

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.1870 of 2018

Arising Out of PS.Case No. -421 Year- 2017 Thana -MADHEPURA District- MADHEPURA

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T.MATHEW @ TOM MATHEW, SON OF MATHEW JOSEF,
PERMANENT RESIDENT OF MAUZA & P.S.- KURAVILANGAD,
DISTRICT- KOTTAYAM, STATE- KERALA, TEMPORARY RESIDENT
AS THE PRINCIPLE, ST. PETER'S SCHOOL, NAVTOLIA, P.S. &
DISTRICT- MADHEPURA (BIHAR).

.... **APPELLANT/S**

VERSUS

THE STATE OF BIHAR

.... **RESPONDENT/S**

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Appearance:

For the Appellant/s : Mr. Vikramdeo Singh, Adv.
Mr. Sunil Kumar Singh, Adv.
For the State : Mr. Binod Bihari Singh, APP

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CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI

ORAL JUDGMENT

Date: 02-08-2018

Appellant, T.Mathew @ Tom Mathew has been found guilty for an offence punishable under Section 376 of the IPC and for that no separate sentence has been inflicted under Section 4 of the POCSO Act whereunder he has been directed to undergo R.I. for the seven years as well as to pay fine appertaining to Rs.50,000/- in default thereof, to undergo S.I. for six months, additionally vide judgment of conviction dated 02.04.2018 and order of sentence dated 10.04.2018 passed by First Additional Sessions Judge-cum-Special Judge, POCSO Act, Madhepura in POCSO Case no.20/2017 arising out of Madhepura P.S. Case No421/2017.

2. At the time of hearing of prayer for bail having been made at the end of the appellant, the lower court record as well as judgment impugned has been gone through and during course thereof, it has found that there happens to be utter violation of mandatory provisions of law so prescribed while conducting the trial



under POCSO Act and that being so, the instant appeal has been directed to be listed for hearing in out of turn manner.

3. Informant (name withheld, PW.2) who happens to be a minor girl, a victim of rape allegedly at the end of the appellant under whom, she was for the last five years. At an earlier occasion, while wife of accused/appellant was away, she was raped which was disclosed to the wife of appellant who, instead of taking proper steps, assaulted her on the pretext that false accusation is being levelled by her, promoted her to go to police station after repetition of the aforesaid sexual assault over her where she gave her fardbeyan and on the basis thereof, Madhepura P.S. Case No.421/2017 has been registered, investigated, charge sheeted and the same happens to be the basis for conduction of the trial with the ultimate result, subject matter of instant appeal.

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. It has further been pleaded that relative of the landlord committed rape upon her, and to shade the real culprit the landlord, taking the police in his collusion, got this case filed. However, nothing has been adduced in defence.

5. In order to substantiate its case, prosecution had examined altogether ten PWs who are PW.1.-Bitti Marandi (mother of the victim), PW.2 is the victim, PW.3-Johani Murmu elder sister of the victim, PW.4-Javier Soren husband of PW.3, PW.5-Pramila Investigating Officer, PW.6-Dr. Keshav (Dentist), PW.7-Kumar Kaushal Kishore (ACJM who had recorded statement of the victim



under Section 164 Cr.P.C.), PW.8-Dr. Shabana (Gynaecologist who had examined the victim), PW.9-Sulekha Devi and PW.10-Rabindra Kumar. Side by side had also exhibited, Ext.1-Signature of victim over fardbeyan, Ext.1/1-Fardbeyan, Ext.2-Signature over seizure list, Ext.3 Series-Medical Report, Ext.4-Statement recorded under Section 164 Cr.P.C., Ext.5-Medical Report. As stated above, nothing has been adduced on behalf of defence.

6. While challenging the judgment impugned, it has been submitted at the end of the learned counsel for the appellant that from perusal of the judgment impugned, it is crystal clear that the learned lower court had acted in whimsical manner in spite of admitting the fact that all the witnesses including the victim have not identified the appellant to be her rapist. That being so, no legal, substantiate evidence is found on the record whereupon, the finding recorded by the learned lower court would not survive. Furthermore, it has also been submitted that the evidence of doctor PW.8, that hymen was torn and further feature of sexual intercourse was visible would not implicate the appellant for want of substantive evidence more particularly, at the end of the victim, PW.2. In likewise manner, it has also been submitted that the learned lower court had acted in illegal manner placing reliance over statement of the victim recorded under Section 164 Cr.P.C. as, the statement under Section 164 Cr.P.C. is only for the purpose of corroboration or contradiction. It is not a substantive piece of evidence so, it cannot be used nor could be based to arrive at a conclusion. So submitted that the judgment impugned suffers from inherent lacuna whereupon, is fit



to be set aside.

7. On the basis, the learned Additional Public Prosecutor while controverting the submission made on behalf of learned counsel for the appellant has strongly defended the finding recorded by the learned lower court. In order to justify such submission, it has been submitted that admittedly victim was being cared by the appellant since her childhood as happens to be orphan. When she reached at the age of adolescence, she has been victimized repeatedly. So, being under custody of appellant since the childhood, she was under his influence and that is apparent from the evidence of the witnesses more particularly during course of cross-examination wherein they all have admitted that case has been compromised. It has also been asserted that the whole event has been controlled by the appellant putting his undue influence over PW.1 and PW.2, victim. That being so, at least to perceive the subsequent conduct of the victim the statement recorded under Section 164 Cr.P.C. has been taken into consideration, as admitted at the end of the victim PW.2 though with certain explanation that under fear of the police she had stated like so as well as exhibited by the Magistrate who had recorded the same along with the finding of the doctor PW.8 who had found presence of evidence of sexual intercourse, appellant has rightly been convicted and sentenced. Hence, appeal be dismissed.

8. After going through the lower court record, the relevant order sheets, the judgment impugned it is apparent that learned lower court had committed a blunder during conduction of trial



which might be, on account of ignorance of law though, the learned lower court has been assigned as Special Court for POCSO Act. It is settled principle of law that whenever separate mode of procedure has been prescribed while conducting trial under Special Act, the same has to be followed in strict sense. Apart from this, the ambit and scope of the special Act has also to be seen, so that its purpose should not frustrate. For better appreciation the relevant provisions of POCSO Act are being quoted below which is found violated at the end of the learned lower court while proceeding with the trial:-

“33. Procedure and powers of Special Court.-

(1) xxxxxxxxxxxx.

(2) The Special Public Prosecutor, or as the case may be, the counsel appearing for the accused shall, while recording the examination-in-chief, cross-examination or re-examination of the child, communicate the questions to be put to the child to the Special Court which shall in turn put those questions to the child.

(3) The Special Court may, if it considers necessary, permit frequent breaks for the child during the trial.

(4) The Special Court shall create a child-friendly atmosphere by allowing a family member, a guardian, a friend or a relative, in whom the child has trust or confidence, to be present in the court.

(5) xxxxxxxxxxxx.

(6) The Special Court shall not permit aggressive questioning or character assassination of the child and ensure that dignity of the child is maintained at all times during the trial.

(7) xxxxxxxxxxxx.

(8) xxxxxxxxxxxx.

(9) xxxxxxxxxxxx.

35. Period for recording of evidence of child and disposal of case.-(1) The evidence of the child shall be recorded within a period of thirty days of the Special Court taking cognizance of the offence and reasons for delay, if any, shall be recorded by the Special Court.



(2) The Special Court shall complete the trial, as far as possible, within a period of one year from the date of taking cognizance of the offence.

36. Child not to see accused at the time of testifying.-(1) The Special Court shall ensure that the child is not exposed in any way to the accused at the time of recording of the evidence, while at the same time ensuring that the accused is in a position to hear the statement of the child and communicate with his advocate.

(2) For the purposes of sub-section (1), the Special Court may record the statement of a child through video conferencing or by utilising single visibility mirrors or curtains or any other device.

37. Trials to be conducted in camera.-The Special Court shall try cases in camera and in the presence of the parents of the child or any other person in whom the child has trust or confidence:

Provided that where the Special Court is of the opinion that the child needs to be examined at a place other than the court, it shall proceed to issue a commission in accordance with the provisions of section 284 of the Code of Criminal Procedure, 1973 (2 of 1974).

40. Right of child to take assistance of legal practitioner.-Subject to the proviso to section 301 of the Code of Criminal Procedure, 1973 (2 of 1974) the family or the guardian of the child shall be entitled to the assistance of a legal counsel of their choice for any offence under this Act:

Provided that if the family or the guardian of the child are unable to afford a legal counsel, the Legal Services Authority shall provide a lawyer to them."

9. So, at least Section 33(2)(3) 36 have been prescribed to protect the minor victim from any sort of fear, influence after seeing the accused which happens to be perpetrator of the crime, adversely affecting upon her on account of her tender age, as well as immaturity. From the order sheet, it is evident that none of the aforesaid provisions have been duly complied with at the end of the learned lower court and on account thereof, allowed the victim to suffer from vagrancy. In the background of aforesaid deficiency, at



least the evidence of the victim PW.2 would not be liable to be for proper consideration whereupon, the trial vitiates as it affects the germen of the proceeding being launched under POCSO Act.

10. In Issac @ Kishor Vs. Ronald Cheriyan and Ors.

reported in **2018 (2) PLJR (SC)**, it has been held:-

“8. We have heard learned counsel for the parties and perused the impugned judgment and materials on record. The point falling for consideration is whether the High Court was right in setting aside the judgment of the trial court and remitting the matter back to the trial court for retrial.

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."

11. Consequent thereupon, the judgment impugned is set aside. Appeal is allowed. Matter is remitted back to the learned lower court to proceed afresh in accordance with procedure so prescribed under POCSO Act as referred hereinabove and then, after hearing both the parties will pass judgment in accordance with law. Appellant who is under custody is directed to be produced before the



learned lower court. Office to transmit the lower court record at once. If there happens to be active co-operation at the end of appellant, the lower court will endeavor to conclude the trial within six months, and to facilitate the same, Superintendent of Police, Madhepura is directed to procure presence of all the charge sheeted witnesses, in time.

(Aditya Kumar Trivedi, J.)

Prakash Narayan

AFR/ NAFR	A.F.R.
CAV DATE	N.A.
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