

IN THE HIGH COURT OF JUDICATURE AT PATNA

Ravi Kumar

vs

The State of Bihar

Criminal Appeal (SJ) No. 1754 of 2023

26 September, 2024

(Hon’ble Mr. Justice Chandra Shekhar Jha)

Issue for Consideration

- Whether the prosecution established that the victim was a “child” under Section 2(1)(d) of the POCSO Act, thereby enabling the application of statutory presumptions under Sections 29 and 30 of the Act.
- Whether conviction can be sustained solely on the basis of a retracted statement recorded under Section 164 Cr.P.C., when the prosecutrix turned hostile.
- Whether the secondary electronic evidence (video in pen drive) is admissible in absence of a certificate under Section 65B of the Indian Evidence Act.

Headnotes

Appeal - filed against judgment of conviction whereunder the appellant/convict has been convicted for the offence under Section 4 of the POCSO Act and Section 376 of the Indian Penal Code.

Held: Doctor who examined victim was not examined. (Para 21)

Victim was not proved “child” within the meaning of Section 2(1)(d) of the POCSO Act during the trial. (Para 22)

video clip was produced during the court in Pen Drive, It is a secondary electronic evidence, and therefore to prove its content, a certificate under Section 65B of the Evidence Act is mandatory, which was not brought on record during trial and therefore, the content of electronic record was also not proved. (Para 23)

Victim herself denied any “penetrative sexual assault”. - Prosecution could not establish the foundational aspects of this case as to import the presumption available under Sections 29 and 30 of the POCSO Act. (Para 25)

Appeal is allowed. (Para 26)

Case Law Cited

Ravinder Singh v. State of Punjab, (2022) 7 SCC 581; Jarnail Singh v. State of Haryana, (2013) 7 SCC 263

List of Acts

Indian Penal Code, 1860 – Section 376; Protection of Children from Sexual Offences Act, 2012 – Sections 2(1)(d), 4, 6, 29, 30; Information Technology Act, 2000 – Sections 67, 67A; Code of Criminal Procedure, 1973 – Sections 164, 313, 374(4), 389(1); Indian Evidence Act, 1872 – Sections 3, 65B; Juvenile Justice (Care and Protection of Children) Act, 2015 – Section 94(2)

List of Keywords

POCSO; Section 164 CrPC; Presumption under POCSO; Electronic evidence; Section 65B Certificate; Hostile witness; Child definition under POCSO; Video evidence inadmissibility; Age determination; Confession and retraction;

Case Arising From

Bibhutipur P.S. Case No. 224 of 2022, District: Samastipur

Appearances for Parties

For the Appellant: Mr. Mahendra Pratap, Advocate

For the Respondent: Mrs. Abha Singh, APP

Headnotes prepared by: Amit Kumar Mallick, adv.

Judgment/Order of the Hon’ble Patna High Court

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (SJ) No.1754 of 2023

Arising Out of PS. Case No.-224 Year-2022 Thana- BIBHUTIPUR District- Samastipur

Ravi Kumar, Son of Bal Kishore Sah, Resident of Village - Deshri, Ward No.-
19, P.S.- Bibhutipur, District - Samastipur.

... .. Appellant/s

Versus

The State of Bihar.

... .. Respondent/s

Appearance :

For the Appellant/s : Mr. Mahendra Pratap, Advocate
For the Respondent/s : Mrs. Abha Singh, APP

CORAM: HONOURABLE MR. JUSTICE CHANDRA SHEKHAR JHA
ORAL JUDGMENT

Date : 26-09-2024

At the outset, it is important to mention that this matter was taken on board under the caption of **"For Orders"** where initially prayer of bail and suspension of sentence under Section 389(1) of the Cr.P.C. was raised by learned counsel appearing on behalf of the appellant but after short argument, it is submitted that he is ready for final argument in this matter, which was not objected by learned APP and therefore, this matter was finally heard under aforesaid caption. Submission for final hearing was raised mainly in view of Section 374(4) of the Cr.P.C., where every



such appeal is to be decided within six months of its filing.

2. The present appeal preferred by appellant/convict Ravi Kumar against judgment of conviction dated 27.01.2023 and the impugned order of sentence dated 09.02.2023 passed by the learned Additional District and Sessions Judge VIth-cum-Special Judge, POCSO Act, Samastipur in T.R. 248 of 2023, R.N. 157 of 2022 arising out of Bibhutipur P.S. Case No. 224 of 2022 whereby and whereunder the appellant/convict has been convicted and sentenced to undergo R.I. for ten years and fine of Rs. 20,000/- (Rupees twenty thousand only) for the offence under Section 4 of the POCSO Act and in default of payment of fine, he shall further undergo six months of R.I. and further sentenced him to undergo R.I. for ten years and fine of Rs. 20,000/- (Rupees twenty thousand only) for the offence under Section 376 of the Indian Penal Code and in default of payment of fine, he shall undergo further six months of R.I. All



aforesaid sentences shall ordered to run concurrently.

3. The crux of prosecution case, as it appears from the written information of the informant, namely, Kajal Kumari that on 04.06.2022, while she was preparing for her matriculation examination took admission in Gyan Sharde Coaching of her village, where, she came in contact of her coaching teacher, namely, Ravi Kumar (appellant) and during the course of study, she has got affinity with Ravi Kumar and on 31.05.2022 he established sexual relationship with her on false pretext of marriage. Appellant also made video of said occurrence and started to blackmail her by demanding further sexual relationship, which she denied. Consequent upon her video was made viral.

4. With aforesaid written information of PW-2/informant/victim, Bibhutipur P.S. Case No. 224 of 2022 was lodged for the offences under Section 376 of the Indian Penal Code, for the offences under Section 4/6 of the POCSO Act and also under Section 67(A) of



the I.T. Act.

5. After investigation, police submitted charge sheet No. 410 of 2022 on 31.07.2022 under Section 376 of the Indian Penal Code read with Section 4/6 of the POCSO Act and under Section 67(A) of the I.T. Act. Thereafter, learned Additional Sessions Judge-VI-cum-Special Court (POCSO), Samastipur, took cognizance against the appellant for the offence under Section 376 of the Indian Penal Code, Section 4 of the POCSO Act and Sections 67 and 67(A) of the I.T. Act for trial and disposal.

6. To established its case before the learned trial court, the prosecution altogether examined total of six witnesses, namely, PW-1 Kanhaiya Kumar (Own brother of the informant) PW-2 Kajal Kumari (Informant), PW-3 Reeta Devi (mother of the informant), PW-4 Ram Nath Chaurasia alias Mukesh Kumar, PW-5 Sanjay Kumar and PW-6 Lovely Kumari (I.O. of the case).



7. The prosecution also exhibited following documents during the trial to substantiate its case which are as:-

Exhibit-P1/PW-2 -Signature of the informant on her statement recorded U/s 164 Cr.P.C.

Exhibit- P2/PW-2 Signature of the victim on the medical requisition.

Exhibit-3/1 PW-6 to Ext. P3/3 PW-6- Signature of the S.H.O. on the formal F.I.R.

Exhibit-P4/PW-6 and MO1/PW-6- Signature of the S.J.O. on the seizure list and medical object.

Exhibit -P5/PW6-Charge sheet.

8. On the basis of evidences, as surfaced during the trial, the appellant/convict was examined under Section 313 of the Cr.P.C., where he denied all the evidences as surfaced against him during trial and claimed his complete innocence and false implication.

9. No defence witnesses/documents were examined on behalf of accused/appellant during the trial.

10. On the basis of aforesaid evidences,



learned trial court convicted the appellant and passed order of sentence, as aforesaid, being aggrieved with, appellant/convict preferred the present appeal.

11. Hence the present appeal.

12. It is submitted by learned counsel appearing on behalf of the appellant/convict that from the evidences available on record, it cannot be said that the prosecution established its case beyond all reasonable doubts. It is pointed out that even the victim did not support the occurrence and merely by taking her statement recorded under Section 164 of the Cr.P.C., presumption as available under Section 29 and 30 of the POCSO Act was imported in this case to secure conviction of the appellant during the trial. It is submitted that the statement of 164 of the Cr.P.C. is not an "**evidence**" in view of Section 3 of the "Evidence Act". Learned counsel further submitted that prosecution failed to established the foundational aspects of crime in question, and, therefore, import of presumption as



available under Sections 29 and 30 of the POCSO Act also appears bad in eye of law. It is further submitted that nothing appears corroborative from the medical examination report of victim, which may suggest that **"penetrative sexual"** assault was committed upon her, as she denied any physical relationship during trial. It is also submitted that "Pen drive" which exhibited during trial is a secondary electronic evidence, which cannot be read as evidence in want of certificate under Section 65B of the Indian Evidence Act. Prosecution also failed to prove victim as a "child" within the meaning of Section 2(1)(d) of the POCSO Act. Having all such evidences in hand the impugned judgment of conviction is required to be set aside/quashed. While concluding the argument, learned counsel relied upon the legal report of Hon'ble Supreme Court as available through ***Ravinder Singh v. State of Punjab*** reported as ***(2022) 7 SCC 581***.

13. Learned APP while opposing the appeal submitted that victim identified her signature upon her



medical examination report and her statement under Section 164 of the Cr.P.C. during trial, where she supported the occurrence of penetrative sexual assault upon her, and therefore, the import of presumption as available under Sections 29 and 30 of the POCSO Act cannot be made questionable because the said identification was the part of her deposition. However, he conceded that the victim denied any penetrative sexual assault during the trial by denying physical relationship with appellant.

14. I have perused the trial court records carefully and gone through the evidences available on record and also considered the rival submissions as canvassed by learned counsel appearing on behalf of the parties.

15. As to re-appreciate the evidence, while disposing the present appeal, it is apposite to discuss the evidences available on record, which are as under:-

16. The most important witness of the present



occurrence is the victim of crime in question, who examined during the trial as **PW-2**. Upon court question, it was deposed by her that her date of birth is 01.01.2005. She deposed during her cross-examination that she lodged this case under the influence of villagers and she was not even acquainted with accused/appellant, whereas she identified her signature on her statement recorded under Section 164 of the Cr.P.C., which upon her identification exhibited as **Exhibit-P1/PW-2**. She deposed that she did not make any statement before the police for making her photo viral. She deposed that accused did not committed any offence with her. She also identified her signature upon medical examination report, which upon her identification exhibited as **Exhibit P2/PW-2**.

16.1. Upon cross-examination, it was stated by her that the appellant/accused was her teacher and she was the student of his coaching institute. It was stated that her photographs with appellant/accused was



captured by other students, who made it viral. She don't know that who made it viral. Upon court question, she categorically replied that appellant/accused did not established physical relation with her. She also stated that the viral video clipps was edited and out of confusion, she lodged present case. She also deposed to give her statement under Section 164 of the Cr.P.C., under misunderstanding of fact/confusion.

17. PW-1 is Kanhaiya Kumar, who is the brother of the victim, who deposed that he came to know about the occurrence as someone told him, while he was in Bangalore.

17.1 Upon cross-examination, it was stated by him that his victim sister was major.

18. PW-3 and PW-4 are Reeta Devi and Ramnath Chauraisya @ Mukesh Kumar respectively, who during the trial turns hostile, where nothing substantial surfaced upon their cross-examination by State, which may be used for contradiction or corroboration of the



testimony of other prosecution witnesses, who appears to support the case of prosecution.

19. PW-5 is Sanjay Kumar, who deposed in examination-in-chief that he came to know that some video of victim and appellant becomes viral. He appears hearsay witness of the occurrence.

19.1 Upon cross-examination, it was stated by him that he never viewed said video and he has no personal knowledge about the occurrence.

20. PW-6 is Lovely Kumari, who is the I.O. of this case. She identified the endorsement of SHO Chandrakant Gauri regarding lodging of present case, which upon her identification exhibited as **Exhibit-P3/PW-6**. She also identified the short signature of the then SHO on all three pages of formal FIR, which upon her identification, exhibited as **Exhibit-P3/1/PW-6**, **Exhibit P3/2/PW-6** and **Exhibit P3/3/PW-6** respectively. She stated that victim supported the occurrence during the course of investigation that



appellant established physical relation with her under the false pretext of marriage, for which he called her on 31.05.2022 at about 1:00 PM in his coaching institute and established physical relation with her thereof and also captured the video of said intimate moments and thereafter, threatened to make it viral. He recorded the statement of witnesses during the course of investigation. She also visited the place of occurrence. It was stated by her that she prepared the seizure of video clips, which was given to her in Pen Drive by brother of victim, namely, Sanjay Pandit (PW-5) and Sanjeev Kumar, which was viewed by her also, being investigating officer of this case, where she found that victim and appellant/accused is making physical relationship. She identified her signature and handwriting regarding said seizure list, which upon her identification exhibited as **Exhibit-P4/PW-6**. It was produced before the court, which was exhibited as material **Exhibit no. MO-1/PW-6**. During the course of investigation, she



also collected the admit card of the victim, which was issued for class 10th (Matric examination), from Bihar School Examination Board, where her date of birth was mentioned as "02.06.2007." She also obtained the Adhar Card of the victim. It is important to mention in this context that the said matriculation certificate was not brought on record in original and even photocopy was not exhibited during the trial. After completion of investigation, she submitted charge sheet No. 410/2022 dated 31.07.2022 against appellant/accused for the offences under Section 376 of the Indian Penal Code, for the offences under Section 4/6 of the POCSO Act and also for the offences under Section 67A of the I.T. Act. Said charge sheet was written in her handwriting bearing her signature, which upon her identification exhibited as **Exhibit No. P5/PW-6.**

20.1 Upon cross-examination, it was stated by her that the original admit card was shown to her during investigation but she collected only photocopy. She did



not examine that from which mobile the video was made viral. She denied that investigation of this case was faulty.

21. It further appears from the perusal of record that the doctor who examined victim was not examined in this case.

22. It appears from the perusal of record and testimony of the victim/PW-2 that date of birth was claimed as 01.01.2005. Occurrence was said to be committed on 31.05.2022 as per FIR. The foremost important question which required to be answered is whether victim was proved "child" within the meaning of Section 2(1)(d) of the POCSO Act. It appears from the deposition of PW-1, who is none but the brother of the victim that her sister was major on the date of occurrence. Even, as per deposition of PW-6, who is the I.O. of this case, it appears that she collected only photocopy of the admit card of class 10th, where the age of victim was recorded as 02.06.2007, said document



was not exhibited during the trial in want of original. Doctor also not appears to examine during the trial in this case to ascertain the findings regarding medical age of victim on the basis of radiological examination. In view of said, it can be safely answered that victim was not proved "child" within the meaning of Section 2(1)(d) of the POCSO Act during the trial in terms of Section 94(2) of the Juvenile Justice Act, 2015, as approved by Apex Court also through ***Jarnail Siongh Vs. State of Haryana*** reported through ***(2013) 7 SCC 263***.

23. It further appears from the deposition of PW-2/victim herself that she lodged this case on the instance of villagers and the appellant did not committed anything wrong upon her. She categorically stated on court question that appellant did not established any physical relations with her. She also stated that she made statement under Section 164 of the Cr.P.C. out of misunderstanding/confusion and she cannot say that who made her video viral. Even, PW-6 could not



investigate on this point that from which mobile the said video was made viral. Moreover, the video clipp was produced during the court in Pen Drive, which was exhibited during the trial as **MO-01/PW-6**, which is a secondary electronic evidence, and therefore to prove its content, a certificate under Section 65B of the Evidence Act is mandatory, which was not brought on record during trial and therefore, it can be said safely that the content of electronic record was also not proved. Moreover, appellant was acquitted from the offences under Section 67(A) of the I.T. Act.

24. It would be apposite to reproduce para no. 22 of the ***Ravinder Singh's case (supra)***, which reads as under:-

"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."



25. In view of aforesaid discussion of evidence as PW-2/victim herself denied any **“penetrative sexual assault”**, where the secondary electronic evidence i.e. Pen Drive not appears proved in view of Section 65B of the Evidence Act, it cannot be said that prosecution established the foundational aspects of this case as to import the presumption available under Sections 29 and 30 of the POCSO Act.

26. Hence, appeal stands allowed.

27. Accordingly, the impugned judgment dated 27.01.2023 and the impugned order of sentence dated 09.02.2023 as passed by the learned Additional District and Sessions Judge Vith-cum-Special Judge, POCSO Act, Samastipur in T.R. 248 of 2023, R.N. 157 of 2022 arising out of Bibhutipur P.S. Case No. 224 of 2022 is hereby set aside/quashed.

28. Appellant namely, Ravi Kumar is in custody in connection with this case, he is directed to be



released forthwith, if not required in any other case.

29. Fine, if any, paid be returned to the
appellant immediately.

30. Office is directed to send back the trial
court records along with a copy of this judgment to the
trial court, forthwith.

(Chandra Shekhar Jha, J)

veena/-

AFR/NAFR	AFR
CAV DATE	NA
Uploading Date	08.10.2024
Transmission Date	08.10.2024

