documents). She recorded statement of the witnesses, victim. Procured the medical report. Got the victim examined under Section 164 Cr.P.C. C.D. relating to videography has been filed. She had visited the P.O., which happens to be ten steps away from the orchard of the informant at a distance of half kilometer away from the house of the informant, wheat field of Meghnath Singh. She had further identified the same as North-Meghnath Singh, South-informant, East-Kuber Singh and West-Daroga Singh. Arrested the accused, got him medically examined, recorded his statement in defence and then, after completing investigation, submitted chargesheet. During cross-examination at Para-11, she had stated that she was disclosed with regard to



Place of occurrence to be an orchard. In Para-12, she had stated that witnesses have also disclosed to that effect. She had also visited the orchard, but she had not mentioned in the case diary. In Para-13, she had not disclosed regarding abnormality if any, found at alleged P.O. whether wheat crop was prampled or not. She had not seen statement of the victim recorded under Section 164 Cr.P.C. She had screened the C.D. Then had stated that it is not a fact that her investigation happens to be collusive.

21. From the evidence of PW-1, it is evident that she had not claimed herself to have visited the P.O. PW-2 at Para-11, he had stated that the victim and her mother both have shown the P.O., but surprisingly enough no cross-examination has been at the end of the appellant whether it happens to be a wheat field or an orchard. PW-3 had simply stated that while she proceeded towards orchard, she had seen the accused fleeing towards Arhar field. At Para-11, during course of cross-examination, she had stated that when she reached, she found the victim lying and was weeping, but again she had not been cross-examined with regard to actual place of occurrence. Victim had disclosed that the occurrence was committed at the orchard and it is evident that she was not at all cross-examined either over occurrence or over place of occurrence. Though at



Para-7, she had stated that the orchard lies at a distance of $\frac{1}{2}$ kilometer from her house. At that very time, none was present there. It is needless to say that the I.O. (PW-8) has found the P.O. which happens to be the wheat field of Meghnath Singh lying ten steps away from the orchard. Surprisingly as is evident from Para-6 of her examination-in-chief that who shown the P.O. is found complete lacking.

22. So, from the evidence as disclosed above, it is evident that due to reason best known to the appellant, victim has not been cross-examined over factum of rape as well as place of occurrence. Furthermore, from the evidence of I.O., it is evident that it happens to be wheat field lying at a distance of 10 steps from the orchard. The defence also failed to substantiate that victim was duly tortured before examination. In the aforesaid background, two Sections of POCSO are relevant to be taken into consideration and those are **Section 29** as well as **Section 30**. For better appreciation, both the 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.”

23. After going through the aforesaid two provisions of law, it has become abundantly clear that there happens to be presumption subject to rebuttable. In rebuttable, it should be at least to the extent of preponderance of probabilities and that happens to be one of the mode prescribed under Criminal Jurisprudence. Giving a relaxation in favour of accused as after having evidence of the prosecution in due discharge of burden, the onus shift upon the accused, which may or may not be availed in the background of nature of evidence adduced at the end of the prosecution.



24. Now, coming to the present scenario, it is evident that doctor had found injury over the private part of victim corroborating the theme of rape. The victim during her examination-in-chief had properly identified the activity of the appellant, accused during course of commission of the occurrence. On that very score, there happens to be no cross-examination. The so alleged contradiction in the evidence of PW-3, Para-12, is not at all confronted to the I.O. (PW-8). When there happens to be analytical approach of those evidences, it is apparent that there happens to be sufficient material having been adduced at the end of the prosecution to infer that the victim was subjected to rape and for that, appellant was responsible. Leaving to test the victim over factum of occurrence is an additional factor, which if taken together with the presumption as enumerated under Section 29 of the Act and its secondary effect under the guise of Section 30 of the Act followed with laches at the end of the appellant having been failed to confront the presumption, did not give any room adverse to the finding so recorded by the lower Court.

25. The infirmity whatsoever been found as disclosed in foregoing paragraph could not be said to be caused prejudice to the appellant rather might have prejudiced to the



victim/ prosecution even then, during course of cross-examination, even during course of argument, failed to highlight the same. Lastly, the step of the PW-1 is not going to give any kind of benefit as from Para-7 of her cross-examination more or less the appellant has accepted the occurrence.

26. That being so, the instant appeal is found de void of merit and is accordingly, dismissed. Appellant is under custody, which he will remain till saturation of the period of the sentence.

(Aditya Kumar Trivedi, J)

Vikash/-

AFR/NAFR	A.F.R.
CAV DATE	N.A.
Uploading Date	16.07.2019
Transmission Date	16.07.2019

