

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.517 of 2015

Arising Out of PS.Case No. -120 Year- 2013 Thana -VIDYAPATINAGAR District- SAMASTIPUR

- =====
1. Mukesh Mahto Son of Dinesh Mahto,
2. Naresh Mahto, Son of Baleshwar Mahto, Both residents of village - Simri, P.S.
- Vidyapati Nagar, District - Samastipur.

.... Appellant/s

Versus

1. The State of Bihar

.... Respondent/s

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Appearance :

For the Appellant/s : Mrs. Soni Srivastava,
Mr. Ravi Bhardwaj,
Mr. Prabhakar Thakur, Advocates.
For the Respondent/s : Mr. Bipin Kumar, APP
For the Informant : Mr. Bhola Prasad,
Mr. Ashok Kumar No.6, Advocates.

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CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI

ORAL JUDGMENT

Date: 18-04-2018

Appellants, Mukesh Mahto and Naresh Mahto have been found guilty for an offence punishable under Section 304(II)/34 IPC and each one has been sentenced to undergo RI for 5 years vide judgment of conviction dated 21.01.2015 and order of sentence dated 27.07.2015 passed by 5th Additional Sessions Judge, Samastipur in Sessions Trial No. 39/2014.

2. Before coming to the facts of the case, from the lower court record, it is evident that while victim including the deceased were taken to Sub-Divisional Hospital, Dalsingsarai for treatment on 13.09.2013, statement of Usha Devi (PW 3) was recorded but, the aforesaid Fard-e-beyan remained unattended as no case was instituted thereupon. Subsequently thereof, the injured



including deceased returned back to their house from hospital where condition of Sanjha Devi deteriorated whereupon she was again taken to Sub-Divisional Hospital, Dalsingsarai where during course of treatment she died and for that, Raju Rai (PW-4) gave his Fard-e-beyan which happens to be the basis for registration of the case as well as conduction of the trial.

3. Investigating Officer (PW 6) during course of examination-in-chief at para-2 had simply highlighted the issue that Fard-e-beyan of Usha Devi was also received from Dalsingsarai police station which has been taken note of during course of investigation. During cross-examination at para-14, he had stated that Fard-e-beyan of Usha Devi was recorded on 13.09.2013 at 10.30 AM and para-16, he had stated that first of all, he received Fard-e-beyan of Raju Rai whereupon this case has been registered. Fard-e-beyan of Usha Devi was received on 14.09.2013 but, after receipt of the Fard-e-beyan of Raju and so the case has been registered on the Fard-e-beyan of Raju Rai.

4. After explaining the controversy persisting on the record since before, now the case of the prosecution is to be seen as per Fard-e-beyan of Raju Rai (PW 4) recorded on 14.09.2013 at about 8.40 AM at Hospital, Dalsingsarai where his mother deceased Sanjha Devi died during course of treatment having an allegation that on



12.09.2013 at about 6.00 PM, he along with his mother, sister, Chunni Devi, Munni Devi, brother, Pappu Rai came at the place of his sister, Usha wife of Rakesh Mahto on the occasion of celebration of birthday of his Bhagini (sister's daughter). After taking meal, they all slept at the place of Usha Devi. Near about 11.30 PM, thy woke up after hearing hue and cry raised by his sister Usha Devi and then, heard his sister crying that with an intention to commit rape upon her, Mukesh and Naresh have caught hold of her hands as well as legs. Hearing the same, they all gone inside the room of his sister and actively involved themselves to rescue his sister who at that very time, was being assaulted by Mukesh and Naresh with fists and slaps, brick particles and during course thereof, leaving his sister, they both began to assault his mother Sanjha Devi with fists, slaps and brick particles, on account thereof his mother became severely injured due to sustaining of injuries over her chest. On commotion having been perceived out of aforesaid situation, attracted several villagers seeing whom, the accused persons escaped therefrom. Anyhow, they took his sister Usha and mother Sanjha Devi to Hospital on 13.09.2013 where they were treated and then in the evening hour, the doctor discharged both of them whereupon took to the place of his sister where in the night, condition of his mother deteriorated on account thereof, taken to the Sadar Hospital where she, during course of treatment died.



5. After registration of Vidyapatnagar PS Case No. 12/2013 under Section 376/511, 341, 323, 302/34 IPC, investigation commenced, after concluding the same, charge-sheet was submitted under Section 302/34 IPC only whereunder cognizance was also taken, charge was also framed, trial proceeded and concluded by way of identifying both the appellants guilty in a manner as indicated hereinabove, subject matter of instant appeal.

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. It has also been pleaded that on account of land dispute, they have been falsely implicated. However, neither ocular nor documentary evidence has been adduced in defence.

7. In order to substantiate its case, prosecution had examined altogether 8 PWs out of whom PW-1, Chunni Devi, PW-2, Munni Devi, PW-3 Usha Devi, PW-4, Raju Rai, PW-5, Dr. Anuranjan Kumar, PW-6, Madan Prasad, PW-7, Santosh Kumar @ Bablu Kumar, PW-8, Dr. Ram Singh, as well as had also exhibited Ext-1, Statement of Usha Devi, Ext-2, Signature of informant over Fard-e-beyan, Ext-2/1, 2/2, signature of respective FIR attesting witnesses, Ext-2/3, endorsement over Fard-e-beyan, Ext-3, Postmortem report, Ext-3/1 signature of another doctor over postmortem report, Ext-4, inquest report, Ext-5 to Ext-5/4, injury report relating to respective



injured, Chunni Devi, Munni Devi, Usha Devi, Sanjha Devi, Raju Rai.

8. While it was being argued at the end of the learned counsel for the appellants challenging the findings recorded by the learned lower court, evidences of the respective witnesses were being referred at her end wherefrom it has been gathered, apart from being the initial prosecution version the witnesses categorically stated during course of trial, more particularly, that of victim, PW-3, Usha Devi that while she was sleeping on the fateful night after taking meal, the appellants made house trespass with an ulterior motive out of whom, Mukesh caught hold of her leg while Naresh gagged her mouth. Anyhow, she tried to raise alarm whereupon, Naresh assaulted her. They both intended to ravish her but, on hue and cry raised by her, her mother and other family members who were present, came inside the room and during course thereof, Naresh tore her blouse, as a result of which, she became naked. During course thereof, both of them, assaulting her as well as her family members with fists, slaps and brick particles managed to escape therefrom.

9. It has further been perceived that no charge relating thereto was framed at an initial stage nor by invoking the privilege having endowed under Section 216 CrPC, the learned lower court cared to frame charge. After having attention of learned counsel



drawn over the same with a view to enlighten over the issue (a) whether the appellants could be held guilty for the aforesaid activity in accordance with the power vested to the appellate court under Section 386 CrPC read with Section 221(2) CrPC, taking into consideration that during course of recording statement of both the appellants recorded under Section 313 CrPC whereunder the aforesaid incriminating materials have been confronted to them, (b) whether on account of presence of such lapses at the end of the court, miscarriage of justice has occurred and for ramification of the same, the matter be remitted back to the learned lower court to proceed afresh exercising the power vested under Section 216/217 of the CrPC.

10. Learned counsel while arguing referred two decisions i.e. the case of *Issac @ Kishor v. Ronald Cheriyan reported in 2018(2) PLJR 57 (SC)* as well as *Shamnsahem M. Multani v. State of Karnataka reported in (2001) 2 SCC 577* and submitted that non framing of charge at the end of the learned lower court in spite of presence of ample material even during trial could be taken into consideration as miscarriage of justice and to that extent, retrial could be ordered. In an alternative, it has also been submitted that an allegation was there, during course of trial witnesses had substantiated, during course of statement under Section 313 CrPC, the aforesaid incriminating materials were confronted to them but on



account of non framing of charge relating thereto, would have given a legal fiction in their favour that irrespective of presence of all those things, could not be taken into consideration against them and so, if at the present stage, the appellants are going to be convicted, that would tantamount to denial of an opportunity to an accused to defend himself for the charge, that means to say, would be against the principle of natural justice i.e. *audi alteram partem*. Therefore, it has been submitted on behalf of learned counsel for the appellants that the circumstances so emerging out from the record suggests that it a fit case wherein, instead of convicting the appellants for the aforesaid allegations, the matter be remitted directing the lower court to proceed right from the stage of Section 216, 217 CrPC so that the appellants will have an opportunity to defend themselves.

11. On the other hand, learned APP strenuously controverted the submission made on behalf of appellants and emphasized that the purpose of framing of charge is that for the particular allegation the accused is to be prosecuted, evidences are to be produced at the end of the prosecution to substantiate the same and during course thereof, irrespective of the fact that court had overlooked, failed to invoke its power as envisaged under Section 216 CrPC, would not debar the appellate court to exercise such power more particularly, when there happens to be permissibility of such



activity in accordance with 221(2) of the CrPC in consonance with Section 464 CrPC. Moreover, during course of statement recorded under Section 313 CrPC the aforesaid incriminating materials were placed, that means to say, accused were fully confronted with the acquisition and so, would have if so desired defended themselves against the aforesaid acquisition. That being so, submissions having been made on behalf of appellants have got no legal enforcement whereupon, is fit to be disowned and consequent thereupon, the appellants be convicted and sentenced for the allegation irrespective of whatsoever inflicted by the learned lower court.

12. From the record, it is apparent that registration of the case was under Section 376/511, 302/34, 341, 323 of the IPC but after concluding investigation, charge-sheet was submitted under Section 302/34 IPC only. Though in terms of Section 227, 228 IPC, the learned lower court was under obligation to peruse the materials having been produced in accordance with Section 173 CrPC in order to infer for what offence the accused persons would be prosecuted, even having failed the evidences whatever been adduced could have been properly cared in accordance with Section 216 CrPC that had also gone unheeded. From the evidences, it is apparent that all the material witnesses i.e. PW-1, 2, 3, 4 have supported the same and the injuries having over their persons are found duly supported with the



evidences of doctor, PW-8. So, till the date of delivery of judgment, though the judgment impugned suggests that evidences of the witnesses on that very score has been taken into consideration but, the learned lower court failed to construe whether those allegations attract any of the penal provision or not and if so, for that, they would have also been prosecuted and for that charge would have been framed attracting Section 216 of the CrPC or would have passed judgment in accordance with Section 221 (2) of the CrPC guided by Section 464 CrPC on the allegation whatsoever been alleged.

13. Now question at the present moment, happens to be with regard to proper identification of power of appellate court. For better appreciation Section 386 of the CrPC is quoted below:-

“386. Power of the Appellate Court. After perusing such record and hearing the appellant or his pleader, if he appears, and the Public Prosecutor if he appears, and in case of an appeal under section 377 or section 378, the accused, if he appears, the Appellate Court may, if it considers that there is no sufficient ground for interfering, dismiss the appeal, or may-

(a) in an appeal from an order or acquittal, reverse such order and direct that further inquiry be made, or that the accused be re- tried or committed for trial, as the case may be, or find him guilty and pass sentence on him according to law;

(b) in an appeal from a conviction-

(i) reverse the finding and sentence and acquit or discharge the accused, or order him to be re- tried by a Court of competent jurisdiction subordinate to such Appellate Court or committed for trial, or

(ii) alter the finding, maintaining the sentence, or

(iii) with or without altering the finding, alter the nature or the extent, or the nature and extent, of the



sentence, but not so as to enhance the Same;

(c) in an appeal for enhancement of sentence-

(i) reverse the finding and sentence and acquit or discharge the accused or order him to be re- tried by a Court competent to try the offence, or

(ii) alter the finding maintaining the sentence, or

(iii) with or without altering the finding, alter the nature or the extent, or the nature and extent, of the sentence, so as to enhance or reduce the same;

(d) in an appeal from any other order, alter or reverse such order;

(e) make any amendment or any consequential or incidental order that may be just or proper; Provided that the sentence shall not be enhanced unless the accused has had an opportunity of showing cause against such enhancement: Provided further that the Appellate Court shall not inflict greater punishment for the offence which in its opinion the accused has committed, than might have been inflicted for that offence by the Court passing the order or sentence under appeal.”

14. From plain reading of Section 386 CrPC, it is apparent that it happens to be bifurcated under so many internal compartments identifying independent sequence guiding the same. Section 386(a) deals with the situation while the appellate court is adjudicating upon and against the judgment of acquittal while Sub-section (b) deals with the judgment of conviction, Sub-section (c) is confined with the prayer having for enhancement of sentence, Sub-section (d) and (e) are the situations which command the appellate court to exercise such power, being consequential or incidental made just and proper, that means to say, in the interest of justice. So basically, it happens to be inherent power of the appellate court



though the lower appellate court could not be, however, when it relates with the High Court, Section 482 CrPC identify the same.

15. Now coming to the controversy in hand, at the cost of repetition, it happens to be on account of non framing of charge relating to allegation having been attributed by PW-3 that while she was sleeping in her room, these appellants intruded, caught hold of her and attempted to ravish her and during course thereof, not only she was assaulted rather others were also assaulted which ultimately cost life of one Sanjha Devi. The trial is only for the death of Sanjha Devi. Charge has been framed relating thereto only. The Hon'ble Apex Court in the case of *Issac @ Kishor v. Ronald Cheriyan reported in 2018(2) PLJR 57 (SC)* dealt with a situation whereunder retrial could be directed, explained under para-11 as follows:-

11. Normally, retrial should not be ordered when there is some infirmity rendering the trial defective. A retrial may be ordered when the original trial has not been satisfactory for particular reasons like..., appropriate charge not framed, evidence wrongly rejected which could have been admitted or evidence admitted which could have been rejected etc. Retrial cannot be ordered when there is a mere irregularity or where it does not cause any prejudice, the Appellate Court may not direct retrial. The power to order retrial should be exercised only in exceptional cases.

16. And to elaborate the same relied upon earlier pronouncements as incorporated under the following paragraphs:-

12. In **K. Chinnaswamy Ready v. State of**



Andhra Pradesh and Another, AIR 1962 SC 1788, the accused had been convicted by the trial court. The Sessions Court took the view that an important piece of evidence held against the accused was inadmissible and acquitted him. The High Court in revision by the de facto complainant held that the evidence held to be inadmissible by the Sessions Court was admissible and set aside the acquittal directing the accused to be retried on the same charges. The Supreme Court agreed with the High Court that the acquittal deserved to be set aside. In para (7), this Court has spelt out what could be termed as exceptional circumstances which reads as under:-

"7. It is true that it is open to a High Court in revision to set aside an order of acquittal even at the instance of private parties, though the State may not have thought fit to appeal; but this jurisdiction should in our opinion be exercised by the High Court only in exceptional cases, when there is some glaring defect in the procedure or there is a manifest error on a point of law and consequently there has been a flagrant miscarriage of justice. Sub-section (4) of Section 439 forbids a High Court from converting a finding of acquittal into one of conviction and that makes it all the more incumbent on the High Court to see that it does not convert the finding of acquittal into one of conviction by the indirect method of ordering retrial, when it cannot itself directly convert a finding of acquittal into a finding of conviction.

This places limitations on the power of the High Court to set aside a finding of acquittal in revision and it is only in exceptional cases that this power should be exercised. It is not possible to lay down the criteria for determining such exceptional cases which would cover all contingencies. We may however indicate some cases of this kind, which would in our opinion justify the High Court in interfering with a finding of acquittal in revision. These cases may be: where the trial court has no jurisdiction to try the case but has still acquitted the accused, or where the trial court has wrongly shut out evidence which the prosecution wished to produce, or where the appeal court has wrongly held evidence which was admitted by the trial court to be inadmissible, or where material evidence has been overlooked either by



the trial court or by the appeal court, or where the acquittal is based on a compounding of the offence, which is invalid under the law. These and other cases of similar nature can properly be held to be cases of exceptional nature, where the High Court can justifiably interfere with an order of acquittal; and in such a case it is obvious that it cannot be said that the High Court was doing indirectly what it could not do directly in view of the provisions of Section 439(4)....."

(underlining added)

The same principle was again reiterated in **Mahendra Pratap Singh v. Sarju Singh** and Another AIR 1968 SC 707.

13. In **Matukdhari Singh and others v. Janardan Prasad**, AIR 1966 SC 356, accused was tried for offences under Sections 420, 466, 406 and 465/471 IPC and acquitted. The trial court did not frame charge under Section 467 IPC regarding which there were prima facie materials available, that is an offence triable exclusively by the Sessions Court. The High Court, in appeal, set aside the acquittal and ordered retrial. The Supreme Court dismissed the appeal preferred before it. The court referred to earlier decisions in **Abinash Chandra Bose v. Bimal Krishna Sen and Another** AIR 1963 SC 316 and **Rajeshwar Prasad Misra v. State of West Bengal and Another** AIR 1965 SC 1887 with reference to the facts of those cases and emphasized that wide discretion available with the Appellate Court in ordering retrial.

17. So from perusal of the same, it is apparent that retrial may be ordered where there happens to be deficiency over framing of appropriate charge inconsonance with the allegation.

18. Now the question arose, whether in terms of Section 221(2) CrPC, the accused could be convicted for an offence



for which no charge has been framed. Whether such activity would be against the principle of natural justice.

19. In *Shamnsahem M. Multani v. State of Karnataka reported in (2001) 2 SCC 577* wherein the accused was convicted under Section 304B IPC though was charged under Section 302 IPC and on that very score, remitting the matter, it has been held that without giving opportunity to defend himself, the accused should not be punished under the following paragraphs -

24. One of the cardinal principles of natural justice is that no man should be condemned without being heard, (Audi alteram partem). But the law reports are replete with instances of courts hesitating to approve the contention that failure of justice had occasioned merely because a person was not heard on a particular aspect. However, if the aspect is of such a nature that non-explanation of it has contributed to penalising an individual, the court should say that since he was not given the opportunity to explain that aspect there was failure of justice on account of non-compliance with the principle of natural justice.

32. The serious consequence which may ensue to the accused in such a situation can be limned through an illustration:- If a bride was murdered within seven years of her marriage and there was evidence to show that either on the previous day or a couple of days earlier she was subjected to harassment by her husband with demand for dowry, such husband would be guilty of the offence on the language of [Section 304-B](#) IPC read with [Section 113-B](#) of the Evidence Act. But if the murder of his wife was actually committed either by a decoit or by a militant in a terrorist act the husband can lead evidence to show that he had no hand in her death at all. If he



succeeds in discharging the burden of proof he is not liable to be convicted under [Section 304B, IPC](#). But if the husband is charged only under [Section 302 IPC](#) he has no burden to prove that his wife was murdered like that as he can have his traditional defence that the prosecution has failed to prove the charge of murder against him and claim an order of acquittal.

33. The above illustration would amplify the gravity of the consequence befalling an accused if he was only asked to defend a charge under [Section 302 IPC](#) and was alternatively convicted under [Section 304B IPC](#) without any notice to him, because he is deprived of the opportunity to disprove the burden cast on him by law.
34. In such a situation, if the trial court finds that the prosecution has failed to make out the case under [Section 302 IPC](#), but the offence under [Section 304-B IPC](#) has been made out, the court has to call upon the accused to enter on his defence in respect of the said offence. Without affording such an opportunity to the accused, a conviction under [Section 304-B IPC](#) would lead to real and serious miscarriage of justice. Even if no such count was included in the charge, when the court affords him an opportunity to discharge his burden by putting him to notice regarding the prima facie view of the court that he is liable to be convicted under [Section 304B IPC](#), unless he succeeds in disproving the presumption, it is possible for the court to enter upon a conviction of the said offence in the event of his failure to disprove the presumption.
35. As the appellant was convicted by the High Court under [Section 304-B IPC](#), without such opportunity being granted to him, we deem it necessary in the interest of justice to afford him that opportunity. The case in the trial court should proceed against the appellant (not against the other two accused whose acquittal remains unchallenged now) from the stage of defence evidence. He is put to notice that unless he disproves the presumption, he is liable to be convicted under [section 304-B IPC](#).



20. That being so, it looks prudent to direct retrial from the stage after invoking Section 216 CrPC for framing of charge appropriately for the allegation having been attributed against the appellants and then to proceed to conclude the trial in accordance with law. The aforesaid exercise must be completed within one year. To effectuate the direction properly, it looks desirable to set aside the judgment impugned and is, accordingly, held so. In terms thereof, appeal is allowed.

21. Appellants are on bail hence their bail bonds are, hereby, cancelled directing them to surrender before the learned lower court within four weeks and in case, a prayer is made at their end to grant them bail the learned lower court will pass appropriate order in accordance with law.

(Aditya Kumar Trivedi, J)

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