

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (SJ) No.478 of 2016**

Arising Out of PS. Case No.-100 Year-2014 Thana- MURLIGANJ District- Madhepura

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Pramod Kumar Ram @ Pramod Ram @ Prem Kumar S/o Late Dashrath Ram
resident of Village - Rampur, Police Station - Murliganj, District -
Madhepura.

... .. Appellant/s

Versus

The State Of Bihar

... .. Respondent/s

=====

with

CRIMINAL APPEAL (SJ) No. 357 of 2016

Arising Out of PS. Case No.-100 Year-2014 Thana- MURLIGANJ District- Madhepura

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Avinash Kumar Son of Kamleshwar Yadav, Resident of village- Rampur,
Police Station- Murliganj, District- Madhepura

... .. Appellant/s

Versus

The State Of Bihar

... .. Respondent/s

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Appearance :

(In CRIMINAL APPEAL (SJ) No. 478 of 2016)

For the Appellant/s : Mr. Arun Kumar Tripathi, Amicus Curiae

For the Respondent/s : Mr. S. A. Ahmad, APP

(In CRIMINAL APPEAL (SJ) No. 357 of 2016)

For the Appellant/s : Mr. Ranbir Singh, Amicus Curiae

For the Respondent/s : Mr.Z.Hoda, APP

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

15-11-2019

On repeated calls, none appears on behalf of
respective appellants, that being so, Mr. Arun Kumar Tripathi as
well as Mr. Ranbir Singh, learned Advocates of this Court have
been requested to assist the Court as an Amicus Curiae.

2. It happens to be conjoint hearing as well as
adjudication by a common judgment as both these two appeals
arise out from a common judgment of conviction and order of
sentence dated 25.04.2016 as well as 30.04.2016 passed by 1st



Additional Sessions Judge-cum-Special Judge, POCSO Act, Madhepura in connection with POSCO Special Case No. 01/2014 arising out of Murliganj PS Case No. 100/2014.

3. By the judgment impugned, both the appellants have been found guilty for an offence punishable under Section 354A/34 IPC and each one has been sentenced to undergo RI for two years, under Section 385/34 IPC, each one has been sentenced to undergo RI for two years, under Section 506/34 IPC, each one has been sentenced to undergo RI for two years, under Section 14 of the POCSO Act, whereunder each one has been sentenced to undergo RI for five years as well as to pay fine of Rs. 25,000/- in default thereof, to undergo SI for six months, additionally, with a further direction to run the sentences concurrently.

4. Subhash Yadav (PW 5) filed a written report on 24.05.2014 disclosing therein that his daughter, PW-7 (name withheld) aged about 13 years, student of Class-VIII used to take tuition by one Pramod Ram, his co-villager and for that, she used to visit at evening hour to his place. During the aforesaid event, Pramod Ram got porn video clips of her in order to blackmail wherein his associate, Avinash Kumar is also actively involved as both of them began to upload over the



website through their mobile, lap-top including that of other girls of the village. On account thereof, his prestige became at stake. Apart from this, they have also advanced demand of Rs. 50,000/- and, also threatened that, in case, of non fulfillment of their demand, they will upload the video clips over internet and will make it viral in order to malign the prestige of his daughter, family members.

5. After registration of Murliganj PS Case No. 100/2014, investigation commenced and concluded by way of submission of charge-sheet, facilitating the trial, meeting with ultimate result, subject matter of these two appeals.

6. Defence case as is evident from the mode of cross-examination as well as statement recorded under Section 313 CrPC is that of complete denial of occurrence so alleged. It has further been pleaded that groupism is prevailing in the village and as, the prosecution party represents different group than that of accused persons, whereupon, this false case has been instituted putting false and frivolous allegations. However, nothing has been adduced on behalf of defence.

7. Altogether ten PWs have been examined on behalf of prosecution in order to substantiate its case who are PW-1, Sanjay Kumar, PW-2, Lalan Yadav, PW-3, Punam Devi, PW-4,



Roshan Kumar, PW-5, Subhash Yadav, PW-6, Guddu Kumar, PW-7, Victim, PW-8, Mukesh Kumar Mukesh, PW-9, Ram Kumar Singh, PW-10, Rupesh Kumar. Side by side has also exhibited Ext-1 series, signatures of seizure list witnesses, Ext-2 Signature of informant over written report, Ext-3, Endorsement over written report, Ext-4, Formal FIR, Ext-5, Seizure list. Lap-top has been exhibited as material Ext-M while mobile as Material Ext- M/1. As stated above, nothing has been adduced on behalf of defence.

8. The learned respective Amicus Curiae, while assailing the judgment impugned, have submitted that learned lower court as is evident from the judgment impugned itself, has acted in a mechanical manner. To justify such plea, it has been submitted that virtually, it happens to be case of no evidence. Victim-PW 7 has not spoken a word against the appellants, more particularly, that of Pramod Ram, she has not alleged against appellant Pramod to have snapped her photograph at an earlier occasion. When there was no snapping of photograph, then there was no occasion for getting the porn clips. With regard to appellant, Avinash Kumar, it has been submitted that she failed to identify him in dock. Furthermore, the prosecution failed to connect through link of legal evidence That means to say, on its



face itself, the prosecution failed to survive. It has further been submitted that there happens to be specific disclosure in the written report that porn video clips were prepared not only with regard to PW-7 but, with regard to other girls of the village and, during course of investigation, it is apparent that Investigating Officer could not be able to identify nor any one came forward on that very score to complain and in likewise manner, named as charge-sheet witness, came forward to depose against the appellants.

9. It has further been submitted that from the evidence available on the record, it is evident that none of the PWs succeeded in substantiating the allegation, more particularly, relating to uploading the same on the website. In its continuity, it has also been submitted that some sort of evidence has come up to the effect that witnesses had an occasion to see the same on mobile of Guddu Kumar (PW 6) but, the said Guddu who has been examined as PW-6, did not choose to substantiate the same and so, their evidences have gone without corroboration whereupon became inadmissible in the eye of law. It has further been submitted that the lap-top as well as mobile have been made as material exhibits through PW-8 which has also been produced in court but, mere production in court, did



not justify its relevance on account of non fulfillment of condition so enumerated under Section 65 (B) of the Evidence Act. That means to say, on account of non fulfillment of ingredients, neither could it be treated as primary evidence nor secondary one. Therefore, the judgment of conviction and sentence happens to be cryptic, whereupon, is fit to be set aside.

10. Learned APP, while controverting the submissions, has submitted that after going through judgment impugned, it is manifest that the learned lower court has considered and properly explained each and every aspect, whereupon, is reasoned one and that being so, needs no interference.

11. After going through the lower court records, it is evident that it gives an impression of parties having compromised in due course of time and, under the fragrance of compromise, some of the witnesses have been recalled on that very score along with examination of the witnesses having influenced therewith. It is needless to say, that the Hon'ble Apex Court has repeatedly deprecated the activity of the lower court when an offence being non compoundable, the witnesses are allowed to be recalled in the background of compromise in order to wash out the existing incriminating material as has been



observed in *Mishrilal & Ors v. State of M.P. & Ors* reported in *(2005) 10 SCC 701* and so, recalling of witnesses on the pretext of compromise and the subsequent cross-examination in the aforesaid background is liable to be segregated from the mainstream.

12. After the aforesaid exercise, when the materials have properly been gone through, it is evident that three kinds of evidences have been adduced on behalf of prosecution. The first one, PW-1, PW-4 who have claimed to have seen the clippings over mobile of Guddu Kumar (PW 6) having obscene photos of the victim, PW-7, the other nature of evidence having been at the end of PW-5, informant, his wife PW-3 and the victim, PW-7. And the third nature is that of PW-8 and PW-9, both are police officials who have seized the lap-top from the possession of Avinash and mobile from Pramod Ram during course of investigation. Furthermore, it is evident that seizure list witnesses, PW-2, Lallan Yadav, PW-6, Guddu Kumar have not supported the case of the prosecution on account thereof, they have been declared hostile. At this moment, it looks pertinent to note that the evidence of PW-1 as well as that of PW-4 that they have seen the obscene photos of the victim, PW-7 over the mobile of Guddu (PW-6) is found not at all



corroborated at the end of Guddu, PW-6 as, he did not utter a word on that very score and in likewise manner, prosecution also failed to make query regarding mobile if any, possessed by him along with deficiency at the end of I.O. in seizing of mobile belonging to PW-6.

13. PW-3 is the mother who during her examination-in-chief has stated that on 24.05.2014 at about 9.30 AM, when her daughter (victim) returned from tuition at Pramod Ram's place, she disclosed to her that her obscene photographs have been taken by Pramod which she disclosed to her husband. Her husband disclosed the same to the members of his community as well as her brother. Thereafter, her husband had instituted a case before the police. Police investigated the case but, she has got no knowledge with regard to the subsequent event. Identified the accused. During cross-examination, she has stated that at the time of occurrence, victim was a student of Class-VIII and was aged about 13 years. Her daughter used to go for tuition at 8:00-9:00 AM. Then there happens to be cross-examination relating to her family status, age of the other daughters in order to ward off applicability of POCSO Act. She has further stated that she came to know about Avinash right from 25.05.2014 but, she had no conversation with him. She has not seen his house. In para-



10, she has stated that none had complained with regard to character of her daughters. Then has denied the suggestion that no such kind of occurrence has ever taken place. On behalf of Pramod at para-13, she has stated that she had not seen the photo. Her evidence is based upon disclosure having been made by her daughter. In 2012, her daughter was student of Class-VIII of Rajkiya Madhya Vidyalaya, Rampur. Pramod Ram is not a teacher at any institution rather he happens to be a student of B.A. Part-II. In para-14, she has stated that during course of statement made before the police, she has stated that her daughter (Victim) had disclosed regarding the occurrence.

14. PW-5 is father/informant. During his examination-in-chief, he has stated that the occurrence is of dated 24.05.2014. Pramod Ram was running a coaching wherein 10-12 girls used to take tuition including his daughter (victim) who at that very time was student of Class-VIII. At that very time, she was aged about 13 years. She used to visit in the morning hour. Some persons have disclosed that obscene photos of his daughter (victim) has been sent to mobile to different persons. They have also disclosed that obscene photos of other girls are also being uploaded and sent to their mobiles. Then thereafter, he made oral complain to the Officer In-charge which



was ascribed whereupon, he put his signature (exhibited). He had also made further statement before the police but again controverted the same. He has further stated that he is not remembering the name of ascribe of the written report. Identified the accused. On court's question, he has stated that his daughter used to take tuition from the accused, Pramod. During cross-examination at para-7, he has stated that none of the girls nor their parents have ever complained. In para-8, he has stated that he had not received complain at the end of his daughter. In para-9, he has stated that the place where Pramod was running his coaching was also visited by him which happens to be the residential house of Pramod. There happens to be large number of houses in the vicinity. There happens to be young girls in the family of Pramod Ram being student of different classes, colleges and Schools. In para-11, he has stated that he was not knowing Avinash since before the occurrence. At para-12, there happens to be some sort of remark made by the learned P.O. over demeanor of the witness whereunder he has incorporated that this witness is speaking lie as, from his mode of presentation, the learned P.O. has further inferred that he has been suppressing something. In para-13, he has stated that he does not know name of the person on whose mobile obscene



photos were saved. He has not seen those obscene photos of his daughter over his own mobile or over mobile of others. His wife had not talked on that very score. In para-15, he has stated that he has got no knowledge with regard to contents of the written report. Then had stated at para-17 onward regarding accused, Avinash to be married having children. In para-23, he has stated that neither he nor his family members had any occasion to see the obscene photographs. Then at para-25, he has stated that he had instituted this case on hearsay basis. He had not seen anything through his eyes nor he had inquired about the same.

15. PW-7 is the victim. She has stated that she has come along with her mother to depose. During her further examination, has stated that on 24.05.2014, she was at her house. At that very moment, she was taking tuition from Pramod. She used to visit the place of Pramod. No occurrence had ever taken place during course thereof. Then has deposed that she had stated before the police that whenever she used to go to place of Pramod, he used to snap her photographs. After taking of photograph, he threatened and then instructed her to demand Rs. 50,000/- from her father, otherwise, he will make her photographs viral amongst the villagers. Again disclosed that she had also made statement before the police that during



course of tuition, Pramod snapped her photograph and then prepared obscene video and then transmitted the same over laptop of Avinash who used to upload the same over website. Pramod and Avinash both conjointly prepared obscene video clips and upload over website relating to other girls also. She has identified Pramod in dock but, failed to identify another person who disclosed his identity as Avinash. During cross-examination, she has stated that so many girls of her age used to take tuition at the place of Pramod. Her family members used to visit that place. Family members of others also used to visit. She had not heard any kind of complaint against Pramod from any girl or her parents. In para-8, she has stated that Pramod happens to be best teacher of her village. Pramod had not snapped her photograph. He had not snapped photograph of any other girls. In para-9, she has stated that during recess, she along with her companion used to take photograph or selfie of each other. In para-11, she has stated that Pramod used to treat them as younger sister. She has further stated that he has got good character. In para-12, she has stated that she had not made complain against Pramod to her parents. In para-13, she has stated that after going through the papers given by the Special Public Prosecutor, she came to know about the allegation which



she did not accept. On behalf of Avinash at para-16, she has stated that none had taken her obscene photograph nor did she allow anyone to snap her. She had not seen any kind of obscene photograph. She is not knowing Avinash.

16. The third kind of evidence is that of PW-8, Officer-Incharge and PW-9 the Investigating Officer. The relevancy of evidence of PW-8 is as, his company has been solicited by PW-9 during course of investigation and relevant seizures relating to lap-top as well as mobile has been done by him during course thereof. PW-8 has stated that on 24.05.2014, he was O/C of Murliganj PS on which date, Subhash produced written report on the basis of which substantial case has been registered (Exhibited all the relevant documents). After registration of the case, he entrusted investigation to ASI, Ram Kumar on the same day. Then has stated that during course of investigation one SAMSUNG mobile has been seized from the possession of Pramod Ram. It has been disclosed at his end that during course of operating mobile, they have seen photograph of a girl. Thereafter, from the house of Avinash a lap-top wherein a folder was prepared under the heading AKY/ My lover video and, after operating the same, Pramod Ram was found engaged in doing indecent behavior with the victim along with other girls



and for that, in presence of two seizure list witnesses, namely, Lallan Kumar and Rupesh, seizure list was prepared which was in his pen and signature, having signature of the respective witnesses. A copy thereof, was handed over to Pramod Ram as well as Avinash (exhibited the same). Identified the accused. Furthermore, he has produced the lap-top by stating that this is the lap-top wherein folder AKY/ My lover video is there having recording of indecent conduct of Pramod with the victim along with other girls. And further, the mobile having photograph of the victim. During cross-examination, he has stated that after entrusting the investigation to ASI, Ram Kumar, he asked him to assist during course of investigation whereupon, he used to accompany the investigating officer whenever he had requested the same. All the formalities during course of investigation have been conjointly performed by both of them. He is not remembering at which time seizure list was prepared. Then he has been suggested that seizure list was prepared on 24.05.2016 at about 8:00 PM and, he intentionally wants to suppress the same. Then there happens to be cross-examination relating to the house of Pramod. Then he has stated that firstly, Pramod was apprehended and then, they had gone to the house of Avinash along with Pramod. From the room of Avinash a lap-top was



seized. He had requested the family members of Avinash to sign over the seizure list but they refused. Then has stated that laptop was operated upon at the place of seizure itself. It was operated upon at the Darwaza of Avinash. The seized articles were deposited in the *Maalkhana* on the same date. The same is incorporated in the station diary. He is not remembering whether the seized articles were sealed or not. But their stickers were there having details of the case number etc. On court's question, he has stated that Officer-Incharge is legally empowered to talk with the Investigating Officer with regard to development in the investigation. Then has denied the suggestion that seizure list was not prepared in accordance with law.

17. PW-9 is the main I.O. who has deposed that after registration of Murliganj PS Case No. 100/2014, investigation was entrusted to him by the Officer-Incharge. Just after taking up investigation, he took further statement of the informant at the police station itself and then proceeded to place of occurrence along with Officer-Incharge where he took statement of different witnesses, visited the place of occurrence which happens to be house of accused, Pramod and then detailed the topography of the house. Also shown the boundary of the P.O as North-Kameshwar Mukhiya, South-Darwaza of Pramod Ram,



East-Rameshwar Ram, West-Road. During course thereof, the Officer-Incharge had arrested Pramod Ram. He had gone to Pramod and searched him. During course thereof, a mobile (Model GT-5233 S containing SIM of Vodafone as well as Memory Card of 4GB) was recovered for which seizure list was prepared by the Officer-Incharge. (Exhibited). It has further been disclosed that during course of operating the mobile photograph of victim was there. It has further been disclosed that during course of search at the house of Avinash one lap-top of LENOVO company bearing Model G-50D was seized. After opening the folder under caption of AKY/My lover video, there happens to be video clips exposing Pramod Ram having been indulged in obscene activity with the victim as well as with other girls which was also seized and for that, the seizure list in presence of witness, Lallan Yadav and Rupesh Kumar was prepared. Thereafter, they returned along with respective material exhibit as well as Pramod Ram. Again he visited the village on 25.05.2014 on which date, he had recorded statement of different witnesses. Then at para-7, his attention has been drawn up towards previous statement of witness, Lallan Yadav, para-8, Guddu Kumar. Then it has been stated that as per direction of the SDPO as well as after completing investigation



he submitted charge-sheet. During cross-examination, para-13, 14, there happens to be cross-examination with regard to the house of accused Pramod Ram. In para-15, he has further stated that save and except the victim, he had not examined other girls as, they have not turned up. Then his attention has been drawn up with regard to contradiction visualizing in the evidence of witness, Punam Devi.

18. PW-10 is another seizure list witness who has stated during his examination-in-chief that recovery of relevant articles were in his presence and for that, seizure list was prepared whereupon, he had put his signature. During cross-examination, he has stated that his signature was taken up on blank paper and further, he came to know about recovery at the police station.

19. From the evidence of the Investigating Officer, it is evident that he had not deposed over fact that the mobile, laptop were sealed at the place of occurrence and, during course of investigation, he got the aforesaid electronic devices examined by an expert. The conditions for admissibility of electronic records is duly prescribed under Section **65B of the Evidence Act**. For better appreciation, the same is quoted below:-

65. (B) when the existence, condition or contents or the original have been proved



to be admitted in writing by the person against whom it is proved or by his representative in interest;

20. The aforesaid conditions have been subject to consideration before the Apex Court in the case of *Anwar P.V. v. P.K. Basheer, (2014) 10 SCC 473*, wherein the Apex Court after analyzing the same observed that the prosecution has to fulfill the ingredients so prescribed under Section 65B before accepting the electronic device as evidence. That being so, the prosecution was under obligation to satisfy the proper compliance of mandate of law in order to proper acceptance, application of lap-top as well as mobile in evidence. Mere exhibit of document will not serve the purpose.

21. Because of the fact that there happens to be deficiency at the end of the prosecution on that very score, that means to say, in proper compliance of the ingredients so prescribed under Section 65B of the Evidence Act, on account thereof, irrespective of material exhibit of the lap-top as well as the mobile and further, having it not sealed at the spot is another circumstance, giving an opportunity of being corrupt, coupled with the evidence of PW-7, the victim, did not justify the finding. Furthermore, from the evidence available on the record, it is apparent that the house of Avinash Kumar as well as that of



Pramod Ram are distinct as well as covers considerable distance, even then, there happens to be common seizure list and further, neither PW-8, Officer-incharge, nor PW-9, the I.O. has spoken with regard to actual place wherefrom LENOVO lap-top was seized and, presence of family members of Avinash, ever having at their end to serve signature therefrom.

22. Preparation of porn film, that too of a minor, is a serious event, which could not be condoned but, for that, the prosecution should also be attentive to substantiate the same by legal, cogent and reliable evidence. True it is, that mere turning hostile would not adversely affect upon the prospect of the case and, in likewise manner, tainted investigation would also not be a ground to disbelieve the prosecution case but, when there happens to be inherent defect since inception then a legal right has also accrued in favour of accused which should not be allowed to jeopardize as, after all, the court has to consider and keep balance relating to interest of the prosecution as well as that of accused. As stated above, it is crystal clear that irrespective of the fact that lap top and mobile have been seized but, due to legal infirmity as prosecution failed to substantiate the case on account of failure to fulfill the ingredients so prescribed under Section 65B of the Evidence Act, those



collection so perused having inside the memory of aforesaid electronic devices became worthless and further, the oral evidence, more particularly, that of the victim appears to be additional factor.

23. Consequent thereupon, the judgment impugned is set aside. Both the appeals are allowed. Appellant, Avinash Kumar (Cr. Appeal (SJ) No. 357 of 2016) is on bail, he is discharged from the liability of bail bond while appellant, Pramod Kumar Ram @ Pramod Ram @ Prem Kumar (Cr. Appeal (SJ) No. 478/2016) is under custody, hence is directed to be released forthwith if not wanted in any other case.

24. The first and last pages of the instant judgment be handed over to the learned respective Amicus Curiae for the needful.

(Aditya Kumar Trivedi, J)

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