

IN THE HIGH COURT OF JUDICATURE AT PATNA

CRIMINAL APPEAL (DB) No.494 of 2023

- =====
1. RAVI KUMAR MAHTO @ RAVI KANT MAHTO Son of Naresh Mahto @
Ram Naresh Maurya Resident of village - Basdila, P.S. - Kopa, Distt. - Saran
 2. Mani Kumar @ Kaku Son of Ramesh Mahto Resident of village - Basdila,
P.S. - Kopa, Distt. - Saran

... ... Appellant/s

Versus

The State of Bihar

... ... Respondent/s

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Indian Penal Code--- section 376/109 and 341—POCSO Act—section 4/16, 6---
Information Technology (IT) Act—section 67 and 67A—allegation that while victim
was going to the field, Appellants caught hold of her and took her to a pit—Appellant
no. 1 tore her cloth while Appellant no.2 was making videograph of her body---
major contradictions in the deposition given by prosecution witnesses—medical
evidence shows no injury on the whole body of the victim—prosecution failed to
produce any documentary evidence to prove the age of the victim; medical evidence
suggests age of victim to be between 16 to 17 years—since margin in age ascertained
is two years on either side; benefit of same given to accused and victim held not be a
minor—no allegation of rape leveled against either of the Appellants by the victim in
her written complaint—mobile phone from which video clip of the incident is alleged
to have been recorded not seized by the police—blood stained clothes of the victim
were not seized by the investigating agency and no blood was found on the place of
occurrence—additional charges framed against Appellant no-2 just two days before
the date of judgment thereby depriving appellant no-2 of sufficient opportunity to
defend—impugned judgment and order quashed and set aside.

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.494 of 2023

Arising Out of PS. Case No.-117 Year-2020 Thana- KOPA District- Saran

- 1. RAVI KUMAR MAHTO @ RAVI KANT MAHTO Son of Naresh Mahto @ Ram Naresh Maurya Resident of village - Basdila, P.S. - Kopa, Distt. - Saran
- 2. Mani Kumar @ Kaku Son of Ramesh Mahto Resident of village - Basdila, P.S. - Kopa, Distt. - Saran

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

Appearance :
For the Appellant/s : Mr. Harshvardhan Shivsundaram, Advocate
For the Respondent/s : Mr. Sujit Kumar Singh, APP

CORAM: HONOURABLE MR. JUSTICE VIPUL M. PANCHOLI
and
HONOURABLE MR. JUSTICE SUNIL DUTTA MISHRA
ORAL JUDGMENT
(Per: HONOURABLE MR. JUSTICE VIPUL M. PANCHOLI)

Date : 27-02-2024

The present appeal has been filed under Section-374(2) of the Code of Criminal Procedure, 1973 (hereinafter referred as ‘Cr.P.C.’) challenging the common judgment of conviction dated 3rd April, 2023 and order of sentence dated 10-04-2023 passed by learned Exclusive Special Judge (POCSO Act), Saran at Chapra, in connection with ST POCSO No. 40/2020, (arising out of Kopa P.S. Case No. 117 of 2020) by which the appellant No.1 has been convicted for the offences punishable under Sections 4/6 of the POCSO Act and Sections 376 and 341 of the Indian Penal Code and sentenced to undergo 10 years rigorous



imprisonment and fine of Rs. 25,000/- under Section 4 of the POCSO Act, 20 years rigorous imprisonment and fine of Rs. 25,000/- under Section 6 of the POCSO Act and simple imprisonment for one month under Section 341 1.P.C. Appellant no.2 has been convicted under sections 4/16, 6 of the POCSO Act and Sections 376/109 and 341 of the Indian Penal Code and sections 67 and 67A of the IT Act and has been sentenced to undergo 10 years rigorous imprisonment and fine of Rs. 25000/- under Section 4/16 of the POCSO Act, 20 years rigorous imprisonment and fine of Rs. 25,000/- under Section 6 of the POCSO Act, simple imprisonment for one month under Section 341 I.P.C., simple imprisonment for one year and fine of Rs. 50,000/- under Section 67 of the IT Act and simple imprisonment for one year and fine of Rs. 50,000/- under section 67A of the IT Act. All the sentences have been directed to run concurrently.

2. Heard Mr. Harshvardhan Shivsundaram, learned Advocate, for the appellants and Mr. Sujit Kumar Singh, learned A.P.P. for the respondent-State.

3. Prosecution story in brief is as under:

“On 27.05.2020 the victim’s mother had gone to the agricultural field for cutting grass asking her to come after



one hour and collect the grass. As per instruction, at about 5:00 p.m., she was going to the field for collecting the grass when accused Ravi Kant Mahto (appellant No.1) and Mani Kumar @ Kaku (appellant No.2) of village-Basdila, P.S. Kopa, surrounded her with oblique motive and accused Ravi Kant Mahto caught hold of her, took her to a nearby pit, pulled off her lower garment (Salwar), tore her Samij, pushed her down into the pit and started doing obscene acts with her body and accused Mani Kumar @ Kaku started capturing the incident in his mobile phone upon which she started raising alarm on which her mother came running and saved her. On seeing her mother at the scene, both the accused ran away. She returned home with her mother. By that time, the video clip prepared by accused Mani Kumar was made viral on Internet. Her mother went to the house of the accused to complain about the act of making the video clip viral when father of accused Ravi Kant, namely Naresh Mahto, Chandreshwar Mahto, Indrajeet Mahto, Rahul Kumar, Lakhan Kumar and Vishnu Kumar, all armed with weapons like Lathi, Danda, Spear etc. chased her away. She somehow managed to reach the house. Again, all the accused came to the doorstep and started beating her family members in which the brothers of the victim, namely Rupesh Kumar, Pawan



Kumar, Munna Kumar and the elder aunt of the victim were seriously injured. On hearing commotion, local people assembled at the place and saved them.”

4. After filing of the F.I.R., the investigating agency carried out the investigation and, during the course of investigation, the Investigating Officer recorded the statement of the witnesses and collected the relevant documents and thereafter filed the charge-sheet against the accused. As the case was exclusively triable by the Court of Sessions, the case was committed to the Court of Sessions.

5. Before the Trial Court prosecution examined P.W. 1 Santosh Mahto, father of the victim, P.W. 2 Durgawati Devi, mother of the victim, P.W.3, Dr. Kiran Ojha, the doctor who medically examined the victim, P.W. 4, the victim, P.W. 5 Sunil Kumar Thakur, the Investigating Officer.

6. Learned advocate appearing for the appellants mainly submitted that the present one is a case of false implication wherein both these appellants have been falsely implicated by the victim and her family members with a view to save their skin from the case lodged by the mother of appellant No.1, bearing Kopa P.S. Case No. 145/2020 and ensure that the actual occurrence may not come to the light.



6.1. It is further submitted that mother of appellant No.1 tried to lodge an F.I.R. for the occurrence which took place on 27.05.2020 for the incident of quarrel which took place between the family members of the appellant No.1 and the family members of the victim.

6.2. It is submitted that, as the F.I.R. on the basis of version given by the mother of appellant No.1 was not registered, a written complaint was filed before the concerned Magistrate Court upon which the direction was issued to the police to lodge the F.I.R.

6.3. Learned counsel for the appellants thereafter submitted that there are major contradictions and improvements in the version given by the victim and her mother. It is submitted that as per the version given by the victim in the written complaint given by her to the police, accused Ravi Kant Mahto (appellant No.1) and Mani Kumar @ Kaku (appellant No.2) of village-Basdila, P.S. Kopa, surrounded her with oblique motive and accused Ravi Kant Mahto caught hold of her, took her to a nearby pit, pulled off her lower garment (Salwar), tore her Samij, pushed her down into the pit and started doing obscene acts with her body and accused Mani Kumar @ Kaku started capturing the incident in his mobile



phone upon which she started raising alarm on which her mother came running and saved her. However, as per the deposition given by P.W. 2, Durgawati Devi, i.e. the mother of the victim, she has seen the occurrence in question and she has also alleged that accused Ravi Kumar committed rape on her daughter whereas accused Mani Kumar @ Kaku was making videograph of the same.

6.4. Learned counsel for the appellants further submits that the mobile phone on which the videograph was recorded was not seized by the investigating agency. At this stage, it is pointed out that, as per the deposition given by the victim before the Court, her brother Deepak Kumar copied the videograph in a pen drive from his mobile phone, as the accused made the video clip viral. However, the said pen drive was not handed over to the investigating agency and the victim has produced the same before the Court. It is also submitted that even Deepak Kumar is also not examined as a witness by the prosecution. Learned counsel would thereafter submit that, as per the deposition given by P.W. 2, mother of victim, clothes of the victim was thoroughly blood-stained. However, the said clothes were not produced before the investigating agency and, therefore, the same were not seized. Even the Investigating



Officer has not found any blood stains at the place of occurrence. Learned counsel would thereafter submit that the prosecution has also failed to prove the age of the victim. It is submitted that though the victim was studying in school, the prosecution has failed to produce either the school register or the birth certificate of the victim. At this stage, it is submitted that even as per the medical evidence, the age of the victim was between 16-17 years. On this point, learned counsel has placed reliance upon the decision rendered by Hon'ble Supreme Court in the case of **Jaya Mala V. Home Secretary, Government of J. and K. & Ors.**, reported in **AIR 1982 SC 1297**.

7. Learned counsel for the appellants thereafter contended that even the medical evidence does not support the version given by the victim. Therefore also, the Trial Court has committed an error while relying upon the version given by the victim and her mother.

8. Learned counsel lastly contended that so far as appellant No. 2 is concerned, the Trial Court framed the charge against him under Section-66 of I.T. Act and under Section-341 of I.P.C. in October, 2020. However, the charge was altered and additional charges were framed against Mani Kumar @ Kaku i.e. appellant No.2 herein on 22.03.2023 under Section-4/16 of



POCSO Act, 6 of POCSO Act, 376/109 of I.P.C. and Sections-67 and 67A of I.T. Act and thereafter, without giving reasonable opportunity to defend against the said charges, the judgment was reserved on 24.03.2023 i.e. within a period of two days. At this stage, it is also pointed out that prior to that, statement of appellant No.2 under Section-313 Cr.P.C. came to be recorded on 19.09.2022. Thus, the appellant No.2 was seriously prejudiced because of the said addition of charge and, ultimately, the Trial Court has convicted the appellant No.2 for the aforesaid offences also. Learned counsel, therefore, urged that the impugned judgment and order be quashed and set aside.

9. On the other hand, learned A.P.P. has vehemently opposed the present appeal. Learned A.P.P. submits that, in fact, the Trial Court has not committed any error while passing the impugned order. It is submitted that the Trial Court has rightly placed reliance upon the deposition given by the victim, P.W.4, mother of victim, P.W. 2, the Doctor who had examined the victim and the statement given by the victim under Section-164 Cr.P.C. Learned A.P.P. has also referred the deposition given by P.W. 5 Sunil Kumar Thakur and thereafter submitted that on the basis of evidence led by the prosecution before the Trial Court, the prosecution has proved the guilt of the appellants herein



beyond reasonable doubt and, therefore, the Trial Court has not committed any error while recording the order of conviction. Learned A.P.P., therefore, urged that the present appeal be dismissed.

10. At this stage, we would like to discuss the evidence of the prosecution witnesses.

11. P.W. 1 Santosh Mahto, father of the victim, has stated in his deposition that the incident took place 11 months ago. His wife had gone to cut grass, asking the daughter to come after an hour to collect the grass. When she was going, accused Ravi Kant forcibly took her, pulled off her pantie and climbed on her body and also made a video clip of the incident. He also tore her clothes. There were blood stains on her body. When she cried for help, her mother reached and took her to the house. Whe she went to the house of the accused to complain, accused Chandeshwar, Naresh, Indrajeet chased her away. Then they went with the victim to the police station where Darogaji took his statement and registered the case. He claims to identify the accused.

11.1. In his cross-examination, he has stated that he is not literate. He does not own any land. He met the victim at 8:00 p.m. and he has stated as informed to him by his wife . He



had not himself seen the occurrence.

12. P.W. 2 Durgawati Devi, mother of the victim, has stated when her daughter came to the field to collect grass, accused Ravi and Mani Kant forcibly took her, put off her pant and committed rape. When she went there, she saw the pant of her daughter soaked in blood. Ravi was committing rape on her daughter and Mani Kant was making videograph. Thereafter, she took her daughter to the house. Further, she went to the house of the accused to complain when accused ran after her. She somehow managed to escape. At the police station, she got the application drafted. Darogaji had taken her statement.

12.1. In her cross-examination she has stated that her daughter was enrolled in a Government school. She does not know the name of the school. When accused were taking her daughter away, she had tried to free her, but to no avail. The clothes of the accused were not torn in her attempt to free her daughter. She had fallen in the attempt and received injury in her waist. Hands of her daughter had received scratches and the clothes were blood-stained. Her daughter had also received injuries on her whole body. She was at the place of occurrence for 10-15 minutes. She has also stated that she and her daughter had directly gone to the police station and reached there at about



5:00 p.m. and stayed there till 10:00-11:00 p.m. She has denied the suggestion of falsely implicating the accused due to previous enmity with the family of the accused in retaliation of Complaint Case No.988 of 2020 filed by the mother of the accused Ravi Kant.

13. P.W. 3, Dr. Kiran Ojha, is the doctor who had examined the victim girl on 29.05.2020. She has stated as follows:-

"On Physical examination -There is no injury on the whole body of victim. Pubic hair, auxiliary hair and breast well developed. Vagina admit two fingers easily. Hymen old ruptured. Slight aberration on posterior side of introitus.

Histopathological examination done by Dr. Deepak Kumar say that spermatozoa not found neither alive nor dead. RBC- Nil. Epithelial cell present+ve.

Age between 16 (sixteen) to 17 (seventeen) years.

Opinion: On account of above facts, we can say that there is strong evidence of intercourse with the victim."

13.1. In her cross-examination, she has stated that she had not mentioned the size & colour of perineal tear in injury report. She had also not mentioned the age of perineal tear. She has also stated that the victim had not produced any



kind of cloth before her. She had not recommended D.N.A. test of the victim for the purpose of forming opinion as to sexual intercourse. She has stated that admission of two fingers into vagina signifies the fact that the victim may have sexual intercourse before or may having sexual intercourse on regular interval. She had not sent the sample of pubic hair and auxiliary hair for any scientific test. She had not attached histopathological report with the injury report which is kept on the file of Sadar Hospital, Chapra.

14. P.W. 4, the victim, has stated in her deposition that while she was going to the field, on the way Ravi Kant and Mani caught hold of her and took her to a pit. Ravi Kant tore her clothe. Mani was making videograph of her body. When her mother went to the house of accused to complain they beat her. They also chased her mother to her house and Chandeshwar and eight others beat her brothers Rupesh, her father Santosh Mahto, Pawan Mahto and Deepak. They went to the police station, narrated the whole incident. Thereafter, she was medically examined at Sadar Hospital, Chapra. Her statement under Section-164 Cr.P.C. was recorded before the concerned Magistrate. She produced the videograph through a pen drive which was exhibited as Exhibit-M.O. 1 (on protest).



14.1. In her cross-examination, she has stated that the pen drive containing the recording was produced belonged to her and recording was done by her brother Deepak at the house itself. The recording on the pen drive was done two years ago. Pen drive was not handed over to the police. Police had not seized the mobile phone. Mobile belonged to Deepak. She has stated that her mother had come to the place of occurrence after one hour. She had not handed over her clothe to the police. She has also stated that she narrated the incident to her mother when he returned home at about 6:00 p.m. She had proceeded for the police station at 3:00 p.m. with her father, mother and brother Rupesh. She had gone for her medical examination on the next date of the incident. She has denied the suggestion that Munna Kumar, Rupesh Kumar, Pawan Kumar, Mandeep Mahto and Deepak Kumar had assaulted Naresh Mahto, Chandeshwar Mahto and Indrajeet Kumar for which Ramkalo Devi, mother of accused Ravi Kant had lodged complaint case No. 988/2020 in the court of learned C.J.M., Chapra leading to institution of Kopa P.S. Case No. 145 of 2020 and in retaliation, in the instruction of her parents she is giving false deposition. She has also denied the suggestion that to have given false deposition to get rid of the said case or to squeeze money from the accused.



15. P.W. 5 Sunil Kumar Thakur has stated that on 27.05.2020 he was posted as an A.S.I. at Kopa Police Station. He was given the charge of investigation of Kopa P.S. Case No. 117/2020. He recorded the statement of the victim, visited the place of occurrence with the police party and recorded the re-statement of the victim. He also recorded the statements of Durvawati Devi and Santosh Mahto. He has given the description of the place of occurrence and he did not find anything worth mentioning. He arrested accused Indrajeet Kumar, Rahul Kumar, Naresh Mahto and Chandeshwar Mahto the same day. Next day he got the statement of the victim under Section-164 Cr.P.C. recorded and also got the victim medically examined.

15.1. In his cross-examination he has stated that except the copy of the F.I.R., nothing was handed over to him by the S.H.O. Formal F.I.R. was drawn up by A.S.I. Bechan Singh. Para-1 is in his handwriting, but there is overwriting in the date in the third line, which does not bear his initial. Though at one place he has recorded in para-3 that he took the statement of the victim at the police station, at another place he has stated that he had taken the statement of the victim at her house. He is unable to state the exact distance of the place of occurrence, but



as per his assessment, it is 200 yards. He has admitted that he had not found any foot-prints, blood-stains, torn clothes or trampled grass. He has not discussed the seizure-list in his case diary. He was neither handed over nor shown the clothes worn at the time of the incident. He was not even shown the videograph of the incident nor any electronic device was handed over to him at the house of the victim. He had not got the D.N.A. test of the accused conducted.

15.2. In his further cross-examination he has stated that the date recorded in para-35 is not wrong, rather it is an overwriting, which does not bear his initial. He had not recorded the statement of any neighbour of the victim or the local people residing near the place of occurrence. He had not detailed the counter case lodged by the mother of the accused, bearing Kopa P.S. Case No. 145/2020, arising out of Complaint Case No. 988 of 2020 in the case diary. He had not seen that there was bandage on the left hand of Indrajeet Kumar and Chandeshwar Prasad @ Chandeshwar Mahto had received injury on his head. Mother of the victim had not stated that he had rushed to the place of occurrence when she heard her daughter crying for help when she saw the accused fleeing away. She had not stated that the pant of her daughter was



soaked in blood. Durgawati Devi had not stated before him that she had witnessed accused Ravi Kant committing rape. She had stated that she had gone to complain to the house of the accused when the accused abused her chased her away and again came to her house and assaulted Rupesh Kumar, Pawan Kumar, Munna Kumar and her elder sister-in-law (Gotni). He has denied that the investigation done is faulty and he had prepared the case diary at the police station itself. It is not a fact that no such incident had taken place and to save the victim and her family members in the case lodged by Ramkalo Devi he had given false evidence about the injured persons in Kopa P.S. Case No. 145/2020.

16. We have considered the submissions canvassed by the learned counsels for the parties.

17. We have also perused the materials placed on record and the evidence led by the prosecution.

18. Having heard learned counsels for the parties and having gone through the material placed on record, it would emerge that the written complaint was given by the victim on 27.05.2020. It has come on record that the said written complaint was, in fact, written by the brother of the victim i.e. Deepak Kumar. However, the said Deepak Kumar, i.e. the



brother of the victim, is not examined by the prosecution. In the written complaint, the victim has stated that on 27.05.2020 the victim's mother had gone to the agricultural field for cutting grass asking her to come after one hour and collect the grass. As per instruction, at about 5:00 p.m., she was going to the field for collecting the grass when accused Ravi Kant Mahto (appellant No.1) and Mani Kumar @ Kaku (appellant No.2) of village-Basdila, P.S. Kopa, surrounded her with oblique motive and accused Ravi Kant Mahto caught hold of her, took her to a nearby pit, pulled off her lower garment (Salwar), tore her Samij, pushed her down into the pit and started doing obscene acts with her body and accused Mani Kumar @ Kaku started capturing the incident in his mobile phone upon which she started raising alarm on which her mother came running and saved her.

18.1. In the deposition given by the victim, she has stated that while she was going to the field, on the way Ravi Kant and Mani caught hold of her and took her to a pit. Ravi Kant tore her clothe. Mani was making videograph of her body. When her mother went to the house of accused to complain they beat her.

18.2. At this stage, if the deposition given by P.W.



2, mother of the victim, is seen, she has stated in her examination-in-chief that, in fact, she has seen the occurrence in question and she has stated about the rape committed by appellant No. 1. She has also narrated that clothes of the victim were thoroughly blood-stained. Thus, from the aforesaid deposition of P.W. 2, it is projected by the prosecution that the mother is an eye-witness. However, if the cross-examination of P.W. 2, mother of victim, is carefully seen, it is revealed that she stayed at the house after returning from the place of occurrence for one hour during which nobody came to meet them. She has further admitted in her cross-examination that her daughter was coming crying and thereafter she has narrated about the occurrence. P.W. 2 has further stated that from the place of occurrence, she went to the police station with her daughter at about 5:00 p.m. At that time, her daughter was wearing the same clothes which she was wearing at the time of occurrence. The clothes were having blood-stains. However, the said clothes were not handed over to the police. At this stage, it is also relevant to note that P.W. 4, the victim, has stated during cross-examination that when she was returning from the place of occurrence, her mother met on the way and she narrated about the entire occurrence to her. Thereafter, they went to the house



at about 6:00 p.m. In the house, they stayed for one hour. Thereafter, at about 8:00 p.m., her father came to the house. Her mother was also present in the house and thereafter they went to the police station.

18.3. From the aforesaid, it can be said that there are major contradictions in the depositions given by the prosecution-witnesses.

19. At this stage, the deposition given by P.W. 3 is also required to be considered. From the deposition given by P.W. 3, it is revealed that in the cross-examination, the said doctor has specifically stated in para-11 that admission of two fingers in vagina signifies that the victim may have sexual intercourse before or may be having sexual intercourse on regular intervals.

20. In para-5 of the deposition, the Doctor has further stated that the report of histopathological examination done by Dr. Deepak Kumar says that spermatozoa not found, neither alive nor dead. The age of the victim was also stated to be between 16 to 17 years. In paragraph-3, the Doctor has further stated that there is no injury on the whole body of the victim and hymen was old ruptured.

20.1. Thus, from the aforesaid medical evidence, it



can be said that there is no injury on the whole body of the victim and, therefore, the story narrated by the victim about the manner in which the occurrence took place is not supported by the aforesaid evidence of the Doctor.

20.2. At this stage, it is also relevant to note that the prosecution has also failed to prove the age of the victim, which is a vital aspect, by producing any documentary evidence. It has come on record that the victim was admitted in the school and she had studied upto Std-V. However, the Investigating Officer has failed to produce any school register or the birth certificate of the victim. Even from the medical evidence, it is revealed that the age of the victim was determined as 16 to 17 years.

20.3. At this stage, we would like to refer the judgment of the Hon'ble Supreme Court in the case of **Jaya Mala (supra)** wherein at para-9 Hon'ble Supreme Court has held as under:

“9. Detenu was arrested and detained on Oct. 18, 1981. The report by the expert is dated May 3, 1982, that is nearly seven months after the date of detention. Growing in age day by day is an involuntary process and the anatomical changes in the structure of the body continuously occur. Even on normal calculation, if seven months are deducted from the approximate age opined by the expert, in Oct., 1981 detenu was around 17 years of age, consequently the statement made in the petition turns out to be wholly



true. However, it is notorious and one can take judicial notice that the margin of error in age ascertained by radiological examination is two years on either side. Undoubtedly, therefore, the detenu was a young school going boy. It equally appears that there was some upheaval in the educational institutions. This young school going boy may be enthusiastic about the students' rights and on two different dates he marginally crossed the bounds of law. It passes comprehension to believe that he can be visited with drastic measure of preventive detention. One cannot treat young people, may be immature, may be even slightly misdirected, may be a little more enthusiastic, with a sledge hammer. In our opinion, in the facts and circumstances of this case the detention order was wholly unwarranted and deserved to be quashed."

20.4. Thus, from the aforesaid decision it can be said that the margin in age ascertained is two years on either side.

21. Therefore, the benefit of the same can be given to the accused and it can be said that the victim was not a minor. It is important to note at this stage that it is a case of the victim in the written complaint given to the police that accused Ravi Kumar, appellant No.1 herein was doing obscene acts with her body and she has not alleged that he has committed rape on her. She has not alleged specific obscene act done by the accused. The victim has stated in the written complaint that appellant No.2 was making videograph on his mobile phone. Thus, the



allegation of rape is not levelled against either of these appellants by the victim in her written complaint. Further, it is alleged that the said occurrence through the video clip was made viral on the Facebook. However, it is surprising that the mobile phone of the appellant No.2 was not seized by the investigating Officer. It has come on record that mobile phone of Deepak Kumar (brother of the victim) or the pen drive which was prepared from the mobile phone of Deepak Kumar was not produced before the investigating agency and, for the first time, the pen drive was produced before the Court. It is relevant to note that the prosecution has failed to examine Deepak Kumar and also failed to produce the mobile phone of Deepak Kumar before the Investigating Officer. The said pen drive is, though exhibited, the objection was taken by the defence and it is specifically alleged that the pen drive has been fabricated.

22. From the evidence of the Investigating Officer it is revealed that the blood-stained clothes of the victim were not seized by the investigating agency and, therefore, the same has not been sent to the F.S.L. The Investigating Officer did not find any blood on the place of occurrence.

23. It would further reveal from the record that initially charge was framed against appellant No.2 under



Section-66 of I.T. Act and 341 of I.P.C. only and thereafter the prosecution had examined the witnesses and statement of the accused under Section-313 Cr.P.C. was recorded on 19.09.2022 and thereafter only, on 22.03.2023, additional charge was framed under Sections-4/16 of POCSO Act, Section-6 of POCSO Act, 376/109 of I.P.C. and 67 and 67A of I.T. Act and after a period of two days only i.e. on 24.03.2023 the judgment was reserved. It is the specific case of the appellant No.2 that because of the aforesaid, serious prejudice has been caused to the appellant No.2 as sufficient opportunity to defend was not provided to appellant No.2 with regard to additional charge framed against him. It is also revealed that the Trial Court has convicted appellant No.2 for the for the additional charges framed against him.

24. In view of the aforesaid facts and circumstances of the present case, we are of the view that the prosecution has miserably failed to prove the case against the appellants beyond reasonable doubt, despite which the Trial Court has passed the impugned judgment and order. Therefore, it deserves to be quashed and set aside.

24.1. Since both the appellants named above are in jail, they are directed to be released from custody forthwith, if



their presence is not required in any other case.

25. The appeal stands allowed.

(Vipul M. Pancholi, J)

(Sunil Dutta Mishra, J)

K.C.Jha/-

AFR/NAFR	A.F.R.
CAV DATE	N.A.
Uploading Date	04.03.2024
Transmission Date	04.03.2024

