

**IN THE HIGH COURT OF JUDICATURE AT PATNA**  
**CRIMINAL APPEAL (SJ) No.305 of 2016**

Arising Out of PS. Case No.-87 Year-2014 Thana- MAHILA PS District- Darbhanga

Ibrahim Kujra son of Sultan Kujra, resident of Village- Benipur, Police Station- Bahera and District- Darbhanga.

... .. Appellant

Versus

The State Of Bihar

... .. Respondent

**Appearance :**

For the Appellant/s : Mr. Girish Chandra Jha, Adv.  
For the Respondent/s : Mr. Z. Hoda, A.P.P.

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

**Date : 11-09-2019**

Appellant Ibrahim Kujra has been found guilty for an offence punishable under section 376 of the Indian Penal Code and sentenced to undergo R.I. for 8 years as well as to pay fine appertaining to Rs.5,000/- and in default thereof, to undergo R.I. for one year, additionally, under section 4 of the POCSO Act and sentenced to undergo R.I. for 7 years as well as to pay fine appertaining to Rs.5,000/- and in default thereof, to undergo R.I. for one year, additionally, under section 3(i)(xi) of the SC/ ST (P.O.A.)Act and sentenced to undergo R.I. for two years as well as to pay fine appertaining to Rs.1,000/- and in default thereof, to undergo R.I. for six months, additionally, under section 323 I.P.C. and sentenced to undergo S.I. for one year as well as to pay fine appertaining to Rs.500/- and in default thereof, to undergo S.I. for one month, additionally, with a further direction that the sentences should run concurrently by the Addl. Sessions Judge I cum Special



Judge, POCSO, Darbhanga in G.R.Case No. 22/2014 arising out of Mahila (Bahera) P.S.Case No. 87/2014.

Name withheld (P.W.1) the victim filed a written report on 1.8.2014 depicting therein that on 30.7.2014 at about 1 P.M. while she had gone near bank of a river to ease herself, was caught hold by Ibrahim Kujra from behind who, after overpowering her, tied her both hands, undressed her, lie her down and then committed rape. After commission of rape, he left her in necked condition. Anyhow, she came to her house where, her Bhabhi (Meena Devi) put clothe, untied her and whom she disclosed the occurrence. Thereafter, she moved in surroundings and disclosed the event, whereupon co-villagers including Sanjay Kumar, Parwind Kumar Pawwan and Rohan Paswan gone in search of Ibrahim Kujra who, after brandishing Chhura managed to succeed in fleeing away. It has also been disclosed that during course of rape Ibrahim Kujra also bit over her cheek, lip and other places.

After registration of Mahila (Bahera) P.S.Case No. 87/2014 investigation followed and, after completing the same charge sheet has been submitted facilitating the trial meeting with the ultimate result, subject matter of the instant appeal.

Defence case as is evidence from the mode of cross-examination as well as statement recorded under section 313



Cr.P.C. is that of complete denial. It has further been pleaded that so alleged victim was accustomed to commit theft in the vegetable field of the appellant/ accused and on the date of occurrence itself she was caught red-handed and for that, she was scolded and in the aforesaid background, this false case has been instituted putting false and frivolous allegation. Two witnesses have also been examined in support thereof.

Altogether 7 P.Ws. have been examined on behalf of the prosecution in order to substantiate its case, who are P.W.1 the victim herself, P.W. 2 Meena Devi, her Bhojai, P.W.3 Shambhu Paswan, her brother, P.W.4 Sanjay Kumar Paswan, a co-villager, P.W.5 Sunil Kumar, Judicial Magistrate, who had recorded statement of the victim under section 164 Cr.P.C., P.W.6 Dr. Vedanand Jha and P.W.7 Neelam Kumar, the I.O. Side by side also exhibited signature of the informant Ext.1 over written report, signature of the informant over the statement recorded under section 164 Cr.P.C. 1/1, statement of the victim recorded under section 164 Cr.P.C. Ext.2, Medical report Ext.3, formal F.I.R. Ext.4, endorsement over the written report Ext.5. In likewise manner, two D.Ws. have been examined on behalf of the defence, D.W.1 Abdul Hakim and D.W.2 Noor Mohammad. Also exhibited



certificate granted by the Ward Counselor and Chief Ward Counselor as Ext.A and Ext.B respectively.

In order to proper appreciation of respective argument raised on behalf of respective parties when L.C.records has been gone through, it is apparent that either learned P.O. had not cared to strictly follow the procedure so prescribed under the POCSO Act or, the learned P.O. was not knowing the relevant provisions so enumerated therein guiding the trial. In likewise manner, during course of investigation, the same mistake has been committed at the end of the I.O.

In accordance with Section 27 of the POCSO Act when the victim happens to be a girl child, there happens to be specific direction that the medical examination shall be conducted by a woman doctor. From the evidence of P.W.6 it is evident that he happens to be a male doctor and although he had shown presence of Dr. Poonam during course of examination of the victim but, the same could not cure the mistakes in utter violation of Section 27(2) of the POCSO Act as he failed to narrate that person of the victim was examined by the Gynecologist Dr. Poonam.

In likewise manner, in accordance of Section 35 of the POCSO Act, the evidence of the child is to be taken within a period of 30 days from the date of order of cognizance and delay if



any, has to be properly explained. From the L.C.records, it is evident that in spite of case having been registered under the POCSO Act alongwith other penal provisions and further under section 33(1) of the POCSO Act, the Special Court so designated is vested with the power of cognizance, even then the matter remained pending before the magisterial court and cognizance was taken on 18.10.2014 by the A.C.J.M. and then thereafter, vide order dated 18.10.2014 itself it was committed to the court of Sessions which ought not to be. Not only this, it is also apparent that the evidence of the victim has been recorded beyond the period of 30 days and for that there happens no explanation as required under the Statute, at the end of the learned lower court.

It is further evident that in spite of the direction made by the Apex Court repeatedly, in the case of **Jarnail Singh v. State of Haryana**, reported in 2013 Cr.L.J. 3976 and in the case of **State of Madhya Pradesh v. Anoop Singh**, reported in (2015)7 SCC 773 that the procedure so prescribed under the Juvenile Justice Act is to be cared during course of ascertainment of the age of the victim. It is evident from the evidence of P.W.6 doctor that they on their own estimated the age of the victim in between 16-17 years over which, neither the I.O. was attentive nor the doctor remained sincere and in the aforesaid background, the learned counsel for



the appellant vehemently submitted that it ought not to be a case under the POCSO Act because of the fact that having variance plus minus two years and further the age having in higher side of the prosecutrix is to be accepted, crosses the limit identifying the victim to be major by way of crossing the age of 18 years.

It is also evident from the evidence of P.W.1 victim that she has been brutishly cross-examined at the end of the defence counsel for so many days having been recorded just in 17 pages without any break during cross-examination. Sub-section (2) of Section 33 of the POCSO Act prohibits direct confrontation either of the Public Prosecutor or of the defence counsel with the victim rather, the questions are to be placed before the court and, the court will consider the same whether fit to be allowed or not and then the court will place before the victim but from the order sheet as well as from the deposition of P.W.1 failed to trace out proper compliance thereof.

By these submissions, the proceeding so raised before the learned lower court suggests in a mechanical manner and on account thereof, needs proper adjudication. Further more, it is also evident from the order sheet that during course of examination-in-chief, cross-examination of P.W.1 none was present in which the



victim has a confidence. That means to say, the object of the act had been completely frustrated.

It is needless to remind, that the retrial should not be allowed in ordinary course of nature but, this happens to be a peculiar circumstance whereunder a minor, the victim for whose benefit special Act has been introduced, by way of acknowledging special status having all kind of protection so that, she could not waylay during course of evidence, as the offence having been committed upon her, on account of her tender age, deficient I/Q helplessness, having deterrent punishment against the perpetrator of the crime, has completely been frustrated, due to P.O. being inert, indifferent towards the compliance of mandate of law. In the aforesaid background, could it be said that the evidence deposited by the victim P.W.1 happens to be in accordance with law. That means to say, court could it be acceptable? The presence of the person in whose favour there happens to be confidence of the victim, as directed under the Statute, is only to have a confidence during the court proceeding and avoiding the direct confrontation is to keep her mental balance and further, the court, during course of putting question before the victim was under obligation to see the nature of question, whether it could be allowed or not, and further having at the end of P.O., a solace for the time being, so



that she should not be afraid of. Such carelessness at the end of the learned lower court has created mismatch and that being so, irrespective of the fact that the appellant has been convicted and sentenced for, could not be allowed to survive.

In **Ata Ram & ors. vs. State of Rajasthan**, reported in 2019(3) BLJ 326 (S.C.) wherein it has been observed that in case of utter violation of the mandate of law, requires de novo trial, For better appreciation, relevant paragraph is quoted below:

*“15. The cases cited by the learned Amicus Curiae dealt with issues whether recording of evidence by video conferencing satisfied the mandate of Section 273 of the Code.*

*A) In State of Maharashtra v. Dr. Praful B. Desai, (2003)4 SCC601, it was observed:*

*“9. It was submitted on behalf of the respondents, that the procedure governing a criminal trial is crucial to the basic right of the accused under Articles 14 and 21 of the Constitution of India. It was submitted that the procedure for trial of a criminal case is expressly laid down, in India, in the Code of Criminal Procedure. It was submitted that the Code of Criminal Procedure lays down specific and express provisions governing the procedure to be followed in a criminal trial. It was submitted that the procedure laid down in the Code of Criminal Procedure was the “procedure established by law”. It was submitted that the legislature alone had the power to change the procedure by enacting a law amending it, and that when the procedure was so changed, that became “the procedure established by law”. It was submitted that any departure from the procedure laid down by law would be contrary to Article 21. In support of this submission reliance*



*was placed on the cases of A.K. Gopalan v. State of Madras, AIR 1950 SC 27, Nazir Ahmad v. King Emperor, AIR 1936 PC 253(2) and Siva Kumar Chadda v. Municipal Corpn. of Delhi, AIR 1995 SC 915 (sic). There can be no dispute with these propositions. However, if the existing provisions of the Criminal Procedure Code permit recording of evidence by video-conferencing then it could not be said that “procedure established by law” has not been followed.*

*20. Recording of evidence by video-conferencing also satisfies the object of providing, in Section 273, that evidence be recorded in the presence of the accused. The accused and his pleader can see the witness as clearly as if the witness was actually sitting before them. In fact the accused may be able to see the witness better than he may have been able to if he was sitting in the dock in a crowded courtroom. They can observe his or her demeanour. In fact the facility to playback would enable better observation of demeanour. They can hear and rehear the deposition of the witness. The accused would be able to instruct his pleader immediately and thus cross-examination of the witness is as effective, if not better. The facility of playback would give an added advantage whilst cross-examining the witness. The witness can be confronted with documents or other material or statement in the same manner as if he/she was in court. All these objects would be fully met when evidence is recorded by video-conferencing. Thus no prejudice, of whatsoever nature, is caused to the accused. Of course, as set out hereinafter, evidence by video-conferencing has to be on some conditions.”*

*B) In Sakshi vs. Union of India, (2004)5 SCC518, the observations of this Court were:-*

*“27. The other aspect which has been highlighted and needs consideration relates to providing protection to a*



*victim of sexual abuse at the time of recording his statement in court. The main suggestions made by the petitioner are for incorporating special provisions in child sexual abuse cases to the following effect:*

*(i) Permitting use of a videotaped interview of the child's statement by the judge (in the presence of a child-support person).*

*(ii) Allow a child to testify via closed-circuit television or from behind a screen to obtain a full and candid account of the acts complained of.*

*(iii) The cross-examination of a minor should only be carried out by the judge based on written questions submitted by the defence upon perusal of the testimony of the minor.*

*(iv) Whenever a child is required to give testimony, sufficient breaks should be given as and when required by the child.*

*C) Recently in **Mahender Chawla and Ors. vs. Union of India (UOI) and Ors.**, 2018(15) SCALE 497, this Court stated:-*

*“29. As pointed out above, in Sakshi's case, the Court had insisted about the need to come up with a legislation for the protection of witnesses. It had even requested the Law Commission to examine certain aspects, which resulted to 172nd review of rape laws by the Law Commission. However, the Court specifically rejected the suggestion of the Law Commission regarding examination of vulnerable witnesses in the absence of Accused. Having regard to the provisions of Section 273 of the Code of Criminal Procedure, which is based on the tenets of principle of natural justice, that the witness must be examined in the presence of the Accused, such a principle cannot be sacrificed in trials and in inquiries regarding sexual offences. In such a scenario examination of these witnesses*



*through video conferencing provides the solution which balances the interest of the Accused as well as vulnerable witnesses.”*

*30. We will briefly refer to the statutory provisions governing the situation. Section 273 Cr.P.C. lays down that:*

*“273. Except as otherwise expressly provided, all evidence taken in the course of the trial or other proceeding shall be taken in the presence of the accused, or, when his personal attendance is dispensed with, in the presence of his pleader.”*

*Sub-section (1) of Section 327 CrPC lays down that any criminal court enquiring into or trying any offence shall be deemed to be open court, to which the public generally may have access, so far as the same can conveniently contain them. Sub-section (2) of the same section says that:*

*“327. (2) Notwithstanding anything contained in sub-section (1) the inquiry into and trial of rape or an offence under Section 376, Section 376-A, Section 376-B, Section 376-C or Section 376-D of the Indian Penal Code (45 of 1860) shall be conducted in- camera.”*

*Under the proviso to this sub-section*

*“the Presiding Judge may, if he thinks fit, or on an application made by either of the parties, allow any particular person to have access to, or be or remain in, the room or building used by the court”.*

*It is rather surprising that the legislature while incorporating sub-section (2) to Section 327 by amending Act 43 of 1983 failed to take note of offences under Sections 354 and 377 IPC and omitted to mention the aforesaid provisions. Deposition of the victims of offences under Sections 354 and 377 IPC can at times be very embarrassing to them.*



31. *The whole inquiry before a court being to elicit the truth, it is absolutely necessary that the victim or the witnesses are able to depose about the entire incident in a free atmosphere without any embarrassment. Section 273 CrPC merely requires the evidence to be taken in the presence of the accused. The section, however, does not say that the evidence should be recorded in such a manner that the accused should have full view of the victim or the witnesses. Recording of evidence by way of video-conferencing vis-à-vis Section 273 CrPC has been held to be permissible in a recent decision of this Court in State of Maharashtra v. Dr. Praful B. Desai<sup>1</sup>. There is major difference between substantive provisions defining crimes and providing punishment for the same and procedural enactment laying down the procedure of trial of such offences. Rules of procedure are handmaiden of justice and are meant to advance and not to obstruct the cause of justice. It is, therefore, permissible for the court to expand or enlarge the meanings of such provisions in order to elicit the truth and do justice with the parties.”*

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23. *It is true that as consistently laid down by this Court, an order of retrial of a criminal case is not to be taken resort to easily and must be made in exceptional cases. For example, it was observed by this Court in **Pandit Ukha Kolhe vs State of Maharashtra**, as under:-*



*“15. An order for retrial of a criminal case is made in exceptional cases, and not unless the appellate Court is satisfied that the Court trying the proceeding had no jurisdiction to try it or that the trial was vitiated by serious illegalities or irregularities or on account of misconception of the nature of the proceedings and on that account in substance there had been no real trial or that the Prosecutor or an accused was, for reasons over which he had no control, prevented from leading or tendering evidence material to the charge, and in the interests of justice the appellate Court deems it appropriate, having regard to the circumstances of the case, that the accused should be put on his trial again. An order of re-trial wipes out from the record the earlier proceeding, and exposes the person accused to another trial which affords the prosecutor an opportunity to rectify the infirmities disclosed in the earlier trial, and will not ordinarily be countenanced when it is made merely to enable the prosecutor to lead evidence which he could but has not cared to lead either on account of insufficient appreciation of the nature of the case or for other reasons. **Harries, C.J., in Ramanlal Rathi v. The State, AIR (1951) Cal. 305.***

*"If at the end of a criminal prosecution the evidence leaves the Court in doubt as to the guilt of the accused the latter is entitled to a verdict of not guilty. A retrial may be ordered when the original trial has not been satisfactory for particular reasons, for example, if evidence had been wrongly rejected which should have been admitted, or admitted when*



*it should have been rejected, or the Court had refused to hear certain witness who should have been heard. But retrial cannot be ordered on the ground that the prosecution did not produce the proper evidence and did not know how to prove their case."*

Consequent thereupon, the judgment impugned is set aside. The appeal is allowed. The matter is remitted back to the learned lower court to proceed afresh in accordance with law. Considering the period of custody, learned lower court is directed to complete the trial within one year but, with a caution that there should be proper presence of the witnesses. Appellant, who is in custody, is directed to be produced before the lower court. Office is also directed to transmit the record to lower court, at once.

**(Aditya Kumar Trivedi, J)**

Surendra/-

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