

**IN THE HIGH COURT OF JUDICATURE AT PATNA**

**Jitendra Kumar Chaurasiya**

**Versus**

**The State of Bihar**

Criminal Appeal (SJ) Number 2955 of 2023

13 August, 2024

**(Hon'ble Mr. Justice Chandra Shekhar Jha)**

**Issue for Consideration**

Whether Judgment of conviction and Order of sentence passed by learned Additional District and Sessions Judge-VI-cum Special Judge, POCSO Act, Samastipur in Tr. No.142 of 2023, arising out of Mahila P.S. Case No.50 of 2021, is correct or not?

**Headnotes**

Indian Penal Code, 1860—Section 376—Protection of Children from Sexual Offences Act, 2012—Section 4—Rape—victim went to attend the marriage ceremony where the present unfortunate occurrence of rape was committed upon her by appellant—victim disclosed about occurrence to her parents only when video of rape/occurrence was made viral—delay to lodge FIR was due to threat given by appellant.

Held: victim not qualify the test of “sterling witness”—owner of the premises, denied any invitation to the victim and her father on occasion of marriage of her daughter—impugned judgment of conviction and order of sentence quashed and set aside—appeal allowed.

(Paras 14, 17, 33 to 35)

**Case Law Cited**

Ravinder Singh vs. State of Punjab, (2022) 7 SCC 581—**Relied Upon;** Santosh Prasad vs. State of Bihar, (2020) 3 SC **Cause Title;** Jitendra Kumar Chaurasiya vs State of Bihar; Criminal Appeal (SJ) Number 2955 of 2023; 13<sup>th</sup> Day of August, 2024C 443; Jarnail Singh vs. State of Haryana & Ors.,

(2013) 7 SCC 263—**Referred To.**

**List of Acts**

Indian Penal Code 1860; Protection of Children from Sexual Offences Act, 2012.

**List of Keywords**

Rape; victim; sterling witness.

**Case Arising From**

From Judgment of conviction and Order of sentence passed by learned Additional District and Sessions Judge-VI-cum Special Judge, POCSO Act, Samastipur in Tr. No.142 of 2023, R.N. 22 of 2022 arising out of Mahila P.S. Case No.50 of 2021.

**Appearances for Parties**

For the Appellant: Mr. Yogesh Chandra Verma Senior Advocate; Ms. Kumari Anupam, Advocate; Mr. Vikas Kumar Jha, Advocate.

For the State: Anita Kumari Singh, APP.

Headnotes Prepared by Reporter : Mr. Abhas Chandra, Advocate

**Judgment/Order of the Hon'ble Patna High Court**

**IN THE HIGH COURT OF JUDICATURE AT PATNA**  
**CRIMINAL APPEAL (SJ) No.2955 of 2023**

Arising Out of PS. Case No.-50 Year-2021 Thana- MAHILA P.S. District- Samastipur

Jitendra Kumar Chaurasiya, Son of Ram Pravesh Chaurasiya, Resident of  
village - Sahit, P.S. - Vidhyapatinagar, Distt. - Samastipur

... .. Appellant

Versus

The State of Bihar

... .. Respondent

**Appearance :**

For the Appellant	:	Mr. Yogesh Chandra Verma, Senior Advocate Ms. Kumari Anupam, Advocate Mr. Vikas Kumar Jha, Advocate
For the Respondent-State:		Mrs. Anita Kumari Singh, APP

**CORAM: HONOURABLE MR. JUSTICE CHANDRA SHEKHAR JHA**  
**ORAL JUDGMENT**

**Date : 13-08-2024**

This appeal has been preferred by the appellant/convict under Section 374(2) of the Code of Criminal Procedure (hereinafter referred to as 'the Code') challenging the impugned judgment of conviction dated 01.05.2023 and order of sentence dated 16.05.2023 passed by learned Additional District and Sessions Judge-VI-cum-Special Judge, POCSO Act, Samastipur in Tr. No.142 of 2023, R.N. 22 of 2022 arising out of Mahila P.S. Case No.50 of 2021, whereby the concerned Trial Court has convicted the appellant/convict for the offence punishable under Section 4 of the Protection of Children from Sexual Offences Act (for short 'POCSO Act) and sentenced to



undergo rigorous imprisonment for ten years with fine of Rs.20,000/- and in default of payment of fine, to further undergo rigorous imprisonment for six months.

**2.** The case of prosecution, in brief, as available through written information of informant/victim (PW-1), which is the basis of FIR is that on 30.05.2021 she had gone to attend a marriage ceremony of one Priyanka Kumari. About 11.30 P.M., at marriage venue one Kajal Devi asked her to bring mobile phone from the roof top, under a conspiracy with Jitendra Kumar Chaurasiya (appellant), who was already waiting for her on the roof top and when she went there, he caught her and raped. When the victim said that she would tell the occurrence to her father, then she was threatened to be killed. At that very time, another co-accused, namely, Suraj Kumar made a video of entire occurrence and same was made viral on social media. When father of the informant/victim saw that video on 15.07.2021, he went to the house of Jitendra Kumar Chaurasiya (appellant) for making complaint, where Jitendra Kumar Chaurasiya (appellant), Ram Pravesh Chaurasiya,



Savitri Devi, Gudiya Kumari and Vivek Kumar started abusing him and threatened to kill him.

**3.** With aforesaid factual allegation, informant/PW-1 requested to the S.H.O., Mahila Police Station, Samastipur for taking appropriate legal action against the appellant/convict.

**4.** On the basis of aforesaid information of informant/PW-1, the police registered Mahila P.S. Case No.50 of 2021 dated 18.07.2021 for the offences punishable under Sections 376, 506, 420 of the Indian Penal Code (for short 'IPC'), Section 4 of the POCSO Act and Section 67-A of the Information and Technology Act (for short 'I.T. Act'), arraying accused/appellant, Jitendra Kumar @ Jitendra Kumar Chaurasiya along with other co-accused person, namely, Suraj Kumar.

**5.** After completion of investigation and on the basis of materials collected during investigation, the Investigating Officer of this case submitted charge-sheet on 14.09.2021 for the offences punishable under Sections 376, 506, 420 read with 34 of the IPC, Section 4 of the POCSO



Act, 2012 and Sections 67-A and 67-B of the I.T. Act. The learned trial court after supplying the police papers under Section 207 of the Code framed charges under Sections 376(3), 506 of the IPC, Section 4 of the POCSO Act and also under Section 67-B of the I.T. Act on 03.12.2021, against the appellant-convict, which were explained to the appellant/convict, to which, he pleaded not guilty and claimed to be tried.

**6.** To substantiate its case, the prosecution has examined altogether seven witnesses. They are:-(i) **PW-1, the informant/victim;** (ii) **PW-Father of the victim;** (iii) **PW-3 Mother of the victim;** (iv) **PW-4 Dr. Girish Kumar,** who has examined the victim; (v) **PW-5 Pushplata Kumari,** the Investigating Officer of this case; (vi) **PW-6 Pankaj Kumar;** and (vii) **PW-7 Shiv Prasad Chaurasiya,** owner of the house, where alleged occurrence took place.

**7.** Apart from the oral evidence, the prosecution has also relied upon following exhibits/documentary evidences, which are:-

Sl. No.	No. of exhibits	Name of documents exhibited
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1.	Exhibit-P-1	Signature of informant-cum-victim on FIR.
2.	Exhibit-P-2	Signature of the victim on her statement u/s 164 Cr.P.C.
3.	Exhibit-P-3	Signature of the victim on the medical requisition.
4.	Exhibit-P-4	Signature of the doctor on the medical requisition.
5.	Exhibit-P-5	Signature of the SHO on the FIR.
6.	Exhibit-P-6	Charge sheet.
7.	Exhibit-P-7	Supplementary charge-sheet.
8.	Exhibit-P-8	Admit card in support of age of the victim.
9.	Exhibit-2 & 2/1	Medical report and signature of the doctor.
10.	Exhibit-3	Written application of the informant/victim.
11.	Exhibit-4	Formal FIR.

**8.** On the basis of evidences/circumstances as surfaced during the trial, the learned trial court has examined the appellant/accused under Section 313 of the Code, where he completely denied all the evidences surfaced during the trial and claimed his complete innocence and false implication.

**9.** Taking note of the evidence as surfaced during



the trial and after considering the arguments as advanced by both the parties, the learned Trial Court has convicted the appellant/convict/accused for the offences under Section 376 of IPC and Section 4 of the POCSO Act and sentenced him in the manner as indicated above.

**10.** Being aggrieved with the aforesaid judgment of conviction and order of sentence, the appellant/convict has preferred the present appeal.

**11.** Hence, the present appeal.

**Argument on behalf of the Appellant:**

**12.** It is submitted by Mr. Yogesh Chandra Verma, learned senior counsel appearing for the appellant that the finding of conviction as recorded by learned Trial Court is completely perverse, where several major contradictions and flaws of prosecution were overlooked and merely upon the basis of pen-drive contents, which is a secondary electronic evidence, the conviction of appellant was secured under Section 376 of the IPC and Section 4 of the POCSO Act. It is submitted that the implication of appellant was false in the background of land dispute, where victim was made





instrumental to lodge present case. This fact can be gathered easily from the deposition of owner of the house, where the marriage ceremony was organized, who denied any occurrence on the alleged date i.e. on 30.05.2021. It is submitted that in present case, the FIR was lodged with a delay of one and half month. There is major discrepancies in the statement of victim, as she narrated different version in FIR, in her statement recorded under Section 164 of the CrPC and also as PW-1 during trial and taking into account all her statements collectively, it can be said safely that she failed to qualify the test of "sterling witness". It is submitted that nothing appears out of medical examination of victim, which may suggest that sexual assault was committed upon her and moreover she was found between the age group of 15  $\frac{1}{2}$  -16 years as per her radiological examination and if benefit of plus (+) minus (-) two years be given, she can be said major on the date of occurrence and, therefore, the conviction as recorded under Section 4 of the POCSO Act also appears questionable. It is also pointed out that penetration is the essential legal ingredient as to convict



accused/appellant under Section 4 of POCSO Act or Section 376 of the IPC but, the prosecution failed to established out of deposition of victim that whether any sexual penetration was taken place particularly, in the background when victim could not qualify the test of "**sterling witness**". In support of his submission, learned counsel relied upon the legal report of Hon'ble Supreme Court as available through **Santosh Prasad vs. State of Bihar [(2020) 3 SCC 443]**.

**13.** Mr. Verma further submitted that the pen-drive and facebook contents, which are the sole basis of the implication of the appellant was not proved in terms of Section 65-B of the Indian Evidence Act and, therefore, the conviction, which was secured on said basis only, is completely bad in eyes of law and benefit of which, must be given to accused/appellant. In support of his submission, he relied upon legal report of Hon'ble Supreme Court as available through **Ravinder Singh v. State of Punjab [(2022) 7 SCC 581]**. Accordingly, it was prayed that the impugned judgment of conviction *qua* appellant be quashed



and set aside.

**13.1.** While concluding argument, it is submitted by Mr. Verma that the trial court through its impugned judgment appears convinced as not to rely upon the video or pen-drive, which was produced before the court but, it relied upon the statement of the appellant as recorded under Section 313 of the CrPC, which was recorded after showing him the same pen-drive in the chamber of the learned trial Court Judge, which was not accepted as evidence. It is submitted by Mr. Verma that statement of appellant recorded under Section 313 of the CrPC, which was recorded on the basis of video contents, not suggesting any overt act on the part of appellant and merely on the basis of presence together in a video, which was not brought on record in terms of Indian Evidence Act, the conviction as recorded by the learned Trial Court is completely perverse and, therefore, on this ground alone, the judgment of conviction can be quashed and set aside.

**Argument on behalf of the State:**

**14.** *Per contra*, learned APP while arguing on



behalf of the State submitted that during the trial, the original admit card of victim as issued by Bihar School Examination Board was exhibited as **Exhibit-P/8**, where her date of birth is shown as 18.06.2006 and, therefore, she was minor on the date of occurrence, which alleged to be taken place on 30.05.2021. It is submitted that the victim was duly proved a "child" within the meaning of Section 2(1) (d) of the POCSO Act during the trial on the basis of aforesaid document issued by Bihar School Examination Board, which is a defined document to ascertain the date of birth of the victim of crime in question in terms of Section 94(2) of the Juvenile Justice (Care and Protection of Children) Act which also approved by the legal ratio as available through **Jarnail Singh v. State of Haryana & Ors. [(2013) 7 SCC 263]**. It is submitted that occurrence was disclosed by victim to her parents only when video of occurrence was made viral, does not mitigate the allegation *ipso facto*, as it is appearing fully corroborated from the deposition of victim. It is also pointed out that delay to lodge FIR was due to threat and as such it was duly



explained.

**15.** I have perused the Trial Court Records carefully and gone through the evidence available on record as also considered the rival submissions canvassed by learned counsel appearing on behalf of the parties.

**16.** After hearing the arguments and upon perusal of record, it appears that the evidence as surfaced during the trial is required to be discussed for the purpose of its re-appreciation for the just and proper disposal of the present appeal.

**17.** The most important witness of this case is PW-1, who is victim herself. It appears from the perusal of record that conviction in present case was secured only on her sole testimony. It was stated by her that she went to attend the marriage ceremony of Priyanka Kumari, which was solemnized on her residence, where the present unfortunate occurrence of rape was committed upon her by appellant. It was stated that the appellant was known to her prior to the occurrence but, they were not in talking terms. She deposed that on 30.05.2021 at about 11.30 P.M. one



Kajal Kumari told her to bring her mobile phone from the roof top of the house, who is cousin sister-in-law (Bhabhi) of the appellant. In compliance of aforesaid request, she went upto roof, where appellant was already present and he committed there rape upon her. The said place was behind *marwa* (wedding cottage). No one was present there. She was shouted but, no one came to rescue her. It was said that due to loud music of marriage ceremony, no one could heard her cry. Whereafter, the appellant threatened not to disclose the occurrence, as she will loose her social prestige and she was also threatened to her life. It was deposed by her that to save the family prestige and fear of social stigma, she did not disclose the occurrence to any one. After sometime, when her father was going to attend the farewell party (Bhoj) of village, he was informed by co-villagers that some video become viral regarding the occurrence which happened with her daughter and, thereafter, the video was shown to her father. After returning home, when her father asked about the occurrence, she started to cry and narrated in details to her father regarding the occurrence, whereafter,



her father went to the house of accused/appellant Jitendra Kumar Chaurasiya, where he was assaulted by his parents. She was also accompanied with her father. She identified the appellant/convict during the trial, who was in blue T-shirt and said that this is the person, who committed rape upon her and the second person is Suraj Kumar, who made the video viral. She identified her signature on written information, which is typed copy, which she found typed as per her statement, which upon her identification was exhibited as **Exhibit-P-1/PW-1**. She also identified signature on her statement recorded under Section 164 of the CrPC, which upon her identification was exhibited as **Exhibit-'P-2/PW-1'**. She also gave her consent for medical examination, where she identified her signature, which upon her identification was exhibited as **Exhibit-'P-3/PW-1'**.

**17.1.** Upon cross-examination, it was stated by her that the present case was lodged after one and half month of the occurrence. It was stated that Shiv Prasad Chaurasiya was the owner of the house. She stated that he is not the witness of the occurrence. It was stated that Kajal



Devi is the daughter-in-law of brother of said Shiv Prasad Chaurasiya. She is also not the witness of the said occurrence. It was stated that she did not receive any invitation in writing rather it was oral invitation to attend the marriage party. She stated that there was no evidence of occurrence on her clothes and she did not receive any injury on her body. She categorically stated that when the physical relation was established, she was in sense and she was also in sense after physical relation. It was stated that occurrence took place at the time of '*Jaimala*'. There were several people present over there, but none of them was on roof. She said that her father also attended marriage but she went there along with her friend. She also returned her home alone. She did not provide her clothes to police, which was wearing on the date and time of occurrence. It was stated that the roof was not surrounded by the boundary. It was stated that rape was committed in standing position. She also stated that the owner of the house was the relative of appellant and, therefore, he was also invited. On specific question that why she remains silent *qua* occurrence for





about one and half month, it was replied that the delay was on instance of accused/appellant. She said that the light was available at roof of the house but, there was no any marriage related function. She remains there for about 1-2 hour. She did not attended '*jaimala* function', as occurrence took place at same time. It was said that her photograph is not available in videography, which was done on the occasion of marriage. She disclosed the boundary of the house, where she stated that house in western side belongs to co-accused, Suraj. She said that on the roof of house, no third person was there except she and Jitendra. She denied suggestion that no such occurrence took place with her and she implicated the appellant due to previous enmities.

**18. PW-2** is the father of victim, who deposed that on 15.07.2021, when he went to attend a *bhoj* party in village, came to know about the occurrence from the co-villagers that some video become viral regarding the occurrence. He said that he saw the appellant to commit rape upon her daughter in said video and pulling her by holding her cloth. No third person was present in said video.



Thereafter, he disclosed the occurrence to her wife (PW-3), who asked to victim, whereafter, the occurrence was narrated to them and, thereafter, the present case was lodged. He identified the appellant and said that he was the same person who was doing wrong work in video with her daughter and another accused is Suraj Kumar, who is the person made the video viral.

**18.1.** Upon cross-examination, he stated that his entire deposition is based upon hearsay input. He was not present at place of occurrence when it took place. He stated that he would call Shiv Prasad Chaurasiya as a witness in support of his case. It was deposed that the victim was appearing candidate of Class-X at the time of occurrence. It was stated that the invitation to attend marriage party was oral. He stated that occurrence took place on 30.05.2021 at 11.30 P.M. as disclosed by him by her daughter/victim. He denied that he did not made statement before police that he came to know about the occurrence on 15.07.2021 from victim herself. It was stated that clip of viral video is with him in safe custody as to produce before the court. It was



stated by him that a case was lodged after one and half month and it was lodged only due to viral video. He denied the suggestion that no such occurrence took place in the house of Sheo Prasad Chaurasia.

**19. PW-3 is the mother of victim, namely, Kamini Devi.** She also deposed on same line as deposed by PW-2. She also claimed to saw the video, where she found appellant committing rape upon her daughter. It was stated that it was Suraj Kumar, who was making the video. She said that she is not the eye-witness of the occurrence. It was stated that *bhoj* (farewell party) was at the residence of Shyam Chaurasiya/co-villager on 15.07.2021 and, thereafter, they straightway went to Vidyapati police station. She stated that the owner of the house is not the witness of this case.

**20. PW-4 is Dr. Girish Kumar,** who was posted as Dy. Medical Superintendent, Sadar Hospital, Samastipur on 19.07.2021. He stated that on the same day, a medical board was constituted under his Chairmanship along with Dr. D.K. Sharma, Dr. Megha Ahuja and Dr. Junaid Akhtar as



Board Members to examine the victim and upon her examination, following injuries were found, which are as under:-

"M.I.- Black mole at upper leap

Height-4 feet 11 inch

Weight-28 Kg.

Teeth-7 x 7/7 x 7

LMP-29-06.2021

**General Examination**

(i) No injury and foreign body seen over the body and private parts

(ii) Auxiliary and public hair developed

(iii) breast developed.

**P/A Examination**

Abdomen-soft

P/V-Hymen old, healed and ruptured.

Two slides vaginal swab sent for microscopical examination-reports shows no spermatozoa found.

No injury or foreign body seen on private parts.

**Investigation**

X-ray pelvis epiview shows-epiphysis of both eliac crest completely appeared but not fused.

X-ray of elbow joint epieviews-shows epiphysis of elbow joint completely fused.

X-ray of wrist joint-epiphysis of digital end of radius and ulna not completely fused.

UPT-negative on 19.07.2021.

USG-Normal scan."



**20.1.** He opined regarding age of the victim on the basis of above physical and radiological finding between 15½ -16½ years. He further opined that no sign of sexual assault at the time of examination was found. He identified his signature as well as writing of Dr. Megha Ahuja, Dr. D.K. Sharma and Dr. Junaid, which upon his identification was exhibited as **Exhibit-P-3/PW-4**.

**21. PW-5 is Pushplata Kumari**, who is the Investigating Officer of this case. She identified her handwriting and signature on FIR/written information, which was given to her on 18.07.2021 by victim. She took up investigation herself and upon her identification, written information and her signature was marked as **Exhibit-P-5/PW-5**. It was stated that formal FIR runs in three pages and upon her identification, each page of formal FIR were exhibited as **Exhibit-P-5/1/PW-5, P-5/2/PW-5 and P5/3/PW-5** respectively. She visited the place of occurrence as per statement of victim. She produced the victim before court for recording her statement under Section 164 of the CrPC. She also got examined victim



medically. During investigation, she said to record the statement of witnesses and after completing the investigation, finding this case true, submitted Charge-sheet No.1 of 2021 dated 14.09.2021, where she identified her signature and hand-writing, which upon her identification, exhibited as **P-6/PW-5**. A supplementary charge-sheet bearing No. 2/2022 dated 08.01.2022 *qua* this appellant was also submitted.

**21.2.** Upon cross-examination, she stated that the FIR was lodged after about two month of the occurrence. It was said that as upon medical examination, victim found with ruptured hymen therefore, she lodged present case under Section 376 of the IPC. She did not seized anything like clothes, which was wearing by victim on the date and time of the occurrence and also did not find any relevant circumstantial evidence *qua* occurrence. She did not seized any video and mobile from accused/appellant. She did not examine appellant/accused medically. She did not record the statement of Priyanka Kumari and Shiv Prasad Chaurasiya, owner of the house. She also not recorded the statement of



Kajal Kumari. She also not recorded the statement of Kajal Devi, who is the *Bhabhi* (sister-in-law) of appellant, who asked victim to bring her mobile phone from roof top. She did not obtain any age related certificate or educational certificate of victim. She did not collect any evidence in support of the fact that on the date of the occurrence, the victim was minor. She did not seized any marriage card in support of marriage ceremony. She said categorically that she is unable to say that from which mobile, the pen drive was prepared, which is available on record and deposed that this fact can only be disclosed by victim herself. She has not verified the pen drive during the investigation. She did not even seized any pen-drive during investigation. She denied the suggestion that her investigation is unscientific and defective. She did not even seized the mobile of co-accused Suraj.

**22. PW-6 is Pankaj Kumar,** who appears to be co-villager of the victim and appearing hearsay witness of the occurrence and his evidence is not so relevant to discuss *qua* present occurrence. Though, he supported the



occurrence on the basis of hearsay input being co-villagers.

**23. PW-7 is Shiv Prasad Chaurasiya**, who is the owner of the house, where alleged occurrence took place on 30.05.2021. It was deposed that his statement was not recorded during the course of investigation and, therefore, he was called by prosecution by exercising power under Section 311 of the CrPC. PW-2, the father of victim was also desirous to call him as a witness. Upon examination, he was turned hostile but he supported the factum of marriage party which solemnized on 30.05.2021 for his daughter wedding namely, Priyanka Kumari. It was stated that nothing was committed on that date by Jitendra Kumar at his house and it is a completely false case. He stated that the case was lodged due to enmity and no such occurrence took place in marriage.

**23.1.** Upon cross-examination, it was stated that he did not invite Lalchun Chaurasiya i.e. PW-2/father of the victim and his family on occasion of marriage of his daughter. It was said that co-villagers attended the marriage and no such occurrence took place in his house on the





alleged date and time.

**24.** From the discussion of aforesaid witnesses, it appears that the most important witness of this occurrence is victim herself, who was examined as PW-1. She was aged about 15 years. Her age and date of birth was proved through **Exhibit-P/8**, which is her admit card issued by Bihar School Examination Board and was taken on record and was read in evidence in view of Section 294 of the CrPC, as same was not even objected by the accused/appellant. The rest of the witnesses are appearing the hearsay witness of the occurrence including the parents of the victim/PW-1 and PW-2.

**25.** One important question, which arises in present case is to decide that whether the statement of victim is so reliable and trustworthy on the basis of which, it can be said that prosecution established the foundational aspect of crime in question as to import the presumption as available under Sections 29 and 30 of the POCSO Act.

**26.** No doubt, the victim (PW-1) deposed specifically that the appellant committed rape upon her on



30.05.2021 in the marriage ceremony of one Priyanka Kumari. At the time of '*jaimala*' function she went to roof top as to collect the phone of his "*Bhabhi*" namely, Kajal Devi. Said Kajal Devi was neither examined during the investigation nor during the trial. It was said that no third person was present during the occurrence and it was committed in standing position. It is also admitted position that the case of the present occurrence was lodged after one and half month of the occurrence, when the video of occurrence was made viral and it came to the knowledge of PW-2, who is the father of victim. The clips of said video was never handed over to the Investigating Officer. The pen-drive was not seized during the course of investigation by I.O./PW-5. The authenticity of the video of pen-drive cannot be said to be proved, which is the genesis of the occurrence. The medical report of the victim in terms of examination of PW-4 did not support anything that occurrence like "rape" was committed upon her. Even the victim said that she did not received any injury during occurrence. It also appears from the record that the owner of house, namely, Shiv



Prasad Chaurasiya, who was examined as PW-7 turned hostile and did not support the occurrence. Upon cross-examination by defence, it was stated by him that he did not invite the family of PW-2 and also PW-3 in his function and, therefore, the presence of victim at place of occurrence appears doubtful on alleged date and time. The deposition of this witness despite of being hostile, appears relevant to this case as to ascertain the credibility of the testimony of victim/PW-1, who is the sole witness of crime in question.

**27.** It appears from the deposition of PW-5, that no electronic evidence or pen-drive was collected by her during the course of investigation. However, it appears from the deposition of PW-2 that the pen drive, capturing the video of occurrence can be produced by him. Therefore, it can be said that pen-drive, which is the secondary electronic evidence and appears to be produced before the trial court by PW-2 was read as evidence without having any certificate as mandatory under Section 65-B of the Indian Evidence Act. However, on the basis of said contents of video, which can not be accepted as evidence, certain incriminating



questions were asked to accused/appellant, where appellant replied that victim of this crime in question appears in video and he also appears therein but, said statement is not suggesting any overt act and mere presence of appellant in video with victim is not sufficient to suggest that any penetrative sexual assault was committed upon her as alleged.

**28.** In this context, it would be apposite to reproduce Para-28 and 29 of the impugned judgment itself for the better appreciation of facts, which are as under:-

*"28. Prior to moving ahead to discuss the oral evidence of the prosecution firstly, it is relevant to point out the statement of the accused which has been recorded 313 Cr.P.C. the statement of the accused u/s 313 Cr.P.C. was on first time recorded on 21.01.2023. At this time the accused has denied the occurrence and in his defence stated that there is land dispute but after the video which has been on the record the same has been explained to the accused on 22.03.2023 then the accused has claimed that he want to see the video then the video has been shown to him at the P.O. chamber where in question no.14 the accused has admitted that she is*



*the same girl who is the victim and in question no.16 he has admitted that he is the second person in the video other than the victim, at this juncture by this admission of the accused there may be adverse presumption which is provided u/s 29 of the POCSO Act is attracted in favour of the prosecution since the defence was required to show that accused has not committed rape upon the victim but the accused has admitted his presence in the video is a sufficient evidence to presume that accused is guilty for the commission of penetrative sexual assault/rape upon the victim.*

*29. The Ld. Defence counsel has submitted on the point of pen-drive that this is unseized material cannot be taken into evidence. At this it is the position of law that in this judgment, I have not totally relied on the evidence to give finding because this is the admission of the accused u/s 313 Cr.P.C. which is the basis of the discussion of the judgment not the video."*

**29.** The electronic evidence, which cannot be accepted as evidence cannot be the basis of question, which may put forward to the accused/appellant under Section 313(1)(b) of the CrPC.



**30.** It would be apposite to reproduce para-21 and 22 of the legal report of Hon'ble Supreme Court as available through **Ravinder Singh Case (supra)**, which are as under:-

"**21.** Lastly, this appeal also raised an important substantive question of law that whether the call records produced by the prosecution would be admissible under Sections 65-A and 65-B of the Evidence Act, given the fact that the requirement of certification of electronic evidence has not been complied with as contemplated under the Act. The uncertainty of whether *Anvar P.V. v. P.K. Basheer* (2014) 10 SCC 473: occupies the filed in this area of law or whether *Shafhi Mohammad v. State of H.P.* (2018) 2 SCC 801: lays down the correct law in this regard has now been conclusively settled by this Court by a judgment dated 14-7-2020 in *Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal* (2020) 7 SCC 1: wherein the Court has held that:

"61. We may reiterate, therefore, that the certificate required under Section 65-B(4) is a condition precedent to the admissibility of evidence by way of



electronic record, as correctly held in *Anvar P.V. v. P.K. Basheer*, (2014) 10 SCC 473, and incorrectly “clarified” in *Shafhi Mohammad v. State of H.P.*, (2018) 2 SCC 801. *Oral evidence in the place of such certificate cannot possibly suffice as Section 65-B(4) is a mandatory requirement of the law.* Indeed, the hallowed principle in *Taylor v. Taylor*, (1875) LR 1 Ch D 426, which has been followed in a number of the judgments of this Court, can also be applied. Section 65-B(4) of the Evidence Act clearly states that secondary evidence is admissible only if lead in the manner stated and not otherwise. To hold otherwise would render Section 65-B(4) otiose.

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73.1. *Anvar P.V. v. P.K. Basheer*, (2014) 10 SCC 473 : as clarified by us hereinabove, is the law declared by this Court on Section 65-B of the Evidence Act. The judgment in *Tomaso Bruno v. State of U.P.*, (2015) 7 SCC 178, being per incuriam, does not lay down the law correctly. Also, the judgment in *Shafhi Mohammad v. State of H.P.*, (2018) 2 SCC 801 and the judgment dated 3-4-2018 reported as *Shafhi Mohammad v. State of H.P.* (2018) 5 SCC 311, do not lay down the law correctly and are therefore overruled.

73.2. The clarification referred to above is that the required certificate under Section 65-B(4) is unnecessary if the original document itself is produced. This can be done by the owner of a laptop computer, computer tablet or even a



mobile phone, by stepping into the witness box and proving that the device concerned, on which the original information is first stored, is owned and/or operated by him. *In cases where the "computer" happens to be a part of a "computer system" or "computer network" and it becomes impossible to physically bring such system or network to the Court, then the only means of providing information contained in such electronic record can be in accordance with Section 65-B(1), together with the requisite certificate under Section 65-B(4)."*

**22.** In light of the above, the electronic evidence produced before the High Court should have been in accordance with the statute and should have complied with the certification requirement, for it to be admissible in the court of law. As rightly stated above, oral evidence in the place of such certificate, as is the case in the present matter, cannot possibly suffice as Section 65-B(4) is a mandatory requirement of the law."

**31.** The victim/PW-1, who is the author of the FIR stated that the occurrence was witnessed by Suraj Kumar, who recorded video of occurrence with his mobile and thereafter uploaded it to the social media i.e. facebook, which becomes viral. It also not appears from FIR that who has shown viral video to the father of victim/PW-2, whereas victim in her statement under Section 164 of Cr.P.C., which





was recorded on 19.07.2021 i.e. just two days after lodging of FIR, categorically stated that the videography was done by the aunty of appellant namely, Manju Devi and it was uploaded on facebook by her only. The news was also spread by mother of appellant in society. Again, when she deposed before the court as PW-1 on 14<sup>th</sup> July, 2022, it was deposed by her that it was co-accused Suraj Kumar, who captured the video of the occurrence and make it viral. She did not even notice the presence of co-accused Suraj Kumar during the occurrence, as she categorically stated that at the time of occurrence no third person was present there. She was sent to the roof top by one Kajal Devi, who was also not examined during the investigation or during the trial.

**32.** It also appears from the deposition of PW-2 that viral video was kept with him in safe custody and will produce before the court but, from the none of the prosecution witnesses, who examined subsequently, it appears that same was produced before the court. This Court under appeal failed to understand that how and by whom the pen-drive, which is the genesis of the present FIR



was produced before the court and was taken note by the learned trial court to examine appellant/convict under Section 313 of the CrPC. The delay to lodge the FIR after one and half month of occurrence also one of the important reason to view the occurrence as doubtful, mere threat is not appearing convincing reason for such delay.

**33.** All such above discussed facts forced this Court as not to believe the testimony of victim as of such convincing nature to believe her to qualify the test of "sterling witness" on the basis of which it can be said that the foundational aspect of the allegation appears proved to import the presumption as available under Sections 29 and 30 of the POCSO Act particularly, in the background of the deposition of PW-7, who is the owner of the premises, denied any invitation to the victim and her father on occasion of marriage of her daughter Priyanka on 30.05.2021 where alleged occurrence took place at about 11:30 P.M.

**34.** Hence, the appeal stands allowed.

**35.** Accordingly, the impugned judgment of



conviction dated 01.05.2023 and order of sentence dated 16.05.2023 passed by learned Additional District and Sessions Judge-VI-cum-Special Judge, POCSO Act, Samastipur in Tr. No.142 of 2023, R.N. 22 of 2022 arising out of Mahila P.S. Case No.50 of 2021 is, hereby, quashed and set aside.

**36.** Resultantly, the above-named appellant is acquitted of the charges levelled against him. He is directed to be released forthwith, if his presence is not required in any other case.

**37.** Fine, if any, deposited be returned to the appellant forthwith.

**38.** Office is directed to send back Trial Court Records along with a copy of this judgment to the learned Trial Court forthwith.

**(Chandra Shekhar Jha, J.)**

Sanjeet/-

AFR/NAFR	AFR
CAV DATE	NA
Uploading Date	13-09-2024
Transmission Date	13-09-2024

