

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.385 of 2015

Arising Out of PS.Case No. -80 Year- 2013 Thana -KAHALGAON District- BHAGALPUR

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1. Rekha Devi Wife of Akhilesh Paswan @ Budal Paswan, Resident of village-
Kaleshwar Pokhar, Purab Tola, P.S.- Rashalpur Kahalgaon, District- Bhagalpur
.... Appellant/s

Versus

1. The State of Bihar

.... Respondent/s

with

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Criminal Appeal (SJ) No. 400 of 2015

Arising Out of PS.Case No. -80 Year- 2013 Thana -KAHALGAON. District- BHAGALPUR

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1. Mangl Paswan @ Mangla Paswan son of kishandeo Paswan Resident of Village-
Kaleshar pokhar Purab tola, Police station- Kahalgaon, District Bhagalpur.
.... Appellant/s

Versus

1. The State of Bihar

.... Respondent/s

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Appearance :

(In CR. APP (SJ) No.385 of 2015)

For the Appellant/s : Mr. Pramod Kumar Singh
: Mr. Dilip Kumar, Advocates

For the Respondent/s : Mr. Abhay Kumar , APP

(In CR. APP (SJ) No.400 of 2015)

For the Appellant/s : Dr. Manoj Kumar, Advocate

For the Respondent/s : Mr. Sujit Kumar Singh

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CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI

ORAL JUDGMENT

Date: 15-05-2018

Criminal Appeal (SJ) No.385 of 2015 wherein Rekha
Devi is appellant and Criminal Appeal (SJ) No.400 of 2015 wherein
Mangl Paswan @ Mangla Paswan is the appellant have been heard
analogously and are being disposed by a common judgment as both
the appeals arise out of common judgment of conviction dated
04.06.2015, order of sentence dated 08.06.2015 passed by Additional
Sessions Judge, 3rd Bhagalpur in Sessions Trial No. 07/2014 whereby



and whereunder, appellant, Mangl Paswan @ Mangla Paswan has been found guilty for an offence punishable under Section 376 I.P.C and sentenced to undergo R.I for 7 years as well as to pay fine of Rs. 5000/- in default thereof, to undergo SI for one year, Rekha Devi for an offence punishable under Section 366/120B IPC and sentenced to undergo RI for 7 years as well as to pay fine of Rs. 5,000/- in default thereof, to undergo SI for six months.

2. PW-5, Sushila Devi filed a written report on 24.02.2013 disclosing therein that her youngest daughter (name withheld) (PW-6) aged about 13 years being only member available, hence, used to visit market to purchase domestic items as per the requirement. In a way to market, house of Rekha Devi lies. Whenever, her daughter visited the market, Rekha Devi forcibly caught hold of her, took her to her house, locked her in a room where Mangla Paswan indulged in physical relationship for the last one year. Her daughter was put under fear that in case of disclosing the event, she will be murdered. Being afraid of her daughter did not disclose the affairs, on the other hand, been frequently victimized. On 19.2.2013, Luriya Devi, her co-villager indulged in quarrel with her and during course thereof, she disclosed the event in order to disgrace her, whereupon, she inquired from her daughter who divulged all the things and further, as being pregnant. It has also been disclosed that



Harendra Paswan, Deputy Mukhiya and his brother Bulbul Paswan were actively involved in order to facilitate the crime.

3. On the basis of aforesaid written report, Kahalgaon (Rasalpur) P.S. Case No. 80/2013 was registered under Section 376, 120B of the I.P.C. and subsequently, 420 IPC was also added followed with an investigation as well as submission of charge-sheet against the accused persons who faced trial and by the judgment impugned, accused Bulbul Paswan and Harendra Paswan have been acquitted while both the appellants have been convicted in a manner as disclosed hereinabove.

4. Defence case as is evident from mode of cross-examination as well as statement recorded under Section 313 of the Cr.P.C is that of complete denial. In order to substantiate the same, five DWs have also been examined.

5. In order to substantiate its case, prosecution had examined altogether 8 PWs, who are PW-1, Kahar Paswan, PW-2, Jicho Paswan, PW-3, Ranjeet Paswan, PW-4, Dr. Ruby Singh, PW-5, Sushila Devi, PW-6, Juli Kumari, PW-7, Umesh Paswan and PW-8, Arvind Kumar Singh. Side by side, had also exhibited the following documentary evidence i.e. Ext.1, medical report, Ext.2, formal F.I.R, Ext, 3. charge-sheet.

6. On the other hand, defence had also examined 5



DWs, DW-1, Gulen Mandal, DW-2, Kaushal Prasad Mandal, DW-3, Dinesh Paswan, DW-4, Ludiya Devi and DW-5, Bhagan Harizan.

7. Learned counsel for both the appellants have conjointly challenged the judgment impugned but placed their pleas independently, separately. Learned counsel for appellant Rekha Devi has submitted that the finding of guilt recorded by the learned lower court as well as sentencing her with the aid of Section 120B of the IPC happens to be contrary to the law. In order to substantiate the same, it has been submitted that being a women, she could not be held guilty for an offence of rape and to substantiate the same, relied upon the case of *Priya Patel v. State* as reported in *2006 Cr.L.J. 3627*.

8. Furthermore, it had been submitted that as major offence goes away. Then in that circumstance, appellant could not be held guilty for being conspirator or abettor and that being so, not only the conviction and sentence recorded under Section 120B of the I.P.C read with Section 376 of the I.P.C is illegal rather she could not be held guilty for an offence punishable under Section 114 of the I.P.C. That being so, the conviction and sentence recorded by the learned lower court is not at all found maintainable in the eye of law.

9. On behalf of appellant, Mangla Paswan, it has been submitted that none of the material witnesses happen to be an eye-witness to the occurrence. So far victim is concerned, her conduct is



suggestive of the fact that she was a consenting party irrespective of her age and that happens to be reason behind that in spite of indulgence under physical relationship with the appellant for the last one year without any protest/resistance and further carrying the womb is a fact which did not attract the conviction of the appellant under Section 376 of the I.P.C. That being so, the judgment of conviction and sentence recorded by the learned lower court happens to be illegal, perverse whereupon is fit to be set aside.

10. During course of argument, learned respective counsels have been requested to assist the court on the score that being the victim, minor was not it a fit case to be prosecuted under the POCSO Act by a designated court and further, its impact on account of non following of the procedure . The learned respective counsels drew attention towards the order dated 28.5.2014 passed by the learned lower court and taking into account the same, have submitted that once the matter has been adjudicated upon and decided, then in that circumstance, it would not be prudent to re-agitate the same. Furthermore, it has also been submitted that the aforesaid order became final in the background of the fact that either of the parties had not challenged the same. So, during course of exercising the appellate jurisdiction, it could not be washed away taking contrary view. Furthermore, it has also been submitted that retrial on that very



score would not be a proper legal solution and for that relied upon ***Ajay Kumar Ghosal Vs. State of Bihar [2017(1) PLJR 458(SC)]***.

11. On the other hand, the learned APP while controverting the submissions raised on behalf of both the appellants has submitted that principle of *res judicata* is not at all applicable in the facts and circumstance of the case, otherwise, it will eclipse power of appellate Court as well as it will also completely cloud the ambit and scope of Section 216, 217 of the Cr.P.C whereunder Court has been empowered to amend the charge till the date of judgment. True it is that the order dated 28.05.2014 was never challenged, but the court failed to construe that the victim, a minor was victimized even after introduction of POCSO Act. That being so, the aforesaid order is suffering from inherent lacuna whereupon the appellate court is quite competent to correct the same. That being so, the judgment impugned did not justify its viability and is fit to be remitted to the court designated to conduct trial under POCSO Act.

12. Before coming to the main issue, the other ancillary circumstances are to be seen. PW-5, the informant happens to be illiterate. The written report was scribed by somebody else and the narration whatever incorporated therein is the narration perceived by that person after hearing the informant PW-5.

13. Be that as it may, the written report was filed on



24.02.2013 and in the middle of the aforesaid written report it has been inscribed that the accused Mangla Paswan had indulged in an illicit intercourse with the victim, a minor aged about 13 years for the last one year and that has been taken into account while rejecting the prayer vide order dated 28.5.2014. Furthermore, the POCSO Act has been enforced from the date of publication in Gazette, i.e. 14.11.2012. However, learned lower court failed to appreciate that during framing of charge, the appellants have been accordingly, charged for the continuing offence coupled with the fact that during course of evidence before court, the prosecution witnesses, moreover, the victim PW-6, a minor had reiterated the same. So, it happens to be continuing offence, putting within the ambit of POCSO Act.

14. That being so, the evidence of the prosecution is to be seen on that very score whether there happens to be applicability of POCSO Act or not.

15. It is not at all disclosed at the end of the prosecution that they are in possession of birth certificate. Victim being illiterate, therefore, there was no occasion for having herself admitted at a school. Then in that circumstance, 3rd option was there and that is medical evidence. Before coming to the same which has been brought up on record by the prosecution through PW-4, Dr. Ruchi Singh who



on the basis of radiological examination, has shown the age of victim below 18 years. That means to say, she used a proper safeguard in order to avoid herself to be frozen under legal complication although, would have properly estimated as per Modi Medical Jurisprudence & Toxicology, should have divulged under proper age group wherein she failed, rightly as she was not the radiologist, however, has not been questioned at the end of the accused that means to say, on the date of examination of the victim i.e. 25.02.2013. She was found to be less than 18 years.

16. Now coming to the oral evidence, it is evident that PW-1 had not spoken over merit of the case, while PW-2, her father had deposed on the basis of whatever been stated by the victim on query without divulging the actual date while PW-3 had gone *volte face* to the prosecution, like PW-2, PW-5 had also deposed.

17. PW-6, victim had disclosed her age to be 13 years during course of evidence recorded on 16.12.2014, while the court had estimated 15 years and again, though she had narrated the occurrence but had failed to disclose the date, month or year and in usual phenomena, defence had also kept silence. That means to say, whatever been observed by the learned lower court vide order dated 28.05.2014, before examination of the witnesses could not survive after examination of the witnesses and so, the learned lower court



should have taken proper recourse so that, accused persons were properly dealt with in trial having been legally sailed.

18. Whether Court has got power to amend charge or not, is not at all the disputed question on account of presence of Section 216 of the Cr.P.C. For better appreciation, the same is quoted below.

Section 216 in The Code Of Criminal Procedure, 1973.

216. Court may alter charge.

[\(1\)](#) Any Court may alter or add to any charge at any time before judgment is pronounced.

[\(2\)](#) Every such alteration or addition shall be read and explained to the accused.

[\(3\)](#) If the alteration or addition to a charge is such that proceeding immediately with the trial is not likely, in the opinion of the Court, to prejudice the accused in his defence or the prosecutor in the conduct of the case, the Court may, in its discretion, after such alteration or addition has been made, proceed with the trial as if the altered or added charge had been the original charge.

[\(4\)](#) If the alteration or addition is such that proceeding immediately with the trial is likely, in the opinion of the Court, to prejudice the accused or the prosecutor as aforesaid, the Court may either direct a new trial or adjourn the trial for such period as may be necessary.

[\(5\)](#) If the offence stated in the altered or added charge is one for the prosecution of which previous sanction is necessary, the case shall not be proceeded with until such sanction is obtained, unless sanction has been already obtained for a prosecution on the same facts as those on which the altered or added charge is founded.

19. In the aforesaid background, learned lower court, irrespective of the fact that nothing has been raised on behalf of



prosecution as well as defence to see whether there was necessity of amendments/alteration of charge and if so, would have exercised the same taking into account Section 216 of the Cr.P.C. which the learned lower court was bound to exercise. Furthermore, Section 216 CrPC is not at all guided by the principle of res judicata, or estoppel. From the record, it is evident that learned lower court had failed on that very score.

20. 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 and explained under following paragraphs:-

9. [Section 386](#) Cr.P.C. defines the powers of the Appellate Court in dealing with the appeals. The powers enumerated thereon are vested in all courts, whether the High Court or subordinate courts, except that Clause (a) of the section is restricted to the powers of the High Court only, since an appeal against an order of acquittal lies only to that court, while Clause (b) of the section is not so restricted and embraces all courts. The power to direct the accused to be retried has been conferred on the High Court not only when it deals with an appeal against acquittal but also when it deals with an appeal against conviction. [Section 386](#) Cr.P.C. reads as under:-

"Section 386:- 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 of 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;

....."

10. Under [Section 386\(a\)](#) and (b)(i), the power to direct retrial has been conferred upon the Appellate Court when it deals either with an appeal against judgment of conviction or an appeal against acquittal (High Court). There is a difference between the powers of an Appellate Court under Clauses (a) and (b). Under Clause (b), the Court is required to touch the finding and sentence, but under Clause

(a), the Court may reverse the order of acquittal and direct that further enquiry be made or the accused may be retried or may find him guilty and pass sentence on him according to law.

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.

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.

21. The Presiding Officer is not expected to sit and preside over the court as is idol rather active indulgence in dispensation of justice is expected. Had there been indulgence of the lower court at proper stage in legal manner, would not have given the appellate court an opportunity to see and record the failure of the learned lower court in getting the trial conducted in illegal manner. That being so, the judgment of conviction and sentence recorded by the learned lower court is set aside.

22. Both the appeals are allowed. The bail bonds of both the appellants are, hereby, cancelled directing them to surrender before the learned lower court within a fortnight failing which learned lower court will proceed against the appellant in accordance with law.



23. In case of appearance and prayer for bail at the end of the appellants are made, the learned lower court will consider the same in accordance with law. The matter is remitted back to the learned lower court to proceed after taking proper recourse of 216 Cr.P.C. Because of the fact that trial under POCSO Act is to be conducted by the designated court, hence the lower court will take proper precaution on that very score.

(Aditya Kumar Trivedi, J)

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