

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (SJ) No.862 of 2019

Arising Out of PS. Case No.-113 Year-2012 Thana- KATORIYA District- Banka

1. SAJID ANSARI AND ORS. Son of Ajmul Ansari resident of village-Ghormara, Police Station-Katoria, District-Banka.
2. Chunna Mian Son of Rabul Mian @ Rebul Mian resident of village-Ghormara, Police Station-Katoria, District-Banka.
3. Mandla Mian, Son of Salim Mian @ Salim Ansari resident of village-Ghormara, Police Station-Katoria, District-Banka.

... .. Appellant/s

Versus

THE STATE OF BIHAR

.. ... Respondent/s

with

CRIMINAL APPEAL (SJ) No. 1438 of 2019

Arising Out of PS. Case No.-113 Year-2012 Thana- KATORIYA District- Banka

MD. IBLAWUE @ IBLAQUE ANSARI @ IDLAQUE ANSARI Son of Taiyab Ansari Resident of Village - Ghormara, P.S.- Katoria, Distt - Banka.

... .. Appellant/s

Versus

THE STATE OF BIHAR

... .. Respondent/s

Appearance :

(In CRIMINAL APPEAL (SJ) Nos. 862 of 2019 + 1438 of 2019)

For the Appellant/s	:	Mr. Satish Chandra Mishra Mr.Md. Nurul Hoda, Advocates.
For the Respondent/s	:	Mr.Sujit Kumar Singh, APP Mr. Binod Bihari Singh, APP
For the Informant	:	Mr. Ajay Kumar Mukherjee, Adv.

CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI
ORAL JUDGMENT

10-07-2019

Both the criminal appeals arise out from common judgment of conviction and sentence dated 25.01.2019 passed by Fast Track Court-I, Banka relating to Sessions Trial No. 1137/2012 as well as 795/2013 arising out of Kotoriya PS Case No. 113/2012 on account thereof, there has been analogous hearing and are being disposed of by a common judgment.



2. From the judgment impugned, it is evident that all the appellants, namely, Md. Iblawue @ Iblaque Ansari @ Idlaque Ansari, Sajid Ansari, Chunna Mian, Mandla Mian have been found guilty for an offence punishable under Section 366A of the IPC and sentenced to undergo RI for 10 years, in likewise manner, under Section 366 of the IPC and sentenced to undergo RI for 10 years as well as to pay fine appertaining to Rs. 25,000/- and in default thereof, to undergo RI for one year.

3. It is the case of the prosecution by way of filing of written report at the end of Bishnu Kumar (PW 5) on 12.06.2012 at 7:30 PM disclosing therein that since evening of 11.06.2012, his sister (name withheld) found missing. It has further been disclosed that his mother has narrated that she has seen Md. Iblawue @ Iblaque Ansari @ Idlaque Ansari, Sajid Ansari, Chunna Mian, Mandla Mian talking with the victim. He has further disclosed the age of the victim to be 17 years. So, he apprehended that these four persons are responsible for getting her enticed away with ulterior motive.

4. After registration of Katoriya PS Case No. 112/2012, investigation commenced and as is evident, charge-sheet was submitted on 14.09.2012 against the accused, Md. Iblawue @ Iblaque Ansari @ Idlaque Ansari keeping



investigation pending against remaining, namely, Sajid Ansari, Chunna Mian, Mandla Mian whereupon, the learned lower court took cognizance of an offence and accordingly, after performing mandatory requirement so envisaged under Section 207 CrPC, the case was committed whereupon Sessions Trial No. 1137/2012 commenced. It is further evident that in due course of time, charge-sheet has been submitted against the remaining accused, namely, Sajid Ansari, Chunna Mian, Mandla Mian and accordingly, after committal Sessions Trial No. 795/2013 has been registered. It is further evident that at an earlier occasion, charge was framed against Md. Iblawue @ Iblaque Ansari @ Idlaque Ansari on 28.01.2013 under Section 366A/34 of the IPC and subsequently, charge under Section 366 of the IPC has also been added on 07.02.2014 on the prayer of prosecution, though rejected to add Section 376 IPC, which she (victim) had alleged and then she was cross-examineed and discharged. It is further evident that in Sessions Trial No. 795/2013 accused, Sajid Ansari, Chunna Mian, Mandla Mian were charged under Section 366/34 of the IPC on 20.12.2013. It is further evident that in Sessions Trial No. 795/2013, PW-1, the victim has been examined on 01.05.2014. In Sessions Trial No. 1137/2012, the victim was examined on 23rd October, 2013 and she was finally



discharged from 24.04.2014. Then thereafter, as is evident from the record that on 25.07.2014, a petition was filed on behalf of prosecution whereupon, both the parties, that means to say, both sets of accused/appellant gave their consent to amalgamate Sessions Trial No. 795/2013 as both the Sessions Trial originate from the same PS Case Number and the same was allowed and since, thereafter, the trial proceeded whereunder remaining witnesses have been examined, statement under Section 313 CrPC has been recorded and then, after hearing both the parties, the judgment impugned has been passed.

5. The case of defence as is evident from the statement recorded under Section 313 CrPC, so far appellant, Md. Iblawue @ Iblaque Ansari @ Idlaque Ansari is concerned, he has claimed that the victim who happens to be a major had accompanied with him to Kolkata out of her own free will, solemnized *Nikah* at New Alipur, Kolkata, performed her marital obligation but, on account of emotional pressure having been exerted at the end of the prosecution party (parents), she has deposed against him while the remaining appellants have completely, denied their involvement during the aforesaid occurrence.

6. Separation of trial, amalgamation of record is a



procedural phenomenon without having proper presence under code and it has to be carried out in accordance with feasibility. So many factors are responsible for the same, that means to say, non appearance of the accused during course of investigation, non completion of the investigation against particular accused, while submission of charge sheet against others abscondance of accused. In likewise manner, when there happens to be presence of accused and the trial is at the same stage, more particularly, no witness has been examined on behalf of prosecution, then in that circumstance, there could be amalgamation as it would not cause prejudice to the respective parties. But as soon as, witness is examined, it could not be. The basic principle for conduction of criminal trial is, it should always be in presence of an accused as provided under Section 273 CrPC. However, presence of accused should not be physical and for that, two relevant provisions are there which guides the issue, the first one Section 205 of the CrPC and second one is Section 317 CrPC, one another Section i.e. Section 299 CrPC also gives such endurance but with a condition, that the same should be exercised only after declaration of an accused as an absconder. However, while availing either of the two, the accused has to forego his precious right, to challenge the identification and in so many case, it



plays vital role but, the law speaks like so.

7. The Hon'ble Apex Court on that very score has already propagated the principle the same in the case of *M/S Bhaskar Industries Ltd v. M/S. Bhiwani Denim & Apparels Ltd* as reported in *(2001) 7 SCC 401* which is as follows:-

"17. Thus, in appropriate cases the magistrate can allow an accused to make even the first appearance through a counsel. The magistrate is empowered to record the plea of the accused even when his counsel makes such plea on behalf of the accused in a case where the personal appearance of the accused is dispensed with. Section 317 of the Code has to be viewed in the above perspective as it empowers the court to dispense with the personal attendance of the accused (provided he is represented by a counsel in that case) even for proceeding with the further steps in the case. However, one precaution which the court should take in such a situation is that the said benefit need be granted only to an accused who gives an undertaking to the satisfaction of the court that he would not dispute his identity as the particular accused in the case, and that a counsel on his behalf would be present in court and that he has no objection in taking evidence in his absence. This precaution is necessary for the further progress of the proceedings including examination of the witnesses."

8. In *State of Maharashtra v. Dr. Praful B. Desai* reported in *(2003) 4 SCC 601*, it has been held as follows:-

12. Considering the question on the basis of Criminal Procedure Code, we are of the view that the High Court has failed to read Section 273 properly. One does not have to consider



dictionary meanings when a plain reading of the provision brings out what was intended. Section 273 reads as follows:

"Section 273: Evidence to be taken in presence of accused. 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.

Explanation : In this section, "accused" includes a person in relation to whom any proceeding under Chapter VIII has been commenced under this Code.

Thus Section 273 provides for dispensation from personal attendance. In such cases evidence can be recorded in the presence of the pleader. The presence of the pleader is thus deemed to be presence of the Accused. Thus Section 273 contemplates constructive presence. This shows that actual physical presence is not a must. This indicates that the term "presence", as used in this Section, is not used in the sense of actual physical presence. A plain reading of Section 273 does not support the restrictive meaning sought to be placed by the Respondent on the word "presence". One must also take note of the definition of the term 'Evidence' as defined in the Indian Evidence Act. Section 3 of the Indian Evidence Act reads as follows:

"Evidence----Evidence means and includes ----- - (1) all statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry;

such statements are called oral evidence (2) all documents including electronic records produced for the inspection of the Court;



such documents are called documentary evidence"

Thus evidence can be both oral and documentary and electronic records can be produced as evidence. This means that evidence, even in criminal matters, can also be by way of electronic records. This would include video-conferencing.

09. In *Ram Shankar v. State of Bihar* as reported in *1975 CrLJ 1402*, it has been held as follows:-

"6. This non-compliance of the provisions of Section 353 vitiated the entire trial. This view is supported by a Bench decision of this Court in *Bigan Singh v. King Emperor* reported in (1927) ILR 6 Pat 691 : (1928) 29 Cri LJ 260."

10. In *Banchhanidhi Singh v. State of Orissa* as reported in *1990 Cr.L.J 397*, it has been held as follows:-

5. Section 273 of the Code of Criminal Procedure provides : --

"Evidence to be taken in presence of accused. --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.

Explanation. --In this section, 'accused' including a person in relation to whom any proceeding under Chapter VIII has been commenced under this Code."

Section 273 of the new Code corresponds to Section 363 of the old Code.



The above quoted provisions of Section 273 would show that the evidence of witnesses has to be recorded in the presence of the accused or when his personal attendance has been dispensed with, in the presence of his pleader. On 16-7-1983, the date when PWs 1, 2 and 3 were examined, the personal attendance of the accused was dispensed with, but then when PWs 1, 2 and 3 were examined by the prosecution and their chief examination was being recorded, even the lawyer for the accused was not present in court. As the personal attendance of the accused-petitioner has been dispensed with, when the lawyer for the accused also was not present in the court at the time when the witnesses were to be examined, the court should have adjourned the case on that day to some other date, instead of proceeding with the examination of the prosecution witnesses and should have directed the accused to be present on that adjourned date. The examination of PWs 1, 2 and 3 in the absence of the accused, and when the lawyer representing him was also not present in the court, is in gross violation of the mandatory provisions of Section 273, Cr.P.C. and on that score alone the entire trial is vitiated. The view I have taken receives support from *Ram Shankar Ray v. State of Bihar*, 1975 Cri LJ 1402 (Pat). (See also *Bigan Singh v. King-Emperor*, AIR 1928 Patna 143 : 29 Cri LJ 260, *Bishnath v. Emperor*, AIR 1935 Oudh 488 : 36 Cri LJ 1198 and *Mrityunjoy Chatterjee v. The State*, AIR 1955 Cal 439 : 1955 Cri LJ 1171.)

11. In *State of M.P. v. Budhram* as reported in

1996 Cr.L.J. 46, it has been held as follows:-

"5. It is a matter of grave concern that a man facing trial on charge of having committed seven murders and ultimately found guilty and sentenced to death has to wait for the outcome of



his fate longer than necessary but in the facts and circumstances of the case it cannot be helped. The infirmity pointed out above goes to the root of the matter and the case must be remanded back for retrial. It is equally a matter of concern that in such important trials the accused persons is not produced before the trial judge from jail on some pretext or the other. This clearly amounts to obstructing the course of justice and the constitutional process. The time has come when this Court is to take stock of the situation and try to evolve remedial measures. With this aim in view a copy of this judgment be placed before the Hon'ble the Chief Justice for being discussed in the next full court meeting.

12. After deducing the principle so laid down by the Apex Court as well as High Court, it has become manifest that presence of accused, though the manner has already been prescribed like Section 205 CrPC or 317 CrPC during course of trial has become condition precedent. It happens to be mandatory one. Any evidence recorded in absence of accused will be nullity in the eye of law. The sole purpose is that accused should know by whom and by which evidence, he is being arrayed as an accused and further to testify his testimony, apart from being confronted at the stage of Section 313 CrPC.

13. From the record of both the sessions trial as referred herein above, it is crystal clear that examination of the victim in both the sessions trial were independently recorded. The accused in one sessions trial had no occasion to hear and



cross-examine the victim relating to other sessions trial and *vice versa*. So, after examination of the victim in both the sessions trial separately, independently, would not have taken as a ground to club both the sessions trial because of the fact that manner whereunder, the witness had deposed, on bare perusal of the same appears to be carrying slight variance to each other and so, the evidence of the victim recorded in one sessions trial could not be used against accused of another sessions trial and *vice versa*.

14. The learned lower court, before clubbing both the sessions trial vide order dated 25.07.2014, should have considered the aforesaid exigency and that being so, the amalgamation happens to be contrary to the spirit of law. Consequent thereupon, the judgment impugned has been passed on the basis of wrong procedure so followed by the learned lower court and ultimately, leading to illegality which is being found incurable. Hence, the same happens to be against the spirit of law, whereupon, is set aside. Both the appeals are allowed.

15. The matter is remitted back to the learned lower court to proceed with both the trial independently right from the stage after examination of PW-1. The learned lower



court will also consider that in case, so prayed, at the end of the prosecution, the scope of Section 216 CrPC would not find barricaded by any finding having under order dated 25.01.2019, which, in the facts and circumstances of the case, could not have been dealt with in such manner.

16. All the appellants are under custody, whereupon, are directed to be produced before the learned lower court.

(Aditya Kumar Trivedi, J)

perwez

AFR/NAFR	AFR
CAV DATE	N/A
Uploading Date	15.07.2019
Transmission Date	15.07.2019

